Supreme Court of New South Wales

⇦ William Hare ⇨ UAE LLC v Aircraft Support Industries Pty Ltd [2014] NSWSC 1403 (14 October 2014)

Last Updated: 15 October 2014

Supreme Court

New South Wales

Case Title:	⇦ **William Hare** ⇨ UAE LLC v Aircraft Support Industries Pty Ltd
Medium Neutral Citation:	[2014] NSWSC 1403
Hearing Date(s):	16 September 2014
Decision Date:	14 October 2014
Jurisdiction:	Equity Division - Commercial List
Before:	Darke J
Decision:	(1) Order that judgment be entered for the plaintiff against the defendant in the sum of US $1,481,678.42. (2) Order that interest is payable at the rate of 9% per annum on so much of the judgment sum in (1) above as is from time to time unpaid.

(3) Order that the defendant pay the plaintiff's costs of the proceedings.

Catchwords:	ARBITRATION - international commercial arbitration - enforcement of foreign award - public policy - breach of rules of natural justice - severance - partial enforcement of award - International Arbitration Act 1974 (Cth) s 8
Legislation Cited:	Arbitration Act 1996 (UK) ss 101, 103 Arbitration Ordinance of Hong Kong s 44 Civil Procedure Act 2005 (NSW) s 101 Commercial Arbitration Act 1984 (Vic) s 33 International Arbitration Act 1974 (Cth) ss 8, 16, 19, 39(2) International Arbitration Amendment Act 2010 (Cth)
Cases Cited:	A.C.N. 006 397 413 Pty. Ltd. v International Movie Group (Canada) Inc. and Another [1997] 2 VR 31 Balfour Beatty Construction Ltd v The Mayor and Burgesses of the London Borough of Lambeth [2002] EWHC 597 (TCC) Bremer Handelsgesellschaft m.b.H. v Westzucker G.m.b.H. (No. 2) Westzucker G.m.b.H. v. Bunge G.m.b.H. [1981] 2 Lloyd's Rep. 130 Dranichnikov v Minister for Immigration and Multicultural Affairs [2003] HCA 26; (2003) 77 ALJR 1088 Fletcher v Commissioner of Taxation (1988) 19 FCR 442 Gold Coast City Council v Canterbury Pipelines (Aust) Pty Ltd [1968] HCA 3; (1968) 118 CLR 58 Gordian Runoff Ltd v Westport Insurance Corporation [2010] NSWCA 57; (2010) 267 ALR 74 Interbulk Ltd. v. Aiden Shipping Co. Ltd. I.C.C.O. International Corn Co. N.V. v. Interbulk Ltd. (The "Vimeira") [1984] 2 Lloyd's Rep 66 J J Agro Industries (P) Ltd v Texuna International Ltd [1992] 2 HKLR 391 Laminoirs - Trefileries - Cableries de Lens, S.A. v. Southwire Company 484 F. Supp. 1063

	(1980) Lyle v Rodgers [1820] USSC 22; (1820) 5 Wheat. 394 Nigerian National Petroleum Corporation v IPCO (Nigeria) Ltd (No. 2) [2008] EWCA Civ 1157; (2009) 1 Lloyds Rep 89 Plaintiff M61/2010E v The Commonwealth of Australia and Others; Plaintiff M69/2010 v The Commonwealth of Australia and Others [2010] HCA 41; (2010) 243 CLR 319 TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] FCAFC 83 Traxys Europe SA v Balaji Coke Industry Pvt Ltd and Another (No 2) [2012] FCA 276; (2012) 201 FCR 535 Westport Insurance Corporation v Gordian Runoff Ltd [2011] HCA 37; (2011) 244 CLR 239
Category:	Principal judgment
Parties:	**William Hare** UAE LLC (plaintiff) Aircraft Support Industries Pty Ltd (defendant)
Representation	
- Counsel:	Counsel: Mr J Hogan-Doran, Mr Q Rares (plaintiff) Mr B W Rayment QC, Mr D T Kell (defendant)
- Solicitors:	Solicitors: Minter Ellison (plaintiff) Tomaras Lawyers (defendant)
File Number(s):	2014/170094
Publication Restriction:	Nil.

JUDGMENT

Introduction

1. By a Summons filed on 6 June 2014, the plaintiff seeks an order under s 8(2) of the *International Arbitration Act 1974* (Cth) ("the Act") for the enforcement of an arbitral award made in the United Arab Emirates. The plaintiff is a company incorporated under the laws of Abu Dhabi in the United Arab Emirates. The defendant is an Australian company.

2. On 18 December 2009, the defendant (as Contractor) entered into a written Subcontract Agreement ("the Agreement") with the plaintiff (as Subcontractor), which provided for the plaintiff to perform certain construction works at Abu Dhabi International Airport. The stated "Sub Contract Price" was almost US $15 million.

3. The Agreement is governed by the laws of the United Arab Emirates (see clause 3.2). Detailed provision in relation to payment to the plaintiff was made in clause 16 of the General Conditions, as modified by the Conditions of Particular Application. By clause 16.3, it was provided that payment was to be subject to various matters including:

"[...] payment will be made in accordance with the valuation prepared by mutual agreement with the Contractor with Retention deducted at 10% until a maximum Retention of 10% of the sub-contract value is retained, reducing to 5% Retention upon receipt of the Taking-Over Certificate with the remaining 5% to be released upon issuance of the Performance Certificate on expiration of the Defects Liability Period. The valuation prepared by the Contractor is subject to certification by the Employer representative."

4. Clause 16.4 dealt with the payment to the plaintiff of the retention monies. Clause 16.5 made provision in respect of the payment to be made after completion of the works and the submission by the plaintiff of its final account. Such payment was to be made "based on the valuation mutually agreed and prepared by the Contractor".

5. Clause 19.1 provided for the arbitration of disputes in connection with the Agreement. Any such arbitration was to be governed by the rules of the Abu Dhabi Chamber of Commerce and Industry, and take place in Abu Dhabi in the English language. The decision of such arbitration was stated to be final and binding upon the parties.

6. Issues arose between the parties in relation to the final amount due and the payment of the retention monies. On 10 May 2011, a letter executed by the defendant was provided to the plaintiff. This letter was a corrected version of an earlier letter also dated 10 May 2011, which had been executed by both the defendant and the plaintiff. The corrected version of the letter is in the following terms:

"RE: ADAT Hanger 6 - Final Account

We write to confirm agreement to the Final Account Sum of USD 15,950,000 in respect of full and final settlement of all subcontract works undertaken by **William Hare** on the above project, including all variations claimed 1-105 and labour and plant provision to ASI for the roof lifting works.

Total payment made to date is in the sum of USD 13,702,814.41 (incl. USD 3,274,876.94 paid direct by ADAT), and confirm a payment in the sum of USD 652,185.59 for the balance of the measured works has been released for payment with immediate effect.

Retention monies will be released as agreed:

* ½ retention release within 30 days of this agreement (on or before 7th June 2011) in the sum of USD 797,500.00

* final release of retention on completion of the defects liability period scheduled for 31 January 2012 in the sum of USD 797,500.00

We trust the above to be satisfactory in regards of the agreements made."

7. The first retention release of US $797,500 was not paid in accordance with the letter. It was eventually paid on 29 May 2012. The second retention release of US $797,500 remained unpaid, and on 24 October 2012 the plaintiff served a request for arbitration in which the dispute was described as one in relation to the defendant's obligations under the 10 May 2011 letter. The letter was said to have varied the terms of the Agreement. The request for arbitration included a preliminary statement of relief sought, which included an order for payment of US $797,500 and an order for payment of US $50,000.

8. An arbitral tribunal, consisting of Dr Mark Hoyle (as Chairman), Mr Guy Elkington and Mr Ian Harper, was constituted. A Final Arbitration Award ("the Award") was issued by the tribunal on 1 May 2014. The tribunal found that the plaintiff was entitled to two payments from the defendant, being US $797,500 in respect of the second release of retention monies, and US $50,000 in respect of the discount granted by the plaintiff in the final account. Interest was awarded on those sums, and the defendant was ordered to pay costs. The total amount of the Award (including the costs paid by the plaintiff to obtain the release of the Award) was US $1,480,622.84. The Award further provided for simple interest to run at a rate of 9% per annum from the date of the Award.

9. It is not disputed that the Award is a foreign award, or that the United Arab Emirates is a Convention country within the meaning of s 8 of the Act. However, by its Further Amended Commercial List Statement, the defendant resists enforcement of the Award on the basis that to enforce the Award would be contrary to public policy within the meaning of s 8(7)(b) of the Act. Section 8(7) of the Act relevantly provides:

"In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that ...

(b) to enforce the award would be contrary to public policy."

10. It is provided in s 8(7A) of the Act that the enforcement of a foreign award would be contrary to public policy if a breach of the rules of natural justice occurred in connection with the making of the award. It is further provided by s 19 of the Act that, for the purposes of Article 36(1)(b)(ii) of the UNCITRAL Model Law on International Commercial Arbitration (which deals with grounds for refusing enforcement of an arbitral award), an award is in conflict with, or is contrary to, the public policy of Australia if a breach of the rules of natural justice occurred in connection with the making of the award. The Model Law has, subject to the provisions of Part III of the Act, the force of law in Australia (see s 16 of the Act).

11. The defendant relies upon a number of grounds to contend that a breach of the rules of natural justice occurred in connection with the making of the Award in this case. These grounds may be summarised as follows:

(1) The tribunal found that the plaintiff was entitled to payment of the sum of US $50,000 even though a claim for payment of that sum was not made by the plaintiff in its Statement of Claim and was not responded to by the defendant in its Defence, or otherwise; and the tribunal further failed to give reasons why the plaintiff was entitled to payment of the sum of US $50,000;
(1)

- (2) The tribunal failed to consider the defendant's contention that the alleged agreement embodied in the 10 May 2011 letter had to be a permitted variation to the Agreement in order to be enforceable; and the tribunal further failed to give reasons why the alleged agreement was a variation, or if it was not, whether the Agreement operated in accordance with its terms;

(3) The tribunal refused to allow the defendant to rely upon certain supplementary grounds of defence and proceeded with the hearing *de bene esse* prior to its determination of whether the supplementary defences could be relied upon;

(4) The tribunal failed to give reasons for the rejection of each of the defences relied upon by the defendant as originally propounded;

(5) The tribunal failed to give reasons why the sums claimed by the plaintiff were due under the Agreement; and

(6) The tribunal failed to give reasons why the sums due under the Agreement were otherwise than as contended by the defendant.

12. Grounds (1) and (2), which were described by Mr B W Rayment QC, who appeared with Mr D T Kell for the defendant, as the principal matters to be put, were dealt with comprehensively in the oral submissions and to some extent in the written submissions filed before the hearing. The remaining grounds were dealt with only in the written submissions. A similar approach was taken by Mr J Hogan-Doran, who appeared with Mr Q Rares for the plaintiff.

13. Before dealing with each of the grounds in turn, it is necessary to describe in some detail the manner in which the arbitration progressed from its commencement through to the making of the Award.

The Arbitration process

14. The Request for Arbitration made on 24 October 2012 ("the Request") contained the following under the heading "Introduction":

"2.2 The Respondent failed to pay the Claimant's retention monies withheld under the Subcontract and, on 10 May 2011, the Claimant and the Respondent entered into an agreement by letter which varied the terms of the Subcontract (the "Letter Agreement") in respect of the repayment of the Claimant's retention monies. By way of the Letter Agreement, the Claimant agreed to accept a lower final account sum on the basis that the Respondent repay the retention sums owed to the Claimant on the dates agreed as set out in the Letter Agreement. [...]

2.3 The Respondent has not complied with the Letter Agreement and a dispute has arisen between the parties in relation to the Respondent's obligations contained in the Letter Agreement."

15. The nature of the dispute is described in further detail in section 4 of the Request. It is there stated:

"4.5 [...] In the Letter Agreement, in consideration for the Respondent agreeing specific dates for the release of the retention monies, the Claimant agreed to reduce the final account sum by around USD $50,000. In the Letter Agreement, the final account sum was agreed and fixed at $15.95 million in full and final settlement of all Subcontract work (including variations) and the retention amount was fixed at USD $1.595 million (i.e. 10% of the final account sum).

[...]

4.11 It is clear that the Claimant has not received the benefit of the Letter Agreement in that it has not received payment of the second half of the retention monies in accordance with the fixed date. In addition to the payment of the second half of the retention monies, the Claimant therefore seeks repayment of the additional USD $50,000 it sacrificed for this benefit."

16. The relief sought by the plaintiff is set out in paragraph 5 of the Request. A claim was made for an order for payment of US $797,500 and an order for payment of US $50,000.

17. In May 2013, the parties, and the tribunal members, signed a document described as "Terms of Reference and Arbitration Agreement" ("TRAA"). The rules of the arbitration were dealt with in paragraph 4 of the TRAA. Paragraph 4.12 which was headed "Statements of Claim and Defence" provided as follows:

"Within the period of time determined by the Tribunal and subject to clauses 4.13 and 4.19 of these Terms of Reference, the Claimant shall state the facts supporting its claim, the points at issue and the relief or remedy sought and the Respondent shall submit its defence in respect of those particulars together with any counterclaim which shall state the facts supporting the counterclaim, the points at issue and the relief or remedies sought. The Parties may submit with their statements all documents they consider relevant or may add a reference to the documents or other evidence they submit."

18. Schedule 4 to the TRAA contained a summary of the plaintiff's claim. Paragraph 1.2.5 was in the following terms:

"In early 2011, the Parties entered negotiations concerning the value of the final account in relation to the Works. As a result of these discussions, the Parties reached an agreement as to the final account sum (USD 15,950,000) and the specific dates the retention was to be repaid. The Claimant agreed to discount the final account sum by appropriately [*sic* - approximately] USD 50,000.

19. Paragraph 1.3 of the Schedule to the TRAA makes it clear that the plaintiff was seeking an order for US $797,500 and an order for payment of US $50,000.

20. Schedule 5 to the TRAA contained a summary of the defendant's Defence. That schedule includes the following:

"1 The parties are still bound by the terms and conditions of the formal agreement entered into on 18 December 2009.

2 The Applicant cannot insist upon payment of any monies until the parties have reached agreement as to the amount finally due and owing under the contract's assessment process.

3 When this assessment process is complete, the balance payable out of retention monies by the Respondent to the Applicant will be US$244,094.62 which the Respondent is ready, willing and able to pay.

[...]

7 The negotiations which led to the alleged variations of the terms of the Sub Contract Agreement of 10 May 2011 were too uncertain in outcome to warrant a finding that the parties had agreed upon a final payment, as asserted by the Respondent [*sic* - Applicant].

8 The alleged 2011 agreement was at best an expression of a negotiating position taken at that time as part of an ongoing negotiation dynamic between the parties and they had not at that time finished their negotiations toward an agreement about the final payment due under the formal contract.

9 Alternatively, this claim is an unwarranted assertion by the Claimant that it is entitled to unilaterally vary the terms and conditions of the contract.

[...]

12 The Claimant seeks recovery of the sum of US$50,000 which it says was a concession made so that it would receive "the benefit of the Letter Agreement". The Claimant therefore seeks repayment of the additional US$50,000 it sacrificed for this benefit. In fact, the Respondent paid the full amount demanded by the Claimant without any deduction of the so-called concession of $50,000 and that benefit or concession was never made by the Claimant."

> 21. Appendix 1 to the TRAA contains a Joint Agreed Chronology. The entries for 10 May 2011 read as follows:

"Meeting between Nigel Moss (Managing Director of the Claimant) and Mark Langbein (Managing Director of the Respondent) to discuss the final account. The Claimant understands that the Respondent disputes Mark Langbein's presence at this meeting.

Further to the meeting above, the Claimant and the Respondent entered into an agreement by letter which varied the terms of the Subcontract (the "Letter Agreement") in respect of the repayment of the Claimant's retention monies and reduced the final account sum payable by approximately USD 50,000 on condition of the prompt release of the retention sum in two equal tranches of USD 797,500 on agreed dates."

22. As was envisaged by paragraph 4.12 of the TRAA, the plaintiff served a Statement of Claim and the defendant served a Defence. The plaintiff also served a Reply and the defendant also served a Rejoinder. Despite their titles, these documents do not take the form of formal pleadings, although they are clearly intended to identify and state the nature of the various claims and contentions made by each of the parties. The documents were also used to serve other functions, including the making of references to the evidence to be adduced.

23. The plaintiff's Statement of Claim includes the following:

"7.3 Following completion of the Works, **William Hare** submitted its Final Account valuation, calculating the total value of its works for the Project at USD $16,317,054.26. ASI's commercial team then reviewed **William Hare**'s Final Account, and calculated a Final Account value of USD $15,885,497.84. [...]

7.4 With two differing valuations of **William Hare**'s Works for the Project, the parties began lengthy discussions in an attempt to agree the Final Account and the value of the retention payments. Mr Prosser [of the plaintiff] confirms that this process of agreeing the Final Account is common.

7.5 ASI's Commercial Manager, Mr Robert Haslan, was the man charged with negotiating and finalising the Final Account for ASI, liaising regularly with Mr Prosser in an attempt to close the gap between the parties.

7.6 During these discussions, it became apparent that the parties were willing to negotiate the Final Account and, in fact, **William Hare** and ASI were not far apart from an agreed figure. Mr Haslan informed Mr Prosser that ASI would agree the Final Account at USD $15.95 million, whilst Mr Prosser indicated to Mr Haslan that **William Hare** would agree the Final Account at USD $16 million. [...]

8.1 On 10 May 2011, at approximately midday, Mr Moss, Mr Langbein and Mr Haslan attended a meeting at Mr Haslan's office to discuss **William Hare**'s Final Account and the final amount of the retention sum that was due to be paid to **William Hare**.

8.2 The attendees did not review and discuss the Final Account in detail as this had already been done by the parties' respective project teams. The discussions centred on agreeing the Final Account.

8.3 Nigel Moss agreed to settle the Final Account at USD $15.95 million on the condition that:

(a) the final outstanding payment for the measured works would be paid immediately;

(b) the first half of the retention sum would be paid by 7 June 2011; and

(c) the final half of the retention sum would be paid at the end of the defects liability period, 31 January 2012.

8.4 Mr Moss's offer was USD $50,000 less than the sum **William Hare** had previously indicated to ASI it would settle the Final Account at. However, Mr Moss was willing to offer this reduction on the basis that ASI would guarantee payment of the outstanding retention sum and fix specific dates for the release of the outstanding two retention payments.

8.5 **William Hare**'s offer was agreed between the Parties and both Mr Moss and Mr Langbein the two respective Managing Directors shook hands on this agreement. [...]

8.6 As a result of this agreement, Mr Haslan was instructed by Mr Langbein to type up a letter of agreement during the meeting. The letter sets out the agreement that had been made in the meeting.

[...]

8.10 The Final Letter Agreement sets out the agreement that was finalised between Mr Moss and Mr Langbein during the 10 May meeting. In consideration for ASI agreeing specific dates for the release of the final payment and the retention sum, **William Hare** agreed the final account sum at USD $15.95 million.

[...]

10.5 The deal struck by the parties, as set out in the Final Letter Agreement, was based on the parties' agreement of the Final Account sum at USD $15,950,000 and that the retention sum that was being held by ASI would be paid to **William Hare** on fixed dates."

> 24. A summary of the relief claimed by the plaintiff was contained in paragraph 12.1 of the Statement of Claim. The only order sought for the payment of money was an order for the payment of US $797,500. No order for the payment of US $50,000 was sought, although the plaintiff did seek "such other relief as the Tribunal deems appropriate." By paragraph 12.2, the plaintiff reserved the right to seek additional relief in due course in the arbitration.
> 25. The defendant's Defence included the following:

"1.2 There is a dispute between the parties as to whether or not Final Payment ought to be made under the terms of a Subcontract Agreement made between the parties on 18 December, 2009.

1.3 ASI assert the parties are yet to agree on the amount of the final payment because the contractually agreed procedure provided under the terms of the Subcontract Agreement has not been completed, and that, unless and until it is, no Final Payment becomes due and payable.

[...]

15.1 The contractual structure set out above is detailed and complex. It was entered into after due deliberation by the principal officers of the two companies involved. At no time has there been any formal agreement to vary or modify the contractual terms set out above, or any of them.

15.2 There are outstanding issues between the parties in relation to contractual variations. These issues have not been resolved. Therefore no "Final Payment" is due under the terms of the contract.

15.3 **William Hare** has attempted to take out of context one step in an complete [*sic* - incomplete] negotiation process as representing, as a result, it would seem, of one short meeting, a formal agreement between the parties to modify their existing written and formal agreement without any formal documentation, providing any reference to the provisions of the existing agreement which are to be modified, and without particularising the basis upon which the modifications have been agreed. **William Hare** has not established under law that the above provisions of the agreement have been varied or modified."

> 26. The Defence contained specific responses to the contentions made in the Statement of Claim concerning the discussions about the Final Account, the meeting on 10 May 2011, and the alleged Final Letter Agreement. The defendant stated that the discussions at the meeting were preliminary to the formal preparation by it of a valuation as contemplated in clause 16.5 of the Agreement. The defendant further stated, in response to paragraph 8.4 of the Statement of Claim, that even if an agreement had been reached at the meeting, it never came into effect as the final invoice issued by **William Hare** "did not contain the deduction of $50,000 referred to". The defendant further stated that there was no agreement as alleged because Mr Haslan, who signed the letter, lacked the authority to bind the defendant. Finally, the defendant stated that it relied upon the evidence contained in the statements of its witnesses to the effect that "it is not possible that the parties had reached a binding and formal agreement in or around 10 May 2011 to resile from the complex, detailed and formal arrangements for resolution of outstanding issues", and that there were in fact a number of issues that remained unresolved.
>
> 27. The plaintiff, in its Reply, described its claim in the following terms:

"2.1 The Respondent appears to have misunderstood the Claimant's claim. The Respondent incorrectly summarises the Claimant's claim as being that the Parties "entered into a variation of the Subcontract Agreement under which [the Respondent] became liable to pay [the Claimant] the sum of USD 797,500". The Respondent also states that the Claimant "has not established under law that the [provisions of the Subcontract Agreement] have been varied or modified.

2.2 For the avoidance of doubt, and to clarify the Respondent's misunderstanding of this claim, the Claimant does not seek to argue that the terms of the Subcontract Agreement have been varied or modified. Rather, the Claimant submits that the Parties entered into a settlement agreement on 10 May 2011 (the "Final Letter Agreement") in which the Respondent agreed to pay the Claimant in full and final settlement of works carried out by the Claimant:

(a) USD 652,185.59 immediately ("Final Payment");

(b) half of the retention release within 30 days of the agreement (i.e. by 7 June 2011) in the sum of USD 797,500.00 ("First Retention Payment"); and

(c) the final release of the retention on 31 January 2012 in the sum of USD 797,500.00 ("Second Retention Payment").

2.3 It is the Claimant's case that the Final Letter Agreement is a standalone agreement, separate from the Subcontract Agreement, and is enforceable in its own right. The terms of the Final Letter Agreement are clear, unambiguous and enforceable. This arbitration relates to the terms of the Final Letter Agreement and not to the terms of the Subcontract Agreement."

> 28. However, in paragraph 4.5 of the Reply, the plaintiff stated that notwithstanding its primary position that the Final Letter Agreement was a standalone agreement, the plaintiff submitted in the alternative that it was made pursuant to the terms of the Subcontract Agreement. The Reply also dealt with various other matters, including the issue of authority, and the question whether there were any unresolved issues.
> 29. The defendant's Rejoinder included the following:

"5 The Arbitration can determine that the initial agreement between the parties has been subject to a formal variation.

6 The respondent asserts that none of the formalities and indeed the terms of the agreement, which the parties could reasonably have anticipated were required to be complied with to achieve such an end were carried out and no such variation was achieved.

[...]

8 At no time had the principal of the respondent given approval for any formal variation, nor is there any formal document evidencing that variation, or any approval by the principal of the respondent for such a variation.

9 As to paragraph 2.3, it is something not possible as a matter of law to vary a formal written contract by use of a letter between an authorised representative of the parties in the manner outlined by the applicant.

10 On the best construction of the contract that could possibly be given to the terms of this letter, it cannot operate except as an expression of the party's intentions at a stage in the negotiation process.

[...]

13 The respondent asserts that the only means whereby the subcontract could possibly be varied is if the relevant principals who had negotiated and executed that subcontract entered in a formal manner, whether by way of a variation, or by way of a new contract, into a binding variation of the original agreement.

[...]

32 It was obvious to the representatives of the applicant at the meeting of 11 May 2011 that, what was contemplated, as a settlement was so great a departure from the prior negotiation position adopted by the respondent, that it would require formal consent."

> 30. The parties also served a number of witness statements. The plaintiff served statements from its Managing Director, Mr Nigel Moss, and from its Operations Director, Mr Ian Prosser. The defendant served a number of statements, including one from its Managing Director, Mr Mark Langbein.
> 31. The statement made by Mr Moss contains the following:

"7 In an attempt to settle the outstanding payment issue and the Final Account, a meeting was arranged for 10 May 2011, for me, Rob Haslan and Mark Langbein, ASI's Managing Director. Rob Haslan was based in Abu Dhabi and was in charge of the day to day running of the Project. [...]

8 My colleague Ian Prosser, **William Hare**'s Operations Director, had told me that Rob Haslan had indicated to him in discussions that the maximum ASI could agree the Final Account would be USD 15.95 million. My position was that USD 16 million should be the amount at which **William Hare** should settle the Final Account.

[...]

10 During the discussions, I agreed that **William Hare**'s offer of USD $16 million for full and final settlement of the Final Account (which was already USD $300,000 less than **William Hare**'s valuation of the Final Account) would be lowered by a further USD $50,000 on the basis that:

(a) **William Hare**'s final payment for its measured works which had been outstanding for some time would be paid immediately;

(b) the first half of the retention monies would be paid by June 2011; and

(c) the final half of the retention monies would be released immediately after the defects liability period ended, envisaged as 31 January 2012.

11 During this meeting, there were no discussions of any outstanding issues relating to the Project nor were there any conditions relating to the payments. [...]

12 An agreement was reached between Mark Langbein and I. [...]

13 I shook hands with Mark Langbein on this agreement and then Rob Haslan was instructed by Mark Langbein to type up a letter agreement to capture the agreement reached.

[...]

15 The same day, I received an email from Rob Haslan (at 4:13pm) which attached a revised letter of agreement with a correct payment sum of USD $652,185.59 (the "Final Letter Agreement"). This Final Letter Agreement reflected the agreement reached at the earlier meeting."

32. Mr Prosser, in his statement dated 16 May 2013, gave evidence about discussions which had taken place prior to the 10 May 2011 meeting concerning the valuation of the Final Account. His statement includes the following:

"9 **William Hare** 's valuation was USD $16,317,054.26 including variations whereas ASI's valuation for the Final Account was USD $15,885,497.84.

[...]

11 I liaised regularly with Robert Haslan, ASI's Commercial Manager, during April/May in an attempt to close the approximate USD $500,000 gap in the parties' respective valuation of the Final Account. [...]

12 During this period, Robert Haslan had indicated to me that he thought it likely ASI would agree to a Final Account Valuation of USD $15.95 million. I have indicated to him that **William Hare** would probably agree to a valuation of USD $16 million. With the parties in principle being only USD $50,000 apart, a meeting was arranged for Nigel Moss and Mark Langbein to try to finalise the Final Account and subsequent repayment of retention monies."

33. Mr Langbein, in his statement dated 13 July 2013, said that, apart from a brief appearance, he had not attended the meeting held on 10 May 2011 (see paragraphs 32 and 38). In relation to the letter of 10 May 2011, Mr Langbein stated in paragraph 25:

"The letter of 10 May 2011 does not record an agreement of the final account because the figures were not calculated in accordance with the terms of the Subcontract and the letter did not attach or refer to any supporting documents to substantiate the final account referred to in that letter. The purported discount referred to by Mr Moss does not provide the necessary consideration for the parties to enter into an agreement to waive their rights and obligations under the terms of the Subcontract."

34. Mr Langbein's statement also deals with other matters, including the issue of authority.

35. The arbitration hearing was held in Abu Dhabi on 11 and 12 December 2013. Earlier hearing dates had been postponed at the request of the defendant. On 3 December 2012, the defendant made an application for leave to rely upon certain supplementary defences, including that the proceedings be dismissed on the ground that the tribunal was not competent to deal with the dispute between the parties. The tribunal received the application and dealt with it *de bene esse*. The tribunal heard submissions on the application on the first day of the hearing, and the hearing thereafter proceeded with the calling and examination of witnesses. At the conclusion of the evidence, agreement was

reached in relation to a list of topics to be dealt with in the closing submissions. The parties filed their closing submissions on 9 January 2014.

36. The tribunal issued the Award on 1 May 2014. The conclusions of the tribunal are described in section H of the Award in relation to the plaintiff's "Individual Heads of Claim". The total of such heads was stated to be US $967,450.27, made up of US $797,500 in respect of the second release of retention monies, US $50,000 in respect of the discount granted by the plaintiff in the Final Account, and US $119,950.27 for interest. Costs were dealt with separately in Part J of the Award.

37. The findings and reasons for the Award are contained within Part I (comprising paragraphs 23 to 29). Article 28(6) of the applicable rules obliged the tribunal to give reasons in support of the Award. The defendant submitted that this requirement was comparable to that found in Article 31(2) of the Model Law. The plaintiff submitted that the requirement was less demanding in the context of international commercial arbitration.

38. In paragraph 23 of the Award, the tribunal rejected the defendant's challenge to the competence of the tribunal. In paragraph 24, the tribunal refused the defendant's application to rely upon the other three supplementary defences. In paragraph 25 of the Award, the tribunal dealt with what it described as "the key elements of the case" as reflected in the submissions of the parties prior to the applications made by the defendant on 6 December 2013. Paragraph 26 dealt specifically with the claim for the payment of US $797,500, and paragraph 27 dealt specifically with the case in relation to the US $50,000. Paragraph 28 dealt with interest, and paragraph 29 dealt with the order for costs. It will be necessary to refer in more detail to aspects of Part I of the Award when considering the defendant's contentions that it was denied natural justice.

39. The quantification of costs was dealt with in Part J of the Award. The costs of the arbitration were assessed at US $375,695.51. In Part K of the Award, that amount was added to the Part H total of US $967,450.27 to give a grand total of US $1,343,145.78. In addition, a sum of up to US $137,477.06 was to be paid to the plaintiff to the extent that the plaintiff was required to pay that amount to obtain the release of the Award. The plaintiff in fact paid that amount on 5 May 2014.

40. Before dealing with the defendant's arguments to the effect that it was denied natural justice, it is convenient to make some preliminary observations concerning the notion of natural justice as it arises in the context of the enforcement of foreign arbitral awards under the Act.

Natural justice in the context of international arbitration

41. This issue was recently considered in depth by the Full Court of the Federal Court of Australia (Allsop CJ, Middleton and Foster JJ) in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83 ("*TCL Air*"). After a discussion about the notion of "public policy" as it came to be used in articles 34 and 36 of the Model Law, and the enactment of ss 19 and 8(7A) of the Act, their Honours stated (at [73]-[76]):

"This history demonstrates that there was no evident purpose in the introduction of ss 19 and 8(7A) of amending the meaning of public policy to incorporate any idiosyncratic national

approach. In Australia, the introduction of a reference to natural justice was expressly for the avoidance of doubt: "to avoid doubt" (s 8(7A)); "for the avoidance of any doubt" (s 19). The rules of natural justice can thus be seen to fall within the conception of a fundamental principle of justice (that is within the conception of public policy), being, as they are, equated with, and based on, the notion of fairness: *Kioa v West* 159 CLR at 583; *Wiseman v Borneman* [1971] AC 297 at 308, 309 and 320. Fairness incorporates the underlying requirement of equality of treatment of the parties. The incorporation of the rules of natural justice into the IAA [the Act] embodied a fundamental principle contained within public policy and *ordre public* - fairness and equality of treatment of the parties, which is at the heart of the arbitral process in Art 18. There is nothing technical or domestically particular about the requirement that an arbitration be conducted fairly. The conceptions of fairness and equality are deeply powerful. They lie at the heart of the constitutional conception of due process. They are inhering elements of law and justice that inform and bind any legal system and any legal order. See the discussion of the norm of equal justice in *Green v R* [2011] HCA 49; 244 CLR 462 at 472-473 [28] and also *Jarratt v Commissioner for Police for NSW* [2005] HCA 50; 224 CLR 44 at 56-57 [26].

Once one recognises that the rules of natural justice were seen by many as within the conception of public policy within Arts 34 and 36, it is necessary to say something further as to the content of the phrase "public policy", so as to understand the statutory context of the phrase "rules of natural justice". We have already referred to the discussion of the negotiation of the New York Convention and the Model Law in van den Berg op cit and Holtzmann and Neuhaus op cit that assists one to the conclusion that the phrase was understood to be limited to the fundamental principles of justice and morality conformable with, and suited to operation within, the international nature of subject matter -- international commercial arbitration, a context very different from the review of public power in administrative law.

This approach to confining the scope of public policy has widespread international judicial support. Contrary to the submission of the appellant, it is not only appropriate, but essential, to pay due regard to the reasoned decisions of other countries where their laws are either based on, or take their content from, international conventions or instruments such as the New York Convention and the Model Law. It is of the first importance to attempt to create or maintain, as far as the language employed by Parliament in the IAA permits, a degree of international harmony and concordance of approach to international commercial arbitration. This is especially so by reference to the reasoned judgments of common law countries in the region, such as Singapore, Hong Kong and New Zealand [...]

A review of the international jurisprudence leads to the conclusion that the interpretation of public policy in Art V of the New York Convention and Arts 34 and 36 of the Model Law is as it was understood at the time of the completion of the preparatory work: it is limited to the fundamental principles of justice and morality of the state, recognising the international dimension of the context [...]"

> 42. Reference should also be made to the discussion in *Traxys Europe SA v Balaji Coke Industry Pvt Ltd and Another* (No 2) [2012] FCA 276; (2012) 201 FCR 535 at [87]-[105] per Foster J, which is cited with approval by the Full Court in *TCL Air* at [80].

43. The Full Court further emphasised the importance of context in considering whether, in any particular case, there has been a denial of natural justice (see, for example, at [77] and [86]). After referring to numerous cases where challenges based on natural justice grounds were made to administrative decisions, their Honours noted (at [105]) that such cases deal with the exercise of public or state power whereas the context of international commercial arbitrations is the exercise of private power through an arrangement and a tribunal to which the parties have consented under a regime wherein errors of fact or law are not legitimate bases for curial intervention. The Full Court continued (at [109]):

"[...] The Model Law and the IAA embody a framework of law for the regulation of arbitration. The avowed intent of both is to facilitate the use and efficacy of international commercial arbitration: see Resolution 40/72 of the United Nations General Assembly (11 December 1985), Art 5 of the Model Law and s 2D of the IAA. Basal to the working of the New York Convention, Art V and the Model Law, Arts 34 and 36 was the absence of any ground for the review or setting aside or denial of recognition or enforcement of awards because of errors by the arbitrator in factual findings or in the application of legal principle (as viewed by national courts). The system enshrined in the Model Law was designed to place independence, autonomy and authority into the hands of arbitrators, through a recognition of the autonomy, independence and free will of the contracting parties. The a-national independence of the international arbitral legal order thus created required at least two things from national court systems for its efficacy: first, a recognition that interference by national courts, beyond the matters identified in the Model Law as grounds for setting aside or non-enforcement would undermine the system; and secondly, the swift and efficient judicial enforcement and recognition of contracts and awards. The appropriate balance between swift enforcement and legitimate testing of grounds under Arts 34 and 36 is critical to maintain; essential to it is courts acting prudently, sparingly and responsibly, but decisively when grounds under Arts 34 and 36 are revealed. An important part of that balance is the protection by the courts of the fundamental norms of fairness and equality embodied in the rules of natural justice within the concept of public policy."

44. The Full Court expressed its conclusion at [111] in the following terms (see also at [55]):

"The above leads one to the conclusion that Arts 34 and 36 should be seen as requiring the demonstration of real practical injustice or real unfairness in the conduct of the reference or in the making of the award. The rules of natural justice are part of Australian public policy. The assessment as to whether those rules have been breached by reference to established principle is not a matter of formal application of rules disembodied from context, or taken from another statutory or human context. The relevant context is international commercial arbitration. No international arbitration award should be set aside for being contrary to Australian public policy unless fundamental norms of justice and fairness are breached. Each of Art 34 and 36 contains a form of discretion or evaluative decision: "may be set aside" (Art 34), "may be refused only" (Art 36). It is not profitable to seek to differentiate between the engagement of public policy under the Articles and a supposedly separate and a later question whether to exercise the discretion; nor is it profitable, but only likely productive of difficulty or error, to read into Arts 34 and 36 any precise notions of required prejudice or other preconditions to the exercise of any

discretion. The provisions (ss 8(7A), 19 and Arts 34 and 36) deal with fundamental conceptions of fairness and justice. It suffices to say that no international award should be set aside unless, by reference to accepted principles of natural justice, real unfairness and real practical injustice has been shown to have been suffered by an international commercial party in the conduct and disposition of a dispute in an award. It is likely that real prejudice, actual or potential, would be a consideration in the evaluation of any unfairness or practical injustice."

Alleged breaches of the rules of natural justice in this case

45. I will deal in turn with each of the grounds relied upon by the defendant.

Ground 1: The award of US $50,000

46. Mr Rayment submitted that although the plaintiff originally made a claim for the payment of US $50,000, the claim was omitted from the Statement of Claim, was not addressed by either party in submissions, and thus should be regarded as a claim that was no longer maintained. Mr Rayment contended that in those circumstances, if the tribunal was nonetheless considering the making of an award of US $50,000 against the defendant, it was obliged as a matter of fairness to notify the defendant and afford it the opportunity to be heard on the question.

47. Mr Rayment also submitted that the tribunal failed to give reasons for its conclusion in relation to the US $50,000, and that this failure was also relevant to the question whether there was a breach of the rules of natural justice in relation to the order for the payment of that sum.

48. Mr Hogan-Doran seemed to accept that the claim for US $50,000 was not contained in the Statement of Claim, although he did refer to the prayer for "other relief". He further accepted that no oral claim was made for an order for payment of US $50,000. He pointed out, however, that the claim was included in the Request and the TRAA, and submitted that the defendant apparently understood that the claim for US $50,000 remained part of the case irrespective of the pleadings. In that regard, Mr Hogan-Doran referred to the transcript of the first day of the hearing (at pages 23 and 24) where it is recorded that in the course of addressing the application for dismissal, Mr Tzovaras, who appeared for the defendant:

(1) referred to "the relief that is being sought";

(2) said that it was conveniently summarised in the arbitration agreement (the TRAA) and is also to be found in paragraph 5.1 of the Request; and

(3) referred to "in [*sic* - an] order for the payment of $50,000".

49. Mr Hogan-Doran also referred to paragraphs 12 and 13 of the defendant's written submissions on its application for dismissal, where further reference is made to the plaintiff's claim for US $50,000 as set out in the Request and the TRAA.

50. Mr Hogan-Doran submitted that it was apparent that the tribunal also understood that the claim for US $50,000 remained part of the case irrespective of the pleadings. In this regard, he referred to Parts D and E of the Award. Part D contains a Summary of the Claimant's Claim. That summary incorporates material taken from the TRAA, including references to an agreement to discount the Final Account by US $50,000, and the seeking

of an order for payment of that sum. Part D contains a Summary of the Respondent's Defence. That summary incorporates from the TRAA the defendant's response to the claim for US $50,000.

51. Mr Hogan-Doran submitted that it was clear that the tribunal accepted Mr Moss' evidence on the matter (particularly at paragraph 10 of his statement) which was open to be characterised as evidence that the defendant would only get the US $50,000 discount (from US $16 million to US $15.95 million) on the condition that it made the payments as stipulated by the terms of the 10 May 2011 letter. It was submitted that all that had happened was that the tribunal, after considering the submissions in the evidence, accepted that characterisation rather than the characterisation advanced by the defendant.

52. It was submitted that this was apparent from the terms of paragraph 27.3 of the Award which is in the following terms:

"Following a review of the position regarding the discount, the Tribunal has carefully considered and deliberated on this point, and decided that the discount must be reinstated. The consequence of this is that the Claimant is entitled to the US $50,000.

It was the Claimant's evidence that the agreement to the discount of the US $50,000 was conditional upon prompt payment under the terms of the Letter Agreement. The first payment of US $652,185.59 was made on 18th May 2011, about a week after the agreement was made. The second payment of US $797,500 was made approximately 12 months late and the third payment was not made at all."

53. These reasons are very brief. Nevertheless, I do not accept the submission that there has been a failure to give reasons in relation to this aspect of the matter. It is apparent from paragraph 27.3 of the Award (read in the light of the earlier references to the issue at paragraphs 10.5 to 10.9 and 12.12) that the tribunal:

(1) interpreted the plaintiff's evidence (which it had accepted at paragraph 25.3.1 of the Award) as being to the effect that the plaintiff agreed to give the defendant a discount of US $50,000 on the amount of the Final Account on condition that the payments provided for in the 10 May 2011 letter were made promptly in accordance with the terms of the letter; and

(2) concluded that if that condition was breached, the discount need not be given.

54. To my mind, paragraph 27.3 of the Award discloses adequately, albeit briefly, the essential reasons why the tribunal reached the decision it did on the payment of US $50,000. It is not for this Court to say whether the tribunal was correct or incorrect in so deciding. However, in the context of an international commercial arbitration where the grounds available to challenge awards are very limited, the reasons given by the tribunal for that decision appear to me to be adequate. In my view the reasons are in conformity with the requirements of Article 31(2) of the Model Law. In *Bremer Handelsgesellschaft m.b.H. v Westzucker G.m.b.H. (No.2)* [1981] 2 Lloyd's Rep. 130, Donaldson LJ stated at 132-133:

"All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is. That is all that is meant by a "reasoned award"."

55. In New South Wales, Lord Justice Donaldson's statement has been approved as applicable to Article 31(2) of the Model Law (see *Gordian Runoff Ltd v Westport Insurance Corporation* [2010] NSWCA 57; (2010) 267 ALR 74 at [207]- [221]; see also *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37; (2011) 244 CLR 239 at [23], [51], [54] and [169]). As noted earlier (see at [37]), the defendant submitted that the requirement under the applicable rules to give reasons was comparable to that found in Article 31(2). As I have found that the reasons are in conformity with the requirements of Article 31(2), it is not necessary to decide whether, as submitted by the plaintiff, the applicable requirement was actually less demanding.

56. I turn now to the question whether there was a breach of the rules of natural justice in the tribunal proceeding to award US $50,000 in circumstances where that claim was not included in the plaintiff's Statement of Claim.

57. For the reasons which follow I have concluded, based on an assessment of the manner in which the arbitration was conducted, that there was such a breach in relation to the order for the payment of US $50,000.

58. Whilst a claim for such an order was identified in the Request and the TRAA, and was never expressly abandoned by the plaintiff, the absence of such a claim from the Statement of Claim, and the subsequent failures of the plaintiff to either state that such a claim was still made, or make any submission in support of it, strongly suggests that the plaintiff had in fact abandoned it.

59. It is true that the "US $50,000 reduction" was referred to in paragraph 12 of the plaintiff's Opening Submissions (see also the reference in paragraph 55 to the plaintiff compromising its right to a higher Final Account valuation). However, no submission was made that if the payments required by the 10 May 2011 letter were not made on time, the defendant would be obliged to pay the sum of US $50,000 to the plaintiff; and no order to that effect was identified. It should also be noted that in the introduction to the Opening Submissions, the plaintiff stated that it relied on the Statement of Claim (and Reply) "in full".

60. The position is similar in relation to the plaintiff's Closing Submissions, where the US $50,000 is referred to in paragraphs 96-97, 156(h) and 206-207. In paragraph 172 of the Closing Submissions, it is stated that "all that remains outstanding is the final USD 797,500 retention sum", and at paragraphs 198 to 203 interest is claimed only on that sum.

61. I do not think that the references to the claim for US $50,000 made by the defendant, in the course of addressing its application for dismissal, ought be regarded as an acceptance that such a claim was still maintained. In the context of that application, where the question was whether the dispute arose out of the Agreement, such statements should be seen as references to the nature and extent of the issues involved in the dispute generally, including at times prior to service of pleadings as envisaged by paragraph 4.12 of the TRAA.

62. It seems to me that in the absence of any explicit statement by the plaintiff that the claim for US $50,000 was still maintained despite its absence from the Statement of Claim, the claim ought reasonably have been treated by all concerned as no longer pressed. If, as appears to be the case, the tribunal took a different view and considered that it remained open to it to deal with that claim and possibly make an order against the defendant for payment of US $50,000, I think that fairness required the tribunal to give

notice of its view to the parties (especially to the defendant) and invite them to address the claim, including by the making of submissions (cf *Interbulk Ltd. v. Aiden Shipping Co. Ltd. I.C.C.O. International Corn Co. N.V. v. Interbulk Ltd. (The "Vimeira")* [1984] 2 Lloyd's Rep 66 at 75 (per Goff LJ) and 76 (per Ackner LJ); *Fletcher v Commissioner of Taxation* (1988) 19 FCR 442 at 454-456).

63. The opportunity to so address the claim (if indeed the plaintiff wished to pursue it) was denied to the defendant but the tribunal nonetheless proceeded to make the order for the payment of US $50,000. In my view, by reference to accepted principles of natural justice, real unfairness and real practical injustice has been shown to have been suffered by the defendant to that extent (see *TCL Air* (supra) at [111] and [154]; *Balfour Beatty Construction Ltd v The Mayor and Burgesses of the London Borough of Lambeth* [2002] EWHC 597 (TCC) at [37]). The defendant was at least denied the opportunity to make a submission that, even if the evidence of Mr Moss was accepted, it did not follow that a failure by the defendant to pay in accordance with the 10 May 2011 letter gave rise to a liability to pay US $50,000 to the plaintiff. In circumstances where Mr Moss' evidence suggested that the US $50,000 was not a discount from a sum the defendant was otherwise liable to pay, but was rather a reduction from a sum the plaintiff had said it was prepared to accept, such a submission was at the very least reasonably arguable.

Ground 2: The contention that the 10 May 2011 letter was either a variation of the Agreement or else of no legal effect

64. Mr Rayment submitted that the defendant had contended in the arbitration that unless the letter of 10 May 2011 was a formally executed variation to the Agreement, then it was of no legal effect, as there could not be two separate and inconsistent contracts in existence. It was put that this contention had been formulated with some clarity in the defendant's Rejoinder (in particular at paragraph 9). Mr Rayment submitted that the tribunal failed to deal with the contention, merely accepting the plaintiff's submission that the letter constituted a binding standalone agreement. Reference was made to statements made by the High Court concerning a failure by a tribunal to consider substantial (and clearly articulated) arguments made in support of claims (see *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; (2003) 77 ALJR 1088 at [24] and [95]; *Plaintiff M61/2010E v The Commonwealth of Australia and Others; Plaintiff M69/2010 v The Commonwealth of Australia and Others* [2010] HCA 41; (2010) 243 CLR 319 at [90]). It was further put that the tribunal failed to give reasons for its conclusions in relation to the agreement and its relationship with the Agreement.

65. Mr Hogan-Doran submitted that to the extent the defendant raised an argument along the lines of the contention described by Mr Rayment, it had essentially disappeared by the time the defendant came to make its Closing Submissions. Insofar as those submissions raised matters going to the validity or enforceability of the alleged agreement, the focus was rather on matters such as a want of authority, a failure to comply with required formalities, and mistake.

66. Mr Hogan-Doran further submitted that in any event it was clear from the Award that the tribunal had considered all of the submissions made by all the parties (see the opening paragraph of Part I of the Award) before turning to deal with "the key elements

of the case" as reflected in those submissions (see paragraph 25 of the Award). He submitted that in those circumstances, no denial of natural justice could be shown.

67. Finally, Mr Hogan-Doran submitted that on a fair reading of the reasons for the Award, it could not be said that the tribunal effectively concluded that there were two inconsistent contracts in existence. It was clear, he submitted, that the tribunal found that there was a separate agreement in the nature of a settlement agreement in relation to the Final Account and the payment of retention monies under the Agreement. Accordingly, there was no finding that such amounts might, in addition, remain payable under the Agreement itself.

68. For the reasons which follow, I do not think that there has been any breach of the rules of natural justice as claimed by the defendant.

69. The plaintiff's case throughout was that the letter of 10 May 2011 embodied the terms of an enforceable agreement which obliged the defendant to make certain payments (see Request at paragraphs 2.2, 2.3 and 4.5; TRAA Sch 4 at paragraph 1.2.5; Statement of Claim at paragraphs 8.3, 8.10 and 10.5; Reply at paragraphs 2.2, 2.3 and 4.5). The plaintiff originally characterised the agreement as a variation of the Agreement, but later characterised it primarily as a settlement agreement in relation to the works the subject of the Agreement, which stood apart from the Agreement and was enforceable in its own right. In the alternative, the plaintiff submitted that the agreement was made pursuant to the terms of the Agreement.

70. Amongst the numerous defences raised by the defendant was the contention that the parties remained bound by the terms of the Agreement and that the letter of 10 May 2011 was not an expression of a final agreed position, but was part of an ongoing negotiation (see TRAA Sch 5 at paragraphs 1 and 8). In its Defence, the defendant placed a deal of emphasis upon the detailed regime embodied in the terms of the Agreement, and the fact that the agreement alleged by the plaintiff was not a formal variation of those terms. It contended that the alleged agreement was preliminary to the formal preparation of a valuation as contemplated by clause 16.5 of the Agreement.

71. The asserted need for any variation of the Agreement to comply with certain formalities, be "entered in a formal manner", or be a "formal variation", was carried into the defendant's Rejoinder. In specific answer to the plaintiff's characterisation of the alleged agreement as a standalone agreement, separate from the Agreement and enforceable in its own right, the defendant stated that it was "not possible as a matter of law to vary a formal written contract by use of a letter between an authorised representative of the parties in the manner outlined by the applicant" (see Rejoinder at paragraph 9). The defendant further stated that the letter of 10 May 2011 could only operate "as an expression of the party's intentions at a stage in the negotiation process" (see Rejoinder at paragraph 10). The Rejoinder does not state in terms that acceptance of the plaintiff's primary characterisation of a standalone agreement would entail the existence of two separate and inconsistent contracts. Neither is such a statement found in the defendant's Opening or Closing Submissions.

72. There, considerable emphasis was again placed upon the lack of formality involved with the letter of 10 May 2011. The Opening Submissions contained the following:

"7 The respondent asserts that the parties are yet to comply with the process to which the parties have agreed in solemn contract pursuant to clause 16.5.

[...]

12 The Respondent says that the only means whereby any purported agreement between the parties could have been entered into, or could be construed to have been entered into, from the events on or surrounding 11 May, 2011 is if the initial agreement between the parties has been subject to a formal variation.

13 The respondent asserts that none of the formalities which the parties could reasonably have anticipated were required to be complied with to achieve such an end were carried out and no such variation of the original agreement was effected.

[...]

15 At no time had Mr Langbein, the principal of the respondent, given approval for any formal variation or are there documents evidencing that formal variation of the contract executed by the appropriate representatives of the parties.

16 The only means whereby the subcontract then could possibly be varied was if the relevant principals who had negotiated and executed that subcontract entered in a formal manner, whether by way of the variation, or by way of a new contract, into a binding variation of the original agreement.

[...]

17 It is not possible as a matter of law to vary a formal written contract by use of a letter between representatives of the parties not of the same status as those who executed the original agreement. The best construction that could possibly be given to the terms of this letter of 11 May 2011 is that it is an expression of the party's intentions at a stage in the negotiation process.

18 The meeting of the "parties" on 11 May 2011 was one of many in the course of meetings to discuss a means of resolving outstanding issues prior to entry into the formal process under clause 16.5.

[...]

33 Informality by way of a letter or a handshake even may be appropriate in a simple commercial context, but not here."

73. The Closing Submissions contain the following, under the heading "Alleged agreement not binding by reason of absence of writing":

"110 The alleged "agreement" between the parties, in the form of a 3 paragraph letter from the Respondent's Commercial Manager dated 10 May 2011 may not meet the UAE law requirements

for a Contract (and ergo for a Settlement Agreement or Contract Amendment). The letter is signed by only one (1) party ("and the signatory does not have authority to contractually bind the Respondent") the subject matter is "ADAT Hangar 6 - Final Account" (as opposed to "Settlement Agreement" or "Contract Amendment") and there is no reference to a "claim" or a "dispute" or settlement thereof. The letter appears to be a "garden variety" final account letter that is often issued by an employer (or main contractor) at the end of a project - not a separate contract/agreement.

[...]

112 The Respondent submits that it is an implied term of the Subcontract that any variation of it, such as the variation that was purported to be made by the Alleged Agreement, must be in writing and executed by the parties to the Subcontract. [...]

113 This issue requires review of the facts surrounding the claimed amendment and whether such amendment has been, expressly or tacitly, approved by the principal. In the absence of any express provision that all amendments or modifications to the contract should be in writing, the general rule provided by Article 94 Federal Law No 18 of 1993 on the Issuance of the Commercial Transactions Law for UAE, is that:

'Unless otherwise provided by law or stipulated in the agreement, commercial obligations of any amount whatsoever may be evidenced by all means of proof.'"

> 74. The transcript of the second day of the arbitral hearing indicates (at page 219) that the absence of writing was one of the topics agreed to be covered in the Closing Submissions.
> 75. The tribunal dealt with the respective contentions of the parties on "the key elements of the case as reflected in the Parties submissions" in paragraphs 25.1 and 25.2 of the Award. It did so under a number of headings, including: "The Letter Agreement is not in accordance with the Contract Provisions or Binding because of an absence of writing."
> 76. At paragraph 25.1.1, the tribunal noted:

"The Claimant maintains that the Respondent has failed to demonstrate why the failure of following the provisions of the Subcontract would invalidate the Letter Agreement and that the Letter Agreement is a separate contractual document to the Subcontract Agreement and that the Subcontract agreement is not relevant [...]

The Claimant takes issue with the Respondent's position that any variation must be in writing. The Respondent submits that it is an implied term of the Subcontract Agreement that any variation to the Subcontract Agreement, such as the Final Letter Agreement, must be in writing and executed by the Parties [...]."

> 77. At paragraphs 25.1.9 and 25.1.10, the tribunal noted the plaintiff's principal contention that the alleged agreement was a standalone agreement, and its alternative

contention that it was made pursuant to terms of the Agreement. At paragraph 25.2.1, the tribunal noted:

"The Respondent maintains that the alleged Letter Agreement is not a formal agreement to vary or modify the terms of the Contract and that as there were or are outstanding issues under the Contract that no "Final Payment" is due.

The Respondent states that one short meeting does not represent a formal agreement between the Parties to modify their existing written agreement and formal contract agreement, without any formal documentation and particulars and that the Claimant has not established under law that the provisions of the agreement (Contract) have been varied or modified. [...]

The Respondent further alleges that there was no agreed variation to this procedure and that the Claimant has failed to provide any evidence that the principal of the Respondent agreed to any variation of this procedure.

[...]

The Respondent states that the alleged "agreement" between the parties, in the form of a 3 paragraph letter from the Respondent's Commercial Manager dated 10 May 2011 may not meet the UAE law requirements for a Contract.

Reliance is placed on the UAE Civil Code regarding contract formation:

Article 129

[...]

The Respondent thus notes that industry custom in the UAE and prior dealings between the parties are important factors in determining whether a contract amendment must be in writing. The industry custom in the UAE is that significant amendments to a substantial construction contract must be in writing."

78. The decision of the tribunal concerning the alleged agreement is set out in paragraph 25.3 of the Award, relevantly at paragraphs 25.3.1 to 25.3.3 which are in the following terms:

"The Letter Agreement: - The tribunal has reviewed the evidence. In its considered view, having deliberated, it concludes that the Letter Agreement is part of the evidential matrix in this arbitration. The dispute between the parties revolves around US $797,500. The resolution of that dispute must be based on evidence, of which the Letter Agreement is a significant part. The evidence of those who gave oral evidence must be weighed in the balance. The 10th May 2011 meeting in the offices of the Respondent is a central part of the case. We accept the evidence put forward for the Claimant concerning this crucial meeting and the consequential production of the Letter Agreement. It is noteworthy that the letter was produced on the Respondent's letterhead, was signed by Robert Haslan of the Respondent, and contained the clear and unambiguous

wording 'Retention monies will be released as agreed' ... The agreement was plainly one to release the sum of US $797,500, and we find as a fact that this was the case.

The law to be applied is that of the UAE. The parties concluded an agreement for the payment of an outstanding amount of money. Such agreement is clearly within the power of the parties.

We do not accept that the Letter Agreement, which is the written culmination of discussions between the parties up to the 10th May 2011, contains items which should not have been there. The 10th May resolution of the dispute for the figure of US $797,500 is clear. Arguments relying on the Respondent's internal process and discussions within the Respondent about the monies to be paid cannot affect the plain agreement made."

> 79. Reference should also be made to paragraph 26.3 of the Award which includes the following:

"The Tribunal has noted the submissions of the parties, and the evidence that has been furnished. Both parties fully relied upon the documents produced by each side, and full opportunity was given to each party to examine and cross-examine the witness that attended the hearing. [...]

The Tribunal finds, having carefully considered all the factors, and after deliberation, that there was an agreement between the Claimant and the Respondent for the payment of US $797,500. As a consequence, the Respondent is obliged to pay the Claimant the said sum."

> 80. It does not seem to me that the contention, as described to this Court by Mr Rayment (and referred to above at [64]), was clearly articulated by the defendant in the course of the arbitration. To the extent that such an argument was advanced, it was not developed at any length or in any detail, and it was certainly not given any prominence in either the Opening or Closing Submissions of the defendant. In any event, there is no reason to think that the tribunal failed to consider any of the submissions made to it by the defendant.
> 81. I am unable to discern any unfairness or practical injustice to the defendant in the manner in which the tribunal proceeded to deal with this aspect of the case. Neither do I think that there is any deficiency in the reasons given by the tribunal for reaching its conclusion that the parties had reached a binding agreement, as contended by the plaintiff, and that the defendant was therefore obliged to pay US $797,500 to the plaintiff.
> 82. It is clear from the reasons given in paragraph 25.3 of the Award that the tribunal accepted the evidence given by the plaintiff's witnesses (notably Mr Moss) as to the events leading up to the letter of 10 May 2011, and on that basis concluded that the parties had reached a binding agreement on the terms set out in that letter. It is also clear that the tribunal concluded that, in accordance with those terms, the defendant was obliged to pay US $797,500 to the plaintiff. In my view, it is implicit in the tribunal's conclusions that it rejected the various arguments put forward by the defendant that there was no binding agreement because required formalities had not been followed. In other words, the tribunal did not think it was necessary for there to be any "formal variation" as contended by the defendant.

83. It is also apparent from a reading of the Award as a whole that, as submitted by Mr Hogan-Doran, the agreement found by the tribunal was essentially a settlement with respect to the Final Account and the payment of retention monies under the Agreement. In those circumstances, I do not think that it can be said that the tribunal concluded that there were two inconsistent contracts in existence. It would be completely contrary to the plaintiff's case, as accepted by the tribunal, for the plaintiff to contend that, in addition to the payments provided for in the letter of 10 May 2011, the defendant was obliged to make further payments on the basis of a different Final Account. Moreover, having found that the parties had reached a binding agreement as to the Final Account and the payment of retention monies, it was not necessary for the tribunal to go further and decide whether the agreement should bear any particular characterisation, such as a standalone agreement, or a variation (whether formal or otherwise). I note, however, that in paragraph 23.3.1 of the Award the tribunal suggested that the asserted agreement and the Agreement itself were clearly "part of the same process", and the asserted agreement was not a "self-standing contract".

Ground 3: The refusal of the defendant's application to rely upon supplementary grounds of defence

84. The application was made only about a week before the scheduled commencement of the hearing. The proposed supplementary defences raised both factual and legal issues. The four supplementary defences sought to be raised may be summarised as:

(1) The tribunal was not competent to determine the dispute between the parties because the dispute fell outside the ambit of the arbitration clause (clause 19.1) of the Agreement;

(2) Mr Haslan, the officer of the defendant who executed the letter of 10 May 2011, did not have any written authority to enter into the alleged agreement;

(3) It was an implied term of the Agreement that any variation of it must be in writing and executed by the parties; and

(4) The alleged agreement was vitiated by a mistake as to the value of the Agreement.

85. The defendant provided written submissions in support of its application on 6 December 2013 and the plaintiff provided written submissions in response on 8 December 2013. On 10 December 2013, the defendant provided submissions in reply.

86. As already mentioned, the tribunal dealt with the application *de bene esse* and heard submissions on the application on the first day of the hearing. The hearing thereafter proceeded with the calling and examination of witnesses. The application was further dealt with by the parties in their respective Closing Submissions.

87. The application to rely upon the supplementary defences was dealt with by the tribunal in paragraphs 23 and 24 of the Award.

88. In paragraph 23.3, the tribunal stated that the application for dismissal for lack of competence was refused for three reasons. These were, first, that the application was not made in time; second, that the TRAA bound the defendant to the arbitration process; and, third, that the alleged agreement and the Agreement "are clearly and unequivocally part of the same process" and the alleged agreement was not "a self-standing contract that excludes arbitration".

89. In paragraph 24.3, the tribunal stated that the application in relation to the other three supplementary defences was also refused. It is clear from the reasons given in that paragraph that the tribunal considered whether it would be in the interests of justice for the supplementary defences to be permitted notwithstanding what was described as "the extraordinary delay" in raising them. The reasons indicate that in so doing the tribunal considered the strength or cogency of the supplementary defences, and the sufficiency of the reasons given for the delay in bringing them forward. The tribunal noted that, to at least some extent, the supplementary defences raised arguments relating to the construction of documents that were already in issue, such that the arguments could be raised in any event.

90. This ground was dealt with by written submissions only. For the defendant, it was put that in circumstances where:

(1) the application was dealt with at the hearing *de bene esse* and was fully argued (including by the parties making submissions as part of their Closing Submissions);

(2) no adjournment was sought by the plaintiff; and

(3) the tribunal did not find that the supplementary defences prejudiced the plaintiff,

(2) to reject the supplementary defences as too late "involved a failure to hear the defendant fairly".

91. The defendant also submitted that the reasons given for the refusal to allow the supplementary defences were internally inconsistent, and thus not reasons at all.

92. For the plaintiff, it was submitted that the procedure adopted by the tribunal for dealing with the application was not the subject of any objection by the defendant, and the hearing proceeded without any application by the defendant for an adjournment. The plaintiff further submitted that the tribunal accommodated the application by permitting the defendant to make extensive written and oral submissions in support of it. Finally, the plaintiff submitted that in any event the substance of the supplementary defences was dealt with and rejected by the tribunal. In this regard, the plaintiff pointed to the findings of the tribunal concerning the authority of Mr Haslan (see paragraph 25.3.4 of the Award), that there was no mistake (see paragraph 25.3.8 of the Award), and the central finding that a binding agreement had been reached (see paragraph 25.3.1 of the Award). The plaintiff submitted that those findings dealt, respectively, with the "no written authorisation" defence, the "agreement subject to mistake" defence, and the "alleged agreement not in writing" defence.

93. I do not think that any breach of the rules of natural justice occurred in relation to the defendant's application to rely on the supplementary defences. The application was brought at the eleventh hour, only days before the scheduled commencement of the hearing. The tribunal gave the defendant ample opportunity to make the applications at the hearing, supported by extensive written and oral submissions. The tribunal chose to deal with the application *de bene esse* and allow the hearing to proceed, and no objection was taken by the defendant to that course. It is clear that the tribunal received further written submissions on the application as part of the Closing Submissions of each party.

94. The tribunal, for the various reasons set out in paragraphs 23.3 and 24.3 of the Award, refused to allow the supplementary defences. It is clear from those reasons that the application was not refused solely on the grounds of lateness. The perceived strength (or lack of strength) of the proposed defences was considered, as was the sufficiency (or

lack of sufficiency) of the proffered explanation for the delay. In my view, neither the circumstance that the plaintiff did not seek an adjournment, nor the circumstance that the tribunal did not expressly find that the plaintiff would suffer prejudice if the supplementary defences were allowed, whether considered separately or together, warrants the conclusion that the rejection of the application involved a failure to afford fairness to the defendant.

95. I also reject the attack on the reasons that were given by the tribunal in paragraph 24.3 of the Award. On one view there is an inconsistency between paragraph 24.3.3 and paragraph 24.3.5, although I am far from convinced that in paragraph 24.3.5 the tribunal was referring to the totality of the arguments raised by the proposed new defences. Paragraph 24.3.6 rather suggests the contrary. In any event, the reasons in paragraph 24.3, when read as a whole, seem to me to adequately explain how the tribunal reached its decision to refuse the application. I do not think that there was any departure from the required standard of reasons.

96. In summary, I do not discern any unfairness or practical injustice to the defendant arising from the manner in which the application for leave to rely on supplementary defences was dealt with by the tribunal.

Grounds 4, 5 and 6: Various failures to give reasons

97. It is convenient that these grounds be dealt with together. As noted earlier, these grounds were dealt with by written submissions only.

98. The defendant's submissions included general statements to the effect that a failure by a tribunal to provide reasons in respect of a matter raised for consideration can amount to a denial of procedural fairness, and that the absence of reasons can evidence a failure to consider and deal with a matter. The defendant further submitted that the tribunal, having decided not to allow reliance upon the supplementary defences, "does not go on to deal with the original defences as pleaded". I assume that this submission is intended to cover each of grounds 4, 5 and 6.

99. The plaintiff submitted that all of the matters raised by the defendant were dealt with by the tribunal at paragraph 25.3 of the Award. It was put that the reasons given by the tribunal at least met the standard as stated by Donaldson LJ in *Bremer Handelsgesellschaft m.b.H. v Westzucker G.m.b.H. (No.2)* (supra). The plaintiff further submitted that the attack on the reasoning of the tribunal was a thinly disguised (and impermissible) attempt to revisit the merits of the tribunal's decision.

100. I do not think that the reasons of the tribunal, insofar as they bear upon the matters raised by the defendant (in its Defence, Rejoinder and submissions) are relevantly inadequate, or reveal any failure on the part of the tribunal to consider any aspect of the defendant's case.

101. It is apparent from a reading of paragraph 25 of the Award that the tribunal considered the evidence and all of the submissions made to it by the parties, and specifically addressed the key elements of the case as reflected in those submissions. The lengthy description of the defendant's position contained in paragraph 25.2 of the Award reveals that the tribunal was aware of the defendant's arguments, including arguments to the effect that:

(1) the alleged agreement was not a formal variation, or a contract formed in accordance with Article 129 of the UAE Civil Code;

(2) there was no authority to bind the defendant to the alleged agreement;

(3) no agreement was in fact reached at the meeting on 10 May 2011;

(4) the alleged agreement included items the plaintiff was not entitled to recover; and

(5) the alleged agreement was entered into under a mistaken belief as to the value of the works under the Agreement.

102. The reasons given in paragraph 25.3 of the Award make it clear that the tribunal: (1) accepted the evidence of the plaintiff's witnesses as to the events of 10 May 2011;

(2) concluded that a binding agreement was thereby made, in accordance with the law of the United Arab Emirates, for the payment of an outstanding amount of money;

(3) construed the agreement as plainly one that required the defendant to pay US $797,500 to the plaintiff as part of the retention monies;

(4) did not accept that the agreement included items that should not have been there;

(5) found that Mr Haslan had authority to bind the defendant to the Agreement; and

(6) concluded that the Agreement was not entered into by mistake.

103. In my view, the reasons meet the standard enunciated by Donaldson LJ in *Bremer Handelsgesellschaft m.b.H. v Westzucker G.m.b.H. (No.2)* (supra). The reasons sufficiently state the basis upon which the defendant was found to be obliged to pay US $797,500 to the plaintiff. That amount was payable as part of the retention monies the parties agreed would be paid on the dates specified in the letter of 10 May 2011. Moreover, the tribunal clearly appreciated, and dealt with, the essence of the defences advanced by the defendant. The defendant has not shown, by reference to the reasons of the tribunal or otherwise, that any particular defence was not in fact considered by the tribunal, or that real unfairness or prejudice was suffered by it as a result. Accordingly, grounds 4, 5 and 6 are not made out.

Conclusion on breach of natural justice

104. It follows from the above that the defendant has succeeded in establishing that in one respect a breach of the rules of natural justice occurred in connection with the making of the Award. That is the breach involved in the tribunal proceeding to make the order for payment of US $50,000 in circumstances where such claim was no longer pressed.

Severance of award

105. Mr Rayment submitted that as a breach of the rules of natural justice occurred in connection with the making of the award, s 8(7A) of the Act operates so that for the purposes of s 8(7) of the Act, the enforcement of the Award is taken to be contrary to public policy and the Court may refuse to enforce the award. Mr Rayment further submitted that the Court should refuse to enforce the Award *in toto* even if only part of

the award is affected by a breach of the rules of natural justice. He submitted that it was not open to the Court to partially enforce an award under s 8 of the Act unless it was a case where s 8(6) applied.

106. Mr Hogan-Doran submitted that if part of the Award was affected by a breach but was severable from the balance of the Award, it would be open to the Court to enforce the Award shorn of the affected part. Mr Hogan-Doran referred to a number of cases (including cases involving arbitral awards in relation to which the New York Convention had application) in which partial enforcement was ordered.

107. In *A.C.N. 006 397 413 Pty. Ltd. v International Movie Group (Canada) Inc and Another* [1997] 2 VR 31, the Court of Appeal in Victoria dealt with a Californian arbitral award, which was said to come within the New York Convention, although the application for enforcement was made under s 33 of the *Commercial Arbitration Act 1984* (Vic) rather than the Act. Section 33 provided that: "An award under an arbitration agreement may, by leave of the Court, be enforced in the same manner as a judgment or order of the Court to the same effect [...]".

108. In that case, certain parts of the award were held to be bad for uncertainty, and a question arose as to whether severance of the invalid part of the award was possible. Brooking JA (with whom Hayne JA and Charles JA agreed) held, after undertaking a detailed and extensive analysis of the authorities on the question, that the invalid part of the award could be severed, leaving the balance of the award to be enforced by order of the Court under s 33 of the *Commercial Arbitration Act 1984*.

109. Brooking JA stated (at 38):

"When is severance of an award possible? Sometimes it is laid down that severance is possible if it may be effected without injustice. It has been said that for severance to occur it must appear that the residue that is to be allowed to stand was in no way affected by the part of the award that is rejected: *McCormick v Grey* (1851) 13 Howard 26 at 37; [1851] USSC 13; 14 Law Ed. 36 at 41. According to Blackburn J., the award is void altogether only if the void part is so mixed up with the rest that it cannot be rejected: *Duke of Buccleuch v Metropolitan Board of Works* (1870) L.R. 5 Ex. 221 at 229. But when will it be said that injustice will result from severance, or that the residue is in some way affected by the rejected part, or that the void part is so mixed up with the rest that it cannot be rejected? Most of the cases found in the reports fall into one or other of two categories. In the first, severance is impossible because it is unjust that the party resisting severance should perform the rest of the award while losing the benefit of a provision in his favour which the opposite party says should be severed as bad. In the second, severance is prevented by the possibility which exists that the arbitrator would have made some different provision in the part of the award sought to be preserved if he had realised that the other part of the award was bad. Cases in the first category may perhaps be regarded as no more than examples of the second, but the distinction is useful for the purpose of grouping the authorities. Both categories may be regarded as instances of the operation of a principle that severance will be impossible where there is such a connection between the bad part of the award and the part which, considered by itself, is good that it would be unjust to allow the "good" part to stand alone. Alternatively, to use the test laid down by the Supreme Court of the United States in *McCormick v Grey*, both categories may be seen as examples of a principle that severance is not possible unless the residue to be allowed to stand was in no way affected by the part of the award that is rejected."

110. Brooking JA referred to numerous cases, both English and American, dealing with the issue of severance. The cases concerned various situations, including an award affected by the presence of an uncertain or unqualified amount, or the award of an amount outside the jurisdiction of the arbitration. His Honour referred (at 40) to the decision of the Supreme Court of the United States in *Lyle v Rodgers* [1820] USSC 22; (1820) 5 Wheat. 394 where Marshall CJ, delivering the opinion of the Court, said at 409:

"That an award may be void in part, and good for the residue, will be readily admitted; but if that part which is void be so connected with the rest as to affect the justice of the case between the parties, the whole is void."

111. Brooking JA further referred to the United States literature concerning the question, including the following, which is quoted at 42:

"Although the arbitrators have gone beyond the scope of the submission, if the award, as regards the matters considered which were not within the submission, is severable, it may be sustained as to that part which deals with matters strictly within the submission. It is indispensable, however, that the part of an award allowed to stand should appear to be in no way affected by the departure from the submission, for if the award is not severable, and includes matter not within the submission, it is void in toto.

The rule that an award may be good in part is properly invoked where the several parts of the award are against the same party, or where several sums are awarded against the same party, the award being bad as to one of the orders. [...]"

112. Brooking JA continued (at 43-44):

"The cases already cited show that where an award directs payment of more than one sum, or the performance of more than one act, by the defendant to or for the benefit of the plaintiff and one of those directions is bad for uncertainty, the award may be severed and may be enforced by action on the award as regards the sufficiently certain directions. [...] There is, moreover, direct authority for the view that, as in an action for the enforcement of the award, so with the summary procedure, an award may be enforced in part, whether the necessity for partial enforcement results from the fact that the award has been performed in part or from the fact that it is bad in part (the bad part being severable). There are at least five authorities which support this view. The first is Evans v National Pool Equipment Pty. Ltd. (1972) 2 NSWLR 410, a decision of the Court of Appeal of New South Wales. At 417 Jacobs JA, speaking in effect for the court, expressed the opinion that where the award required payment of a specified sum together with interest at a specified rate in respect of a period after the date of the award, the direction for payment of interest being beyond power, that direction was clearly severable and could be excluded from the part of the award sought to be enforced summarily. [...]"

113. Brooking JA also referred to the decision of Kaplan J in the High Court of Hong Kong in *J J Agro Industries (P) Ltd v Texuna International Ltd* [1992] 2 HKLR 391. That case involved an instance of fraudulent conduct, namely, the kidnapping of a witness for one of the parties to an arbitration. It appears that following the kidnapping, the witness

(Mr Savla) swore a false affidavit contradicting an earlier affidavit made by him for the purposes of the arbitration. The false affidavit was relied upon by the arbitrator in his decision.

114. Enforcement of the award was resisted on the ground that to do so would be contrary to public policy. Reliance was placed upon s 44(3) of the Arbitration Ordinance of Hong Kong, which is in the following terms:

"Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award."

115. The question arose as to whether it was possible under Hong Kong law to sever the award. The question arose in circumstances where it appeared that a part of the award dealing with an Indian rupee deposit of 250,000 was in no way affected by the fraudulent conduct. Kaplan J rejected a submission that there was no warrant in the Arbitration Ordinance for enforcing the good part of an award and refusing to enforce the bad. His Honour stated (at 398-399):

"It would be most surprising if Mr Bunting's extreme submission was sound in law. The policy of the courts in modern time has been supportive of the arbitral process. Legislation has been introduced to limit court interference on the merits in domestic cases without leave. In international cases there is now the Model Law which does not permit any court interference on the merits. Arbitration is the preferred method of dispute resolution in many areas both internationally and domestically. If an award contained an objectionable part it would be absurd if the remainder of the award was to fail as well. This would be elevating form over substance which the courts have for some time been concerned to prevent where possible. [...]I am quite satisfied that the words in section 44(3) "[...] if it would be contrary to public policy to enforce the award" must be taken to refer to that part of the award which is challenged on those grounds. The argument that the arbitrators could have rendered two awards but did not or that the plaintiffs could have applied to enforce each part separately is neither here nor there. These are technical points which only obscure the underlying reality of the situation, namely, that the rupee claim stands on its own and is in no way affected by the Savla allegation. [...]

I think it is also pertinent to note that the doctrine of severability of an award is recognised distinctly in section 44(4) which enabled the court to enforce that part of an award that was within the jurisdiction of the arbitrators whilst not enforcing that part which was outside their jurisdiction. [...]

I am not impressed with the argument that because there is no specific reference to severability in the sub-section on public policy, therefore this means that the whole award has to fail if part only is affected by the public policy ground. I believe that section 44(4) indicates a statutory intention to provide for the doctrine of severability and merely because the draftsman had not applied his mind to a situation where the public policy ground of opposition related to only part of an award, this is not sufficient to exclude the doctrine. As I have already said, it is necessary to have regard to more than the piece of paper that is the award, and one must look at its substance to see whether the arbitrator has decided and ordered and then to see whether there are

any freestanding parts or whether it is an integral award not separable in any way. If it is necessary to do so, I would be prepared to hold that on a true construction of Part IV of the Arbitration Ordinance the words "contrary to public policy to enforce the award" should be read as "contrary to public policy to enforce a severable part of the award"."

> 116. Finally, reference should be made to the decision of the Court of Appeal in *Nigerian National Petroleum Corporation v IPCO (Nigeria) Ltd (No. 2)* [2008] EWCA Civ 1157; (2009) 1 Lloyds Rep 89, where partial enforcement of a New York Convention award was permitted under s 101 of the *Arbitration Act 1996* (UK). Under that Act, the grounds for refusal of recognition or enforcement of a New York Convention award are set forth in s 103 which relevantly provides:

"(1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.

(2) Recognition or enforcement of the award may be refused if the party against whom it is involved proves:

[...]

(d) 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 (but see subsection (4));

[...]

(3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration or if it would be contrary to public policy to recognise or enforce the award.

(4) An award which contains decision on matters not submitted to arbitration may be recognised or enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted. [...]"

> 117. The Court of Appeal rejected a submission that, apart from the express provision made in s 103(4), partial enforcement of an award was not permitted. Tuckey LJ (with whom Wall LJ and Rimer LJ agreed) stated:

"[14] So do the Convention and the 1996 Act prevent part enforcement of an award in a case such as this as Mr Nash contends? I start by thinking this is unlikely because the purpose of the Convention is to ensure the effective and speedy enforcement of international arbitration awards. An all or nothing approach to the enforcement of an award is inconsistent with this purpose and unnecessarily technical. I can see no objection in principle to enforcement of part of an award provided the part to be enforced can be ascertained from the face of the award and judgment can be given in the same terms as those in the award. [...]

[16] Nor do I accept his argument on construction. There is nothing which expressly prevents part enforcement in the language of the Convention or the statute. At first sight section 103(4) supports Mr Nash's argument. It does allow for part enforcement where the tribunal has strayed beyond the limits of its jurisdiction. But this provision was necessary to make it clear that such an error does not give grounds for saying that no part of the award should be enforced. No such provision is required for the other cases in section 103(2) which contemplate all or nothing challenges to the whole of the award.

[17] The statute refers of course to "an" or "the" award. Does this mean the whole award and nothing but the whole award as Mr Nash contends? I do not think so. Such a construction would have absurd commercial consequences and cannot have been intended. Mr Lyndon-Stamford QC for IPCO gave the example of an award for £100 million and a challenge to only a £5 million part of it. On NMPC's case the court could not enforce the £95 million part of the award until after the challenge had been determined. This would encourage unscrupulous parties to mount minor challenges to awards so as to frustrate their speedy and effective enforcement. [...]

[18] In these circumstances I think that the word "award" in this part of the 1996 Act should be construed to mean the award or part of it. To be enforceable it must be possible to enter judgment (in terms of the award) but in this case there is no difficulty about that as the exact correspondence between the award and the judgment shows. Put less formally if one were to ask whether enforcement of part of an award in accordance with its terms was enforcement of the award the answer would be "of course"."

> 118. The provisions of the United Kingdom legislation under consideration in that case, and the provisions of the Hong Kong legislation under consideration in the *J J Agro Industries (P) Ltd v Texuna International Ltd* (supra) closely resemble the provisions of s 8 of the Act. That is, of course, unsurprising as each enactment is a reflection of Article V of the New York Convention, which is concerned with the recognition and enforcement of arbitral awards.
> 119. Section 8 of the Act is relevantly in the following terms:

"(1) Subject to this Part, a foreign award is binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made.

(2) Subject to this Part, a foreign award may be enforced in a court of a State or Territory as if the award were a judgment or order of that court.

(3) Subject to this Part, a foreign award may be enforced in the Federal Court of Australia as if the award were a judgment or order of that court.

(3A) The court may only refuse to enforce the foreign award in the circumstances mentioned in subsections (5) and (7).

[...]

(5) Subject to subsection (6), in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that:

(a) that party, being a party to the arbitration agreement in pursuance of which the award was made, was, under the law applicable to him or her, under some incapacity at the time when the agreement was made;

(b) the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made;

(c) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case in the arbitration proceedings;

(d) the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration;

(e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(f) the award has not yet become binding on the parties to the arbitration agreement or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

(6) Where an award to which paragraph (5)(d) applies contains decisions on matters submitted to arbitration and those decisions can be separated from decisions on matters not so submitted, that part of the award which contains decisions on matters so submitted may be enforced.

(7) In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that:

(a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting; or

(b) to enforce the award would be contrary to public policy.

(7A) To avoid doubt and without limiting paragraph (7)(b), the enforcement of a foreign award would be contrary to public policy if:

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

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

[...]"

120. Subsection 8(6) expressly permits partial enforcement where s 8(5)(d) applies. Neither party suggested that s 8(5)(d) applied in this case. However, it should be noted that in both *J J Agro Industries (P) Ltd v Texuna International Ltd* (supra) and *Nigerian National Petroleum Corporation v IPCO (Nigeria) Ltd (No. 2)* (supra), there was a rejection of an argument to the effect that the presence of such a provision (s 44(4) of the Arbitration Ordinance of Hong Kong, and s 103(4) of the Arbitration Act of the United Kingdom, respectively) meant that in other cases partial enforcement was not possible. Moreover, in *A.C.N. 006 397 413 Pty. Ltd. v International Movie Group (Canada) Inc and Another* (supra), Brooking JA (at 47), obiter, rejected a submission that the presence of the specific provision in s 8(6) of the Act meant that severance is only possible where the defect in the award is of the kind mentioned in s 8(6).

121. I did not understand Mr Rayment to make a submission in those terms. Rather, Mr Rayment pointed to the language of s 8(7A) of the Act as the basis of a submission that the Australian legislation was relevantly distinguishable from, and should be interpreted differently to, the overseas legislation that was dealt with in the abovementioned cases.

122. Mr Rayment submitted that the presence of s 8(7A) meant that it was not possible to construe references to "award" in s 8 of the Act as extending to part of an award. In particular, he submitted that "award" in s 8(7A) (and hence in s 8(7)) should be construed as meaning the whole award, not any part of it. It was submitted that, were it otherwise, an award part of which was induced by fraud or corruption could be enforced in the other respects, and such a view could hardly be correct as a matter of statutory construction. Similarly, it was put that a breach of the rules of natural justice, albeit in one respect only, will affect the recognition of the whole of the award because natural justice is part of the principle of legality.

123. I do not agree that s 8(7A) has the effect contended for by the defendant. The provision was inserted in the Act by the *International Arbitration Amendment Act 2010* (Cth). Its stated purpose was to avoid doubt about whether it would be contrary to public policy within the meaning of s 8(7) to enforce awards where they were affected by fraud or corruption or where breaches of the rules of natural justice had occurred. The revised Explanatory Memorandum deals with the provision in paragraphs 47 to 49 which are relevantly in the following terms:

"47 Under subsection 8(7) of the Act, a court may refuse to enforce an award where to do so would be contrary to public policy. This ground reflects paragraph V(2)(b) of the New York Convention.

48 A similar ground for setting aside or refusing to enforce an award is found in Article 34 and Article 36 of the Model Law. Section 19 of the Act clarifies the meaning of public policy under these articles of the Model Law. [...]

49 At the time this provision was enacted - through the *International Arbitration Amendment Act 1989* (Cth) - it was decided not to make an equivalent amendment with respect to the public policy ground of refusal in section 8 even though Articles 34 and 36 are based on Article V of the New York Convention. The Explanatory Memorandum to the 1989 legislation states that this

decision was made "so as to avoid any possible inference that the term 'public policy' which is referred to in the New York Convention does not contain those elements".

Despite this explanation, the application of section 19 has the potential to lead to the misinterpretation of the public policy ground in section 8. Accordingly this item replicates the terms of section 19 and applies them to the public policy ground in subsection 8(7) of the Act."

> 124. There is nothing there, or in the Minister's Second Reading Speech, to suggest that the enactment of s 8(7A) was intended to effect any restriction on the circumstances in which foreign arbitral awards may be enforced under s 8 of the Act, or introduce any idiosyncratic Australian approach to the enforcement of awards affected by fraud or corruption, or breaches of the rules of natural justice (see *TCL Air* (supra) at [72]-[73]). Moreover, I do not think that the partial enforcement of awards so affected should be seen as something the legislature is unlikely to have intended. Arbitral awards may be affected by fraud or corruption, or breaches of the rules of natural justice in a vast variety of ways and in a vast variety of circumstances. It is quite possible that an award will be seriously affected by such matters, yet an identifiable part of the award may be quite unaffected by them. The case of *J J Agro Industries (P) Ltd v Texuna International Ltd* (supra) provides an example. It does not seem to me that the enforcement of parts of awards not affected by any fraud, corruption or breach of the rules of natural justice is in any way offensive, or contrary, to the principles of justice.
> 125. The principles of severance have been applied to arbitral awards for centuries. Those principles have been applied in the context of international commercial arbitration. Those principles are themselves firmly based upon notions of justice.
> 126. In approaching this question of statutory construction, the Court is required, by s 39(2) of the Act, to have regard to:

"(a) the objects of the Act; and

(b) the fact that:

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

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

> 127. The objects of the Act are set out in s 2D. The objects include:

"(a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and

[...]

(c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; and

(d) to give effect to Australia's obligations under the Convention [...]"

128. It is also appropriate that regard is had to the reasoned decisions of other countries where their laws are either based on, or take their content from, international conventions or instruments such as the New York Convention and the Model Law (see *TCL Air* (supra) at [75]).

129. In my opinion, s 8 of the Act should be construed so as to allow enforcement (pursuant to s 8(2) or s 8(3)) of a part of an award, and allow refusal of enforcement (pursuant to s 8(7)) of part of an award, where severance of the award is possible. That is to say, "the award" as it appears in those sub-sections should be construed as including part of the relevant award.

130. It seems to me that this construction is not only available as a matter of language, it is consistent with the objects of the Act, and promotes rather than hinders the efficient and fair enforcement of international arbitral awards. Further, it accords with the approach taken internationally in relation to similar legislation.

131. The alternative construction would have the result that in any case where a breach of the rules of natural justice occurred in connection with an award (or the award was affected by fraud or corruption), the award would, in its entirety, be unable to be enforced under s 8 of the Act, even if it could be seen that part of the award was in no way affected by the breach. That would be the position even if the affected part was only a very small element within the overall award. I would regard that as an anomalous (if not absurd) result, and one very much opposed to the efficient and fair enforcement of international arbitral awards.

132. The next question is whether severance is possible in relation to the Award in the present case.

133. The defendant seemed to accept that the breach of the rules of natural justice in relation to the US $50,000 affected only part of the Award. It was submitted, however, that severance should not be allowed because "the arbitral proceedings were fundamentally flawed in that the defendant was denied a fair hearing, and the opportunity to present its case in respect of an important matter. The flawed process necessarily affects the award which derived from that process."

134. I cannot accept that submission. I have found that there was a breach of the rules of natural justice in respect of one aspect of the arbitration. It has not been suggested by the plaintiff that such aspect should be regarded as *de minimis*, but it is nonetheless a minor element of the dispute the subject of the arbitration. The value of the works performed by the plaintiff under the Agreement was in the order of US $16 million. Moreover, the breach in no way affected the manner in which the balance of the dispute was dealt with. In my view, the arbitral proceedings cannot be fairly described as fundamentally flawed.

135. On the contrary, the arbitrators have clearly approached their task with diligence and, save in respect of that one aspect, have given the defendant a fair opportunity to present its arguments in relation to the issues the subject of the arbitration.

136. In my opinion, severance of that part of the Award that concerns the US $50,000 can be effected without causing any injustice to the defendant. The Award provides in Part H for the defendant to pay two separate amounts to the plaintiff, namely, US $797,500 and US $50,000. Only the amount of US $50,000 is affected by the breach of

the rules of natural justice. The Award also provides for the payment of interest on each of those two sums (see paragraph 28.3 of the Award). The proportion of the awarded interest that is attributable to the sum of US $50,000 may be readily ascertained. Only that portion of the awarded interest is affected by the breach of the rules of natural justice. I consider that it is open to the Court to sever that portion of the interest. In *A.C.N. 006 397 413 Pty. Ltd. v International Movie Group (Canada) Inc. and Another* (supra) the portion of an award of interest that related to an invalid order was treated as of no effect, but the award of interest was otherwise held to be effective (see at 47); and partial enforcement of an award of interest was allowed in *Laminoirs - Trefileries - Cableries de Lens, S.A. v. Southwire Company* 484 F. Supp. 1063 (1980). Further, I do not think that anything said, *obiter*, in *Gold Coast City Council v Canterbury Pipelines (Aust) Pty Ltd* [1968] HCA 3; (1968) 118 CLR 58 stands in the way of my conclusion. The observations made by Menzies J (at 75), with which Kitto J agreed (at 68), were made in relation to a ground of challenge which was not permitted to be raised, and without reference to any authority. Moreover, a different view was taken by Windeyer J (at 78).

137. I therefore conclude that in accordance with s 8(7) of the Act the order for the payment of US $50,000, and the proportion of the awarded interest attributable to that sum, should not be enforced. Those parts of the Award should be severed, and the balance of the Award should be enforced in accordance with s 8(2) of the Act. The proportion of the $119,950.27 in interest that is attributable to the US $50,000 is US $7,076.71. It follows that a total amount of $57,076.71 should be severed from the Award.

Conclusion

138. The total amount of the Award (including the costs of US $137,477.06 paid by the plaintiff to obtain the release of the Award) was US $1,480,622.84. Upon severance of the US $57,076.71, the total becomes US $1,423,546.13. Section 8(2) of the Act provides that a foreign award may be enforced in this Court as if the award were a judgment or order of the Court. Enforcement of the Award should be effected by the making of orders that give effect to the Award to the extent I have indicated. Accordingly, the Court will order that a judgment be entered in favour of the plaintiff against the defendant for US $1,423,546.13, together with interest up to the date of judgment at the rate of 9% per annum, in accordance with paragraph 41 of the Award. The interest should run from the date of the Award (1 May 2014) in relation to the amount of US $1,286,069.07, and from the date of payment (5 May 2014) in relation to the amount of US $137,477.06. So calculated, the total amount of interest up to today (14 October 2014) is US $58,132.29. Judgment will therefore be entered against the defendant for US $1,481,678.42. In conformity with the Award, interest should continue to run at the rate of 9% per annum. The Court will therefore order under s 101 of the *Civil Procedure Act 2005* (NSW), that interest is payable at the rate of 9% per annum on so much of the judgment sum of US $1,481,678.42 as is from time to time unpaid.

139. The defendant should pay the plaintiff's costs of the proceedings.

140. Due to the conclusion I have reached concerning severance, the question whether, absent severance, the Award should be enforced in its entirety notwithstanding that part of it was affected by a breach of the rules of natural justice, does not arise.

****
