SIAC (SINGAPORE INTERNATIONAL ARBITRATION CENTRE)

SIAC Case No. 225 of 2013

ASIA RESOURCE MINERALS PLC (PREVIOUSLY KNOWN AS BUMI PLC) AND PT BERAU COAL ENERGY TBK V. ROSAN ROESLANI

FINAL AWARD (NO. 151 OF 2014)

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29 December 2014

Tribunal:
Cecil W.M. Abraham (President)
Michael C. Pryles (Appointed by the respondent)
David St. John Sutton (Appointed by the claimant)

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DRAMATIS PERSONAE & ABBREVIATIONS

	Party	Description
1	PT Asian Bulk Logistics **("ABL")**	• A company incorporated in Indonesia involved in transhipment • A 49% shareholding in ABL is identified as one of the "Assets" in clause 1.3(a) of the deed
2	Andy Widya Susatyo	• Controlling shareholder of BPL • Business partner of the Respondent
3	Amien Sunaryadi	• Partner at Ernst & Young Indonesia • Former Vice Chairman of the Indonesian Corruption Eradication Commission (the "KPK")
4	Arief Wiedhartono	• Deputy head of operations at Berau Coal from at least 2007 until present • Director of Berau Energy from 22 June 2010
5	Asia Resource Minerals plc (formerly known as Bumi plc) **("ARM")**	• The First Claimant • A public limited company incorporated in England and Wales
6	The Bakrie Family (the "Bakries")	• Former indirect shareholders in ARM • Majority shareholders of PT Bumi Resources Tbk
7	Ben Spiers	• Solicitor at Freshfields, who acted for the Claimants in the drafting of the settlement deed
8	PT Berau Coal ("Berau Coal")	• A company incorporated in Indonesia, which is (indirectly) 90% owned by Berau Energy
9	PT Berau Coal Energy Tbk **("Berau Energy")**	• The Second Claimant • A company incorporated in Indonesia • A 85% subsidiary of ARM
10	PT Borneo Parapatan Lestari **("BPL")**	• A company which owns land in the Parapatan mining area • A 75% shareholding in BPL is identified as one of the "Assets" in clause 1.3(b) of the deed

11	PT Bumi Resources	• A coal mining company controlled by the Bakries • ARM held an interest in PT Bumi Resources prior to the Separation
12	Claire Pardo **("Ms. Pardo")**	• Solicitor at Freshfields, who acted for the Claimants in the drafting of the settlement deed
13	Clyde & Co Clasis Singapore Pte Ltd	• Legal representatives of the Respondent in the arbitration
14	Didik Cahyanto	• President Director of Berau Coal until 2 August 2010 • Senior Deputy Director in charge of Health, Safety and Environment and Procurement for Berau Coal from June 2012 • Director of Berau Energy from 2 August 2010 until 29 May 2012
15	Eko Santoso Budianto **("Mr. Budianto")**	• President Director of Berau Energy from 30 March 2010 until 30 July 2010 and from 7 March 2013 until 30 June 2014 • President Director of Berau Coal from 13 March 2013 until 30 June 2014 • Director of Operations of Berau Coal from 2 August 2010 until 13 March 2013
16	Ernst & Young Indonesia **("EY")**	• PT Ernst & Young Indonesia, which prepared reports for Berau Coal dated 10 April 2013, 31 May 2013 and 26 August 2013
17	Ferial Martifauzi	• Director of Berau Coal from 2 August 2010 until 20 June 2012
18	Freshfields Bruckhaus Derringer LLP **("Freshfields")**	• Legal representatives of the Claimants in connection with the drafting of the settlement deed
19	I. Made Seroja	• Former deputy director within Berau group
20	Jayesh Pankhania	• ARM Group Financial Controller
21	John Ramos	• Vice President Director of Berau Coal from 8 July 2011 to 20 June 2012 and 31 August 2012 to 13 March 2013 • Chief Financial Officer of Berau Coal from 15 December 2009 to 20 June 2012 • Director of Berau Coal from 15 December 2009 to 13 March 2013 • Director of Berau Energy from 30 March 2010 until 7 March 2013
22	Julian Connerty **("Mr. Connerty")**	• Partner and solicitor at Clyde & Co LLP, who acted for the Respondent in the drafting of the settlement deed

23	Julian Makin **("Mr. Makin")**	• Partner and solicitor at Freshfields, who acted for the Claimants in the drafting of the settlement deed
24	Keith Lawler **("Mr. Lawler")**	• ARM Group Head of Internal Audit and Risk from 1 October 2012 to present
25	KPMG	• KPMG Corporate Finance Pte Ltd (Singapore), which produced a valuation of ABL
26	Macfarlanes LLP	• Legal representatives of the Claimants
27	Nathaniel Rothschild **("Mr. Rothschild")**	• Promoter of ARM • Co-chairman of ARM from 11 April 2011 until 26 March 2012 • Non-executive director of ARM from 26 March 2012 until 15 October 2012
28	Nicholas von Schirnding **("Mr. Schirnding")**	• Chief Executive Officer of ARM from 31 December 2012 until 27 June 2014
29	Nirwan Bakrie	• A member of the Bakrie family
30	Paul Vickers **("Mr. Vickers")**	• General Counsel of ARM
31	Perry Nagle	• Former legal counsel of the Berau group
32	PwC Indonesia	• KAP Tanudiredja, Wibisana & Rekan (a member firm of PricewaterhouseCoopers International Limited), which audited the 2012 and 2011 consolidated accounts for Berau Energy
33	Recapital group	• An investment holding company controlled by the Respondent
34	Retno Suryandari	• Former head of legal at Berau Coal
35	Ross Hunter	• Partner at PwC, London
36	(Lord) Robin Renwick	• Former head of the ARM Audit Committee
37	Rosan Perkasa Roeslani **("Mr.**	• The Respondent • Director of ARM from 11 April 2011 to 19 December 2012 • President Director of Berau Coal from 2 August 2010 until 13 March 2013 • President Director of Berau Energy from 30 July 2010 until 7 March 2013

	Roeslani")	
38	Sacha Winzenreid **("Mr. Winzenreid")**	• Technical adviser at PwC Indonesia
39	Samin Tan **("Mr. Tan")**	• Director of ARM from 26 March 2012 until 27 June 2014 • Chairman of the board of directors of ARM from 26 March 2012 until 28 March 2014 • Commissioner of Berau Energy from 30 April 2012 to 7 March 2013 • President Commissioner of Berau Coal from 20 June 2012 until 13 March 2013 • Former President Director of PT Borneo Lumbing Energi & Metal Tbk (2007 to 2011)
40	Sofyan Djalil	• President Commissioner of Berau Energy from 30 March 2010 until 30 June 2014 • President Commissioner of Berau Coal from 13 March 2013 until 30 June 2014
41	Sojitz	• Sojitz Corporation, a Japanese company • 10% shareholder in Berau Coal

MATERIAL DATES

NO.	DATE	DESCRIPTION
1.	30 March 2010	Mr. Budianto joins Berau Energy as President Director.
2.	2 August 2010	Mr. Roeslani becomes President Director of Berau Energy. Mr. Budianto steps down as President Director of Berau Energy and becomes Director of Operations for Berau Coal.
3.	11 April 2011	Mr. Roeslani becomes director of ARM.
4.	26 March 2012	Mr. Tan appointed a director and Chairman of ARM.
5.	30 April 2012	Mr. Tan appointed Commissioner of Berau Energy.
6.	October 2012	The Bakrie Group expressed its intention to separate itself from ARM (the **"Separation").**
7.	12 December 2012	Mr. Lawler, Group Head of Internal Audit and Risk, reports to the ARM board audit committee in respect of corporate governance issues.

8.	12 December 2012	The ARM board discusses points raised by Mr. Lawler. The ARM board agrees for Mr. Lawler to conduct a review of the Berau group's corporate governance and related-party transactions.
9.	18 December 2012	Mr. Roeslani gives Mr. Budianto power of attorney for the period 19 December 2012 to 4 January 2013.
10.	19 December 2012	UK Takeover Panel rules that the Bakrie Group and Mr. Roeslani (via his investment holding vehicle PT Bukit Mutiara) were concert parties. Mr. Roeslani resigns as a director of ARM.
11.	20 December 2012	Mr. Lawler emails Mr. Roeslani, Mr. Schirnding (ARM Chief Executive Officer), Mr. Vickers (ARM General Counsel) and Mr. Jayesh Pankhania to follow up on an internal control effectiveness masterplan.
12.	11 to 14 January 2013	Mr. Schirnding emails Mr. Roeslani to follow up on Mr. Lawler's "corporate governance project". Mr. Roeslani offers to meet with Mr. Lawler in London.
13.	11 to 16 January 2013	Mr. Lawler emails Mr. Perry Nagle, legal counsel to the Berau group, to follow up on the corporate governance project. Mr. Lawler sends Mr. Nagle a full agenda of what Mr. Lawler has been asked to do.
14.	12 to 15 February 2013	Mr. Lawler and Mr. Roeslani exchange emails about a possible meeting in Jakarta or call.
15.	18 to 20 February 2013	Mr. Lawler emails Mr. Roeslani to set out their earlier conversation. Mr. Roeslani states that he took the need for transparency and full disclosure very seriously and attaches an updated related party transaction disclosure schedule.
16.	21 February 2013	Mr. Lawler reports that the ARM internal audit team, had, amongst other things, identified four previously undisclosed related party transactions and a further four that they are looking at in greater detail.
17.	25 February 2013	Mr. Lawler emails Mr. Roeslani about his upcoming trip and suggests a meeting.
18.	7 March 2013	Mr. Budianto replaces Mr. Roeslani as President Director of Berau Energy.
19.	13 March 2013	Mr. Budianto replaces Mr. Roeslani as President Director of Berau Coal.
20.	19 March 2013	The ARM board announces that it will delay the publication of the group 2012 financial statements because the new management of Berau Energy is undertaking a thorough review of all balance sheet items.

21.	20 March 2013	The shareholders of Berau Coal pass a resolution in respect of, among other things, the discharge of Mr. Roeslani and John Ramos as, respectively, President Director and Vice President Director of Berau Coal and the appointment of Mr. Budianto as President Director.
22.	20 March 2013	Meeting between Mr. Tan, Mr. Roeslani and Mr. Winzenreid (PwC) to discuss the review of items on the balance sheet of Berau Energy.
23.	25 March 2013	Mr. Lawler reports that his review of related party transactions is materially complete. He also reports that in the course of a review of various construction transactions a number of relationships have emerged which give cause for concern.
24.	26 March 2013	Berau Coal instructs EY to conduct a fact-finding investigation into the transactions identified as having no clear business purpose.
25.	1 April 2013	The shareholders of Berau Energy pass a resolution in respect of, among other things, the discharge of Mr. Roeslani and John Ramos as directors of Berau Energy and the appointment of Mr. Budianto as President Director.
26.	10 April 2013	EY makes a report **("April EY Report")** presenting their findings in respect of a series of construction contracts and certain land release and compensation payments.
27.	12 April 2013	PwC sends Mr. Schirnding an email informing him that they were unable to complete the ARM audit and opine on the financial statements because of issues with certain expenditures. Mr. Schirnding forwards the email to Mr. Tan. Mr. Tan forwards the email to Mr. Roeslani.
28.	12 April 2013	The ARM board announces that it will delay the publication of the group 2012 financial statements due to the level of further work that is needed to complete the investigation into several balance sheet items.
29.	17 April 2013	Mr. Lawler summarises the April EY Report to the Audit Committee.
30.	22 April 2013	ARM announces that it has requested that its shares be temporarily suspended from trading as a result of a review of the integrity of a number of items on Berau Energy's balance sheet and the consequential delay in filing the company's annual report.
31.	22 April 2013	EY instructed to follow up on their findings in the April EY Report.
32.	8 May 2013	A meeting is held at Mr. Tan's offices attended by Mr. Tan, Mr. Roeslani, Mr. Winzenreid, Mr. Amien Sunaryadi **("Mr. Sunaryadi"),** Mr. Lawler and Jayesh Pankhania (Group Financial Controller of ARM).
33.	8 May	PwC emails Mr. Roeslani the 8 May Schedule and supporting spreadsheets **("8 May**

	2013	Schedule")
34.	8 May 2013	Berau Coal asks EY to provide Mr. Roeslani with a copy of the April EY Report.
35.	8 to 13 May 2013	Mr. Sunaryadi and Mr. Roeslani exchange SMS text messages in respect of the third party access letter relating to the April EY Report.
36.	10 May 2013	Meeting held between representatives of EY, including Mr. Sunaryadi, Mr. Roeslani (for part of the meeting) and representatives of PT SAM. EY gives the third party access letter to Mr. Roeslani.
37.	17 May 2013	Mr. Winzenreid emails Mr. Tan with the 16 May Schedule. Mr. Tan forwards the email to Mr. Roeslani.
38.	21 May 2013	Mr. Tan asked Mr. Roeslani to comment on draft annual report for Berau Energy.
39.	23 May 2013	Mr. Roeslani emails Mr. Tan with a part of his response in relation to the draft annual report for Berau Energy.
40.	28 May 2013	Mr. Roeslani emails Mr. Tan with more comments in relation to the draft annual report for Berau Energy.
41.	29 May 2013	The first draft of an agreement for settlement is sent by Mr. Roeslani to Mr. Schirnding.
42.	29 May - 26 June 2013	Several drafts of a settlement deed were exchanged between the parties.
43.	31 May 2013	The ARM group consolidated financial statements are published.
44.	31 May 2013	The Berau Energy group consolidated financial statements are published.
45.	31 May 2013	EY Report presenting their findings in respect of certain construction contracts, the PT SAM stockpile facility and BPL.
46.	12 June 2013	A conference call is held. Mr. Roeslani and Mr. Connerty attended for the Respondent. Mr. Schirnding and Mr. Vickers as well as solicitors from Freshfields, Mr. Makin, Mr. Ben Spiers and Ms. Pardo attend for the Claimants.
47.	14 June 2013	The Berau Coal annual report is finalised.
48.	20 June 2013	Mr. Tan and Mr. Roeslani have a telephone call and afterwards Mr. Tan faxes the 20 June Schedule to Mr. Roeslani.

49.	26 June 2013	The parties sign the Deed and ARM makes a public announcement.
50.	8 July 2013	PT Revessel Indonesia and KPMG enter into a letter agreement in respect of the valuation of ABL.
51.	22 July 2013	Trading of shares in ARM resumed.
52.	13 August 2013	Mr. Roeslani emails Mr. Schirnding and Mr. Tan in respect of the ABL valuation.
53.	26 August 2013	EY present their findings in respect of BPL.
54.	5 September 2013	Further exchange of emails between Mr. Roeslani and Mr. Schirnding in respect of the ABL valuation.
55.	5 September 2013	Clyde & Co writes to Freshfields requesting for the EY report(s) and engagement letter for Mr. Roeslani to engage the process under Clause 2.3.
56.	10 September 2013	Clyde & Co writes a further letter to Freshfields seeking a response to their 5 September 2013 letter.
57.	10 September 2013	Mr. Schirnding asks Mr. Roeslani if KPMG have finalised their valuation of ABL.
58.	11 September 2013	Ben Spiers of Freshfields replies to Ms. Becca Hogan **("Ms. Hogan")** of Clyde & Co stating that the EY papers are confidential.
59.	11 September 2013	Clyde & Co writes to Freshfields asking for the EY report(s) and related documents to be disclosed.
60.	16 September 2013	Clyde & Co writes a letter to Freshfields referring to Clyde & Co's letter dated 11 September 2013, and asking that all correspondence be between the two law firms.
61.	18 September 2013	Freshfields writes to Clyde & Co denying that Mr. Roeslani is entitled to information and documents and giving notice under clause 1.4 of the Deed that the Respondent is required to meet the First Payment Deadline.
62.	25 September 2013	Mr. Roeslani (by his solicitors) provides a signed undertaking which he claims satisfies his obligation to sign binding documentation in respect of the First Payment Deadline under clause 1.11(b) of the Deed. Clyde & Co also wrote a

		(second letter) maintaining that Mr. Roeslani's obligations under the Deed are subject to an obligation of co-operation under clause 2.3 of the Deed.
63.	26 September 2013	First Payment Deadline (as defined in the Deed).
64.	27 September 2013	The Claimants extend the First Payment Deadline to 4 October 2013.
65.	22 October 2013	Freshfields writes to Clyde & Co stating that ARM does not accept KPMG's valuation.
66.	7 November 2013	ARM issues a circular to its shareholders, which addresses, among other things, the Deed.
67.	8 November 2013	The Claimants issue their notice of arbitration in accordance with the SIAC rules.
68.	20 December 2013	The Claimants (by their solicitors) give notice under clause 1.4 of the Deed that the Respondent was required to meet the Second Payment Deadline.
69.	26 December 2013	Second Payment Deadline (as defined in the Deed).

I PARTIES

Asia Resource Mineral PLC (previously known as Bumi PLC) and PT Berau Coal Energy TBK (Claimants)

1. The First Claimant is a public limited company incorporated and registered in England and Wales with its registered office at Atlas House, 3rd Floor, 173 Victoria Street, London SW1E 5NH, England.

2. The Second Claimant is a company incorporated and registered in Indonesia with its registered office at JI Permuda No. 40, Tanjung Redeb 773311, Berau, Kalimantan Timur, P.O. Box 114, Republic of Indonesia.

3. The First Claimant and the Second Claimant will be collectively referred to as the Claimants.

Rosan Roeslani (Respondent)

4. The Respondent is an Indonesian national with an address at Jln. Kemang Timur Raya No. 99A, Jakarta 008003, Indonesia. He was a non-executive Director of the First Claimant and President Director (equivalent to CEO) of the Second Claimant.

II THE AGREEMENT

5. The Claimants entered into a Deed dated 26 June 2013 with the Respondent (the "Deed").

III THE DISPUTE

6. The dispute is set out in the following pleadings:
(i) Statement of Claim (undated) which was served on the Tribunal on 20 January 2014;

(ii) Statement of Defence & Counterclaim dated 3 March 2014;

(iii) Statement of Reply & Defence to Counterclaim dated 17 March 2014;and

(iv) Statement of Rejoinder dated 23 April 2014.

IV ARBITRATION CLAUSE

7. The arbitration clause is contained in Clause 6.2 of the Deed and provides as follows:
"6.2 All disputes (including claims for set-off and counterclaims) arising out of or in connection with this Deed, including disputes arising out of or in connection with: (i) the creation, validity, effect, interpretation, performance or non-performance of or the legal relationships established by, this Deed; and (ii) any non-contractual obligations arising out of or in connection with this Deed shall be finally settled under the Rules of the Singapore International Arbitration Centre by three arbitrators appointed in accordance with those Rules. The place of arbitration shall be Singapore. The language to be used in the arbitral proceedings shall be English."

8. The applicable arbitration rules, which were in force at the time the Notice of Arbitration was given, are the Arbitration Rules of the Singapore International Arbitration Centre, 5th edition, 1 April 2013 ("SIAC Rules").

V GOVERNING LAW AND PLACE OF ARBITRATION

9. Clause 6.1 of the Deed provides, *inter alia,* that the Deed shall be governed by and interpreted in

accordance with English law, as follows:-

"6.1 This Deed and any non-contractual obligations arising out of or in connection with this Deed shall be governed by, and interpreted in accordance with, English law."

Clause 6.2 of the Deed provides that the place of arbitration shall be Singapore.

VI LEGAL REPRESENTATION

10. The Claimants are represented by Mr. Christopher Pymont Q.C. and Mr. David Mumford of Maitland Chambers, 7 Stone Buildings, Lincoln's Inn, London WC2A 3SZ, England and Mr. Ian Mackie and Ms. Chloe Edworthy of Macfarlanes LLP, 20 Cursitor Street, London EC4A 1LT, England.

11. The Respondent is represented by Mr. Stephen Moriaty Q.C. of Fountain Court Chambers, Fountain Court, Temple, London EC4Y 9DH, England and Mr. Steven Lim, Mr. Nelson Goh, Mr. Michael Hom, Mr. Koh Junxiang and Mr. Benjamin Ng of Clyde & Co Clasis Singapore Pte Ltd, 12 Marina Bouvelard, Marina Bay Financial Centre Tower 3, #30-03, Singapore 018982.

VII PROCEDURAL HISTORY

Notice of Arbitration and Appointment of Arbitral Tribunal

12. The Claimants gave Notice of Arbitration on 8 November 2013 pursuant to Rule 3 of the SIAC Rules in which the Claimants and the Respondent were named as parties to the arbitration.

13. The Claimants nominated Mr. David Sutton and the Respondent nominated Professor Michael Pryles as co-arbitrators. Mr. David Sutton and Professor Michael Pryles nominated Tan Sri Cecil Abraham as Presiding Arbitrator.

14. The Vice President of the Court of Arbitration of SIAC appointed Mr. David Sutton and Professor Michael Pryles as co-arbitrators on 2 December 2013, and Tan Sri Cecil Abraham as presiding arbitrator on 24 December 2013.

15. The contact details of the Arbitrators are as follows:
Mr. David Sutton
20 Essex Street
London WC2R 3 AL
England.
Fax: +44 20 7842 1270
Email: dsutton@20essexst.com

Professor Michael Pryles
Level 26
530 Collins Street
Melbourne 3000
Australia.
Fax:+613 8644 3881
Email: mail@michaelpryles.com / mcpryles@gmail.com

Tan Sri Cecil Abraham
M/s Zul Rafique & Partners
D3-3-8, Solaris Dutamas
No. 1 Jalan Dutamas 1
50480 Kuala Lumpur
Malaysia.
Fax: +603 6209 8288
Email: cecil@zulrafique.com.m y

Procedural Order

16. The Tribunal handed down Procedural Order & Timetable No. 1 dated 20 January 2014 **(Procedural Order).**

Witness Statements

17. The Claimants and the Respondent were requested to file their Witness Statements pursuant to the Procedural Order. The following Witness Statements were filed:
Claimants' Witnesses

(i) Witness Statement of Mr. Winzenreid dated 28 May 2014;

(ii) Witness Statement of Mr. Tan dated 30 May 2014;

(iii) Witness Statement of Mr. Lawler dated 30 May 2014;

(iv) Witness Statement of Mr. Sunaryadi dated 30 May 2014;

(v) Witness Statement of Mr. Budianto dated 30 May 2014;

(vi) Second Witness Statement of Mr. Lawler dated 29 July 2014.

Respondent's Witnesses

(i) Witness Statement of Mr. Roeslani dated 30 May 2014;

(ii) Witness Statement of Mr. Connerty dated 30 May 2014;

(iii) Rebuttal Witness Statement of Mr. Roeslani dated 13 June 2014;

(iv) Rebuttal Witness Statement of Mr. Connerty dated 13 June 2014.

Pre-Hearing Conference

18. A pre-hearing conference was held by telephone on 30 July 2014 and the following direction was handed down by the Tribunal:
(i) The Claimants and the Respondent are to exchange Opening Skeleton Arguments on or before 8 August 2014;

(ii) The Opening Statements and Submissions of the Claimants and the Respondent be confined to one hour;

(iii) The taking of evidence of Mr. Lawler be by video link in the afternoon of 25 August 2014.

Skeleton Submissions

19. The Claimants and the Respondent filed their Skeleton Submissions together with their respective Bundles of Authorities on 8 August 2014.

VIII HEARING

20. The hearing took place from 25 to 28 August 2014 at Maxwell Chambers, Singapore.

21. The Claimant called the following factual witnesses:-
(i) Mr. Tan;

(ii) Mr. Lawler;

(iii) Mr. Winzenreid; and

(iv) Mr. Sunaryadi.

Mr. Budianto was not called as a witness.

22. The Respondent called the following factual witnesses:
(i) Mr. Roeslani; and

(ii) Mr. Connerty.

IX POST HEARING SUBMISSIONS

23. The Tribunal, at the conclusion of the hearing on 28 August 2014, gave directions for Post Hearing Submissions as follows:
(i) The Claimants and the Respondent are to simultaneously exchange and file their Closing Submissions on or before 8 September 2014.

(ii) The Rebuttal Submissions if necessary are to be exchanged on or before 23 September 2014.

(iii) The Closing Submissions of the Claimants and the Respondent were received by the Tribunal on 8 September 2014.

(iv) The Rebuttal Submissions of the Claimants was received by the Tribunal on 23 September 2014.

(v) The Respondent filed a Note in response to the Claimants' Rebuttal Submissions and the Note was received by the Tribunal on 2 October 2014.

(vi) There was no request for Oral Closing Submissions by the parties.

Submissions on Costs

24. The Tribunal on 14 October 2014 directed the Claimants and the Respondent to file their Submissions on Costs by 24 October 2014.

25. The Tribunal received the Claimants' and the Respondent's Submissions on Costs on 24 October 2014 respectively.

26. The Respondent on 6 November 2014 filed an additional submission on costs of the arbitration.

Submissions on Interest

27. The Tribunal on 29 October 2014 directed that the Claimants and the Respondent file submissions on interest by 4 November 2014. The Tribunal received the submissions from the Claimants and the Respondent on 4 November 2014. The Tribunal also received an additional submission on interest from the Respondent on 6 November 2014.

X CLOSURE OF ARBITRAL PROCEEDINGS

28. The arbitral proceedings were declared closed on receipt of the Submissions on Interest from the Respondent on 6 November 2014.

XI BACKGROUND

29. ARM is a public company incorporated in England and Wales and holds 84.7% of the shares in Berau Energy, a company incorporated in Indonesia.

30. Berau Energy is the holding company of the Berau Group of Companies of which Berau Coal is one of the principal operating subsidiaries.

31. Berau Coal is incorporated in Indonesia and carries on the business of coal mining. Its shares are held 90% indirectly by Berau Energy and 10% by Sojitz, a Japanese company.

32. The Respondent was the President Director of Berau Energy from 30 July 2010 until 7 March 2013 and was also the President Director of Berau Coal until 13 March 2013. The Respondent was also a Director of ARM from 11 April 2011 until 19 December 2012.

33. The Board of Directors of ARM in December 2012 decided that Mr. Lawler should conduct an internal audit of related party transactions and review progress on internal controls in the first quarter of 2013 in Berau Energy and its subsidiaries.

34. Mr. Budianto, who had been President Director of Berau Energy from 30 March 2010 to 30 July 2010 and subsequently Director of Operations at Berau Coal from 2 August 2010, replaced the Respondent as President Director of Berau Energy and President Director of Berau Coal on 7 March 2013 and 13 March 2013 respectively.

35. The internal audit team and Berau Energy's auditors PwC had, prior to Mr. Budianto's appointment, begun to seek information about certain payments which were capitalised in the draft Consolidated Balance Sheet of Berau Energy. The management of Berau Energy under Mr. Budianto undertook a review of the Balance Sheet. This exercise resulted in the deferment of the publication of Berau Energy's consolidated results. ARM's full year results announcements also had to be deferred as a consequence.

36. A meeting was held among the Respondent, Mr. Tan and representatives of PwC on 20 March 2013. PwC noted that the management of Berau Energy was in the process of reviewing its Balance Sheet as at 31 December 2012.

37. At this meeting, the Respondent agreed to assist the new management by providing explanations and information with regard to various items in the Balance Sheet.

38. EY was instructed by Berau Coal on 26 March 2013 to conduct an analysis of certain capital expenditures. EY issued the April EY Report on 10 April 2013. The ARM Board announced a further delay in the publication of its financial results on 12 April 2013.

39. A meeting was held on 8 May 2013 between the Respondent, Mr. Tan, representatives of PwC and representatives of EY. The April EY Report was the only report that was in existence at the date of this meeting. Mr. Tan at this meeting showed to the Respondent the 8 May Schedule entitled "Expenditures outside normal course of business". The Respondent was also shown spreadsheets

supporting the 8 May Schedule. PwC on 8 May 2013 emailed to the Respondent certain spreadsheets which included a summary of the capital expenditures which were under investigation.

40. There was a meeting on 10 May 2013 when the Respondent introduced representatives of EY to representatives of PT SAM.

41. Mr. Tan on 17 May 2013 sent to the Respondent a revised version of the 8 May Schedule which was prepared by PwC on 16 May 2013 (the **"16 MaySchedule").**

42. Mr. Tan on 21 May 2013 sent to the Respondent the draft Berau Energy Financial Statement for the year ended 2012 for his comments. The Respondent commented on the draft Berau Energy Financial Statement by emails dated 23 and 28 May 2013.

43. The parties exchanged numerous drafts of a Settlement Deed between 29 May 2013 and 26 June 2013. The Claimants were represented in the drafting of the Deed by solicitors from Freshfields and the solicitors concerned are Mr. Makin, Mr. Spiers and Ms. Pardo. The Respondent was represented by Mr. Connerty, a solicitor from Clyde & Co. Mr. Tan, Mr. Schirnding and the Respondent also held discussions with regard to the terms of the proposed Deed.

44. The consolidated Financial Statements of ARM and Berau Energy were published on 31 May 2013. The Annual Report of ARM contained a note entitled "other exceptional costs" which contained amounts of expenditures in 2011 and 2012 for which no clear business purpose had been identified.

45. There was a conference call held on 12 June 2013 between the parties and the participants included Mr. Schirnding, Mr. Vickers, Mr. Makin, Mr. Spiers, Ms. Pardo, the Respondent and Mr. Connerty.

46. Mr. Tan on 20 June 2013 faxed a version of the 8 May Schedule containing hand-written annotations (the **"20 June Schedule").** The final amount shown in the 20 June Schedule was USS 173,000,000.

47. The Claimants and the Respondent on 26 June 2013 executed the Deed. The Deed was executed before the Annual General Meeting of ARM.

48. The Deed provided for a schedule of payments. The first payment was scheduled for 26 September 2013, while the second payment was due on 26 December 2013. The Respondent has not made any payment or transferred any assets under the Deed on the grounds that he is not liable to do so.

XII SUMMARY OF THE PLEADINGS

Summary of the Statement of Claim

49. The Claimants and the Respondent entered into the Deed for the transfer or to procure the transfer of assets and cash of US$173 million to the 2nd Claimant, in consideration for which the Respondent’s liability to the Claimants for certain claims against him would be reduced on a dollar

for dollar basis and, upon the value of the assets transferred equalling no less than US$173 million, be extinguished.

50. The Deed provided for payment of US$30 million to the 2nd Claimant within 3 months after the date of execution of the Deed subject to regulatory or shareholders' approval.

51. The Respondent, despite an extension of time granted by the Claimants, failed to make the first payment by 4 October 2013.

52. The second payment was due on 22 December 2013 in the sum of US$173 million. The Respondent also failed to make payment.

53. The Respondent was also obliged to transfer a percentage of shareholdings in ABL subject to a joint valuation. KPMG made a valuation of the Respondent's shareholdings in ABL. **("KPMG Valuation")**

54. The Claimants contend that KPMG was appointed by the Respondent unilaterally, hence the KPMG Valuation does not bind the Claimants.

55. The reliefs claimed by the Claimants are as follows:
(i) specific performance of the Respondent's obligations under the Deed and/or payment of the sums due under the Deed;

(ii) orders that the Respondent transfer to Berau Energy assets equal in value to US$173 million including the:

(a) transfer of a 49% shareholding in ABL;

(b) payment or transfer of such amount in cash (in US dollars) as equals the difference between US$173 million and the value of the said shareholding;

(c) alternatively, payment or transfer of the sum of US$173 million;

(iii) insofar as regulatory or shareholder approval is required, orders that the Respondent:

(a) sign binding documentation in respect of each transfer; and

(b) complete each transfer expediently after obtaining the approval;

(iv) damages;

(v) a declaration that the Claimants are not bound by the KPMG Valuation;

(vi) interest; and

(vii) costs.

Summary of the Defence and Counterclaim

56. The Respondent contends that the Deed is void for common mistake because the parties entered into the Deed under a shared but mistaken belief that the payments classified as *"other exceptional costs"* in the ARM Other Exceptional Costs Table, had been made by Berau Energy when in fact the substantial payments were made by Berau Coal.

57. The Respondent also contends that the Deed should be rescinded as the Claimants have allegedly made false representations with regard to the amount to be paid under the Deed.

58. Further, the Respondent contends that the Claimants are in breach of their express or implied duty to co-operate under Clause 2.3 of the Deed by repeatedly refusing to provide the Respondent with relevant explanations, documents and information.

59. The Respondent also contends that regulatory or shareholders' approval was not obtained.

60. The Respondent further contends that KPMG was jointly appointed by the parties and hence the Claimants are bound by the KPMG Valuation.

61. The Respondent by way of counterclaim seeks a declaration that the Deed is void for common mistake a declaration that the Claimants are bound by the KPMG Valuation, and rescission of the Deed for misrepresentation.

Summary of the Reply & Defence to Counterclaim

62. The Claimants deny that there is a common mistake insofar as the paying entity is concerned.

63. The Claimants further contend that, if there was a mistake, the Deed can be rectified, either by implication or construction.

64. The Claimants also deny that the Deed must be rescinded for misrepresentation.

65. The Claimants deny that the performance of the Deed is conditional upon obtaining shareholders' approval.

66. The Claimants deny that they are in breach of the express or implied duty to co-operate under Clause 2.3.

67. The Claimants further deny that they are bound by the KMPG Valuation.

68. The Claimants deny that the Respondent is entitled to the reliefs claimed in the Counterclaim.

Summary of the Statement of Rejoinder

69. The Respondent denies that the Deed can be rectified.

70. The Respondent in his rejoinder repeats and reiterates the principal issues of his Defence.

XIII ISSUES

71. The Claimants and the Respondent submitted to the Tribunal an Agreed List of Issues on 29 July 2014 which is as follows:
Mistake

1. Whether the Deed is void for common mistake.

2. In particular whether the Deed is void because the parties entered into the Deed in the common mistaken belief that:

(1) The payments classified as "other exceptional costs" *in the ARM Other Exceptional Costs Table had all been made by Berau Energy; and/or*

(2) The Respondent would obtain a release from all potential claims for those payments by reducing and extinguishing his liability in respect of them upon the transfer of the assets referred to in the Deed.

3. Whether the Deed should be construed, whether terms should be implied into the Deed, alternatively whether the Deed should be rectified, so that:

(1) The definition of Potential Claim in clause 2.2 includes references to Berau Coal:

(2) The definition of Potential Claim in clause 2.2 includes references to payments made in 2010;

*(3) In the definition of Potential Claim in clause 2.2, the words "*annual report and accounts for Bumi for the financial year ended 31 December 2012" *are replaced with reference to the 20 June Schedule;*

(4) In clause 2.1, references to "liabilities to the Claimants" *are references to* "liabilities to the Claimants and/or Berau Coal

(5) Clause 2.1 provides that the Claimants are to procure a waiver from Berau Coal;

(6) In clause 2.3, certain, but not all, references to Berau Energy are changed to "Berau Energy or Berau Coal

(7) Clause 2.3 includes references to payments made in 2010, as well as to payments made in 2011 and 2012;

(8) In clause 2.3, the words "annual report and accounts for Bumi for the financial year ended 31 December 2012" *and the reference to* "the matters set out in lines 1, 2, 4 and 5 of the table entitled

'other exceptional costs' at page 79 of Bumi's annual report and accounts for the year ended 31 December 2012" *are replaced with references to the 20 June Schedule:*

(9) The definition of Potential Claim in clause 2.2 includes references to payments which were accrued for in 2012 but only made in 2013; and

(10) Clause 2.3 includes references to payments which were accrued for in 2012 but only made in 2013.

Misrepresentation

4. Whether the Deed should be rescinded for misrepresentation; and in particular

(1) Whether the 20th June Schedule represented that:

(a) a payment of USD7.8 million in respect of PT Sam was classified as "Other Exceptional costs" *in the ARM Annual Report;*

(b) a payment of USD 12 million in respect of "operating exp without clear business purpose" *was classified as* "Other Exceptional Costs" *on the ARM Annual Report;*

(c) in respect of USD90.7 million worth of payments relating to "Construction"*, an EY report found there to be* "no evidence of assets; no valid invoices or reports; no substance to contractors; common mgt/shareholders amongst contractors; all the same branch" *? and/or*

(d) in respect of USD 7.8 million of payments relating to "Stockpile facility (PT SAM)", *an EY report had concluded there was* "no progress of construction does not support value; contract terms are not commercial".

(2) Whether one or more of those representations was false.

(3) If so, whether the Claimants knew or should have known that the representations were false.

(4) Whether the Respondent was induced to enter into the Deed by one or more of the above misrepresentations.

Clause 2.3 /Duty to Cooperate

5. Whether the Claimants are (as a matter of construction of clause 2.3 and/or implication) under a duty to provide Mr. Roeslani with such explanations, information and documents as may be required for him to understand why payments have been classified as "other exceptional costs" *and to explain why they have a* "business purpose".

6. If so, whether the Claimants are in breach of this duty such that Mr. Roeslani's obligations under the Deed do not become due until he has had the opportunity to exercise his rights under Clause 2.3.

Shareholders' Approval

7. Whether ARM requires shareholders' approval for any waiver of the Potential Claims or any transfer of the Assets under the Deed.

8. If so, whether Mr. Roeslani is obliged to perform his obligations under the Deed if shareholder approval has not been obtained and what, in that event, his obligations are.

KPMG Valuation

9. Whether the KPMG Valuation binds the parties.

BPL Due Diligence

10. It is now common ground that Mr. Roeslani is not entitled to satisfy his obligations under the Deed by transferring or procuring the transfer of a 75% shareholding in BPL.

XIV SUBMISSIONS

Claimants' Submissions

72. The Claimants' Submissions are set out in their Skeleton Submissions dated 8 August 2014, Closing Submissions dated 8 September 2014 and Rebuttal Submissions dated 23 September 2014.

73. The Claimants' Submissions can be summarised as follows:-

Common Mistake

74. The Claimants contend that the Respondent's case is that there are 2 mistakes, namely:-
(i) that the payments classified as *"other exceptional costs"* in the ARM Other Exceptional Costs Table were made by Berau Energy; and

(ii) that the Respondent would obtain a release from all potential claims in respect of those payments by reducing and extinguishing the Respondent's liability in respect of them upon the transfer of the assets which are referred to in the Deed.

75. The Claimants rely on *Chitty on Contracts*[1] and *Great Peace Shipping Ltd v Tsavliris Salvage Ltd*[2] and contend that the Respondent must establish the following:-

(i) that the parties entered into the contact under a shared positive, but mistaken, belief as to the facts;

(ii) that the mistake must be fundamental in that it made the contractual obligation impossible, or the performance is different from what the parties had anticipated;

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[1] *31st Edn., paragraph 5-017*
[2] *[2003] QB 679*

(iii) that none of the parties took the risk of the mistake under the contract; and

(iv) that the mistake was not the fault of either party, nor did they know of the true state of affairs.

76. The Claimants contend:-
(i) that there is no shared belief that Berau Energy had made all the relevant payments;

(ii) that the Respondent was aware that the majority of the payments were made by Berau Coal;

(iii) that the spreadsheets of the 8 May Schedule and the April EY Report clearly indicate that the majority of the payments were made by Berau Coal;

(iv) that these payments were incurred during the Respondent's term as President Director of Berau Energy and Berau Coal; and

(v) that the Respondent was aware that Berau Energy was the holding company of Berau Coal.

77. The Claimants further contend:-
(i) that the Respondent could not have been under any mistake that the payments for hauling road construction and land releases were incurred by Berau Coal;

(ii) that the Respondent's mistaken belief that all the payments were made by Berau Coal are not sufficient to render the contract *void* on the grounds of mistake; [3]

(iii) that the Claimants are not responsible for the Respondent's mistaken belief;

(iv) that the Respondent had full knowledge of the payments prior to executing the Deed; and

(v) that the Respondent therefore cannot be granted relief from the obligations he assumed. [4]

78. The Claimants further contend that:-
(i) the fact that not all the payments were made by Berau Energy does not render the performance of the contract impossible nor is it different from what was anticipated;

(ii) the Deed will still operate to reduce the Respondent's liabilities on a dollar for dollar basis in respect of the payments and extinguish those liabilities upon full payment; and

(iii) the fact that the Claimants are able to procure a release by Berau Coal, as well as obtaining a release themselves, does not render the Claimants' performance radically different from what was set out in the Deed.

79. The Claimants therefore contend for the reasons set out above that there is no mistake insofar as the Respondent's belief that he would not obtain a reduction in and would obtain an extinguishment of his liability under the Potential Claims upon the transfer of the Assets.

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[3] [See Chitty on Contracts, 31st Edn. at paragraph 5-06].

[4] [Associated Japanese Bank (International) Ltd v Credit du Nord [1989] 1 WLR 255].

80. The Deed, in the Claimants' contention, clearly provides expressly for a reduction in the extinguishment of liabilities as well as gives the Claimants discretion as to which entity would receive the Assets.

81. The Claimants contend that even if the Respondent did have a mistaken belief, the Respondent will obtain a reduction and extinguishment of liabilities.

82. The Claimants therefore argue that the Deed should not be held to be void for common mistake.

Misrepresentation

83. The Claimants contend:-
(i) that there was no misrepresentation in the sending out of the 20 June Schedule as it was merely a record of the discussions of the 8 May 2013 meeting;

(ii) that the 20 June Schedule did not constitute a representation about the manner in which the payments were classified in the ARM Annual Report nor would such a representation be material or have induced the Respondent to execute the Deed;

(iii) that the Respondent was not able to demonstrate that the payments which made up the US$173 million had not been identified by management as lacking a clear business purpose;

(iv) that the payments classified as *"Other Exceptional Costs"* in the ARM Annual Report were in fact true as this had been identified in correspondence;

(v) that the US$7.8 million entry relating to *"Stockpile facility (PT SAM)"* and the US$12 million entry relating to *"Operating exp without clear purpose"* in the 20 June Schedule were included in the ARM Other Exceptional Costs Table and they form part of the US$101 million described as *"Expenditure attributed to hauling roads and other construction in progress";*

(vi) that it was unrealistic for the Respondent to suggest that the explanatory notes against the US$90.7 million *"Construction"* figure and the US$7.8 million *"Stockpile facility (PT SAM)"* figure in the 20 June Schedule constituted material representations which induced the Respondent to enter into the Deed;

(vii) that the Respondent was aware of these figures when the 20 June Schedule was faxed to him and when the April EY Report was furnished to him; and

(viii) that the Respondent was provided with two further reports of EY by 30 June 2013 which referred to the *"Stockpile facility (PT SAM)"* and also the US$90.7 million *"Construction"* figure.

84. The Claimants therefore contend that based on these documents the Respondent could have demonstrated that the relevant payments had a clear business purpose and thereby his liability to transfer the Assets would be reduced pursuant to Clause 2.3 of the Deed.

Rectification of the Deed

85. The Claimants contend that tire payments to which Potential Claims is intended to refer is clear when one reads the terms of the Deed, the ARM Annual Report and the 8 May Schedule, namely, that the majority of the payments were made by Berau Coal and the fact that these payments are described as being made by Berau Energy is of no consequence.

86. The Claimants contend that this is a matter of construction or, alternatively, a matter of implication, or in the further alternative, the Deed can be rectified and on these the Claimants rely on a number of authorities, namely:
(i) *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd;*[5]

(ii) *Chartbrook Ltd* v *Persimmon Homes Ltd;*[6] and

(iii) *Lewison, The Interpretation of Contracts.*[7]

87. The Claimants have produced a document during the course of the arbitration in which the Deed has been marked-up indicating the manner in which the Deed can be rectified.

88. The Claimants contend that the reference to Berau Energy in the Deed rather than to Berau Coal was merely an error.

Duty to co-operate under Clause 2.3 of the Deed

89. The Claimants contend that the decision of the House of Lords in *Mackay v Dick,*[8] on which the Respondent relies, is not a rule of law but merely a generalisation about the interpretation of contractual obligations.

90. The Claimants contend that the obligation to comply with Clause 2.3 of the Deed was on the Respondent and not the Claimants and that the Claimants had provided redacted EY Reports to the Respondent but the Respondent failed to provide any information to demonstrate a clear business purpose for the payments.

91. The Claimants therefore contend that there is no breach of Clause 2.3 of the Deed.

ARM's shareholder approval

92. The Claimants contend that there is no requirement for shareholder approval under English law or under ARM's Articles of Association. The Claimants rely on the Financial Conduct Authority ("FCA")

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[5] *[1997] AC 749*
[6] *[2009] 1 AC 1101*
[7] *5th Edn., paragraph 9.05*
[8] *(1881)6 App Cas 251*

letter dated 8 August 2014.

KPMG Valuation

93. The Claimants contend that the KPMG Valuation does not constitute a determination by a third party pursuant to clause 1.3 of the Deed because KPMG was instructed by PT Revessel Indonesia, a company controlled by the Respondent and not the Parties jointly. Tire Claimants further contend that the Respondent's reliance on Mr. Schirnding's communication is irrelevant.

Respondent's Submissions

94. The Respondent's Submissions are set out in its Skeleton Submissions dated 8 August 2014, Closing Submissions dated 8 September 2014 and a Note in response to the Claimants' Rebuttal Closing Submissions dated 2 October 2014.

95. The Submissions of the Respondent can be summarised as follows:-

Common Mistake

96. The Respondent also relies on the decision in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*[9] and contends that the following 5 elements must be present for a contract to be void for common mistake:-

    (i) there must be a common assumption as to the existence of a state of affairs;

    (ii) there must be no warranty by either party that such a state of affairs exists;

    (iii) the non-existence of the state of affairs must not be attributable to the fault of either party;

    (iv) the non-existence of the state of affairs must render performance of the contract impossible; and

    (v) the state of affairs may be the existence, or a vital attribute of, the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.

97. The Respondent relies on two elements, namely:-
    (i) first, that the payments classified as *"other exceptional costs"* in the table in the ARM Annual Report had all been made by Berau Energy rather than by Berau Coal; and

    (ii) second, that there was a common mistaken belief that the Respondent would obtain a release from all potential claims for those payments by reducing and extinguishing his liability in respect

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[9] *[2003] QB 679 at paragraph 76*

of them upon the transfer of the assets referred to in the Deed.

98. With regard to the first element, the Respondent contends that the Deed provides that it was Berau Energy who made the Disputed Payments. The Respondent further contends that the public announcement by ARM on 26 June 2013 and the further circular of 7 November 2013 also made the same mistake. It was further contended that: it was Mr. Schirnding who proposed the initial draft, which included Berau Energy. The Respondent contends that if the Parties were aware of this, then the Deed would not have been executed.

99. The Respondent refers to the *Great Peace Shipping Limited* decision, which expressed the requirement of the doctrine of frustration and contends that this doctrine is analogous to common mistake and should only apply when no party is at fault because the claim in damages affects the innocent party.

100. The Respondent further submits that he was not at fault and that it was Mr. Schirnding who produced the draft, which stated that Berau Energy made the Disputed Payments.

101. As for the second element referred to in paragraph 97, the Respondent submits that the Parties shared a common belief that the Deed would by itself release the Respondent from all potential claims to the relevant payments by reducing and extinguishing his liability in respect of them upon the transfer of the assets referred to in the Deed.

Misrepresentation

102. The Respondent contends that there are 4 acts of misrepresentation, namely:-
(i) whether one or more of four alleged representations were made;

(ii) whether they were false;

(iii) if so, whether the Claimants knew or should have known that they were false; and

(iv) whether the Respondent was induced to enter into the Deed by one or more of the abovementioned misrepresentations.

Representation and Falsity

103. The Respondent submits that the 20 June Schedule included US$7.8 million in respect of a stockpile facility at PT SAM and US$12 million in respect of operating expenses without a clear business purpose. The Claimants' position is that these items were supposed to be classified under "other exceptional costs" in the ARM Annual Report when in fact they were not. The Claimants' answer is that these two items were included in the table of other exceptional costs in the ARM Annual Report. The Respondent states, however, that the Claimants' elaboration on how the figures were included

is unclear.

104. The Respondent contends that the content of the 20 June Schedule is identical to the 8 May Schedule. The Claimants represented to the Respondent from 8 May onwards that the April EY Report had reached the adverse conclusions expressed in the 8 May Schedule and 20 June Schedule in respect of US$90.7 million attributable to Construction and US$7.8 million attributable to the PT SAM Stockpile facility. The Claimants made these statements to support their view that those amounts constituted expenditures outside the normal course of business, which the Respondent should agree to pay as part of the US$173 million.

105. The Respondent contends that 58 payments which made up the US$90.7 million referred to Construction, whereas the April EY Report had only considered 18 payments amounting to US$55.7 million and did not consider the US$7.8 million attributable to the PT SAM facility.

106. The Respondent acknowledges that the further report produced by EY on 31 May 2013 ("May EY Report") did consider the PT SAM facility and more of the payments making up the US$90.2 million attributable to Construction. The Respondent contends that even when taking into account the May EY Report, the representation made about the conclusions reached by EY in relation to this figure were a material exaggeration for the following reasons, namely:
(i) EY had not reached a conclusion about the payments of US$11.5 million and US$9.8 million that were included in the US$90.2 million;

(ii) Thus, the US$21.3 million payment in respect of which it was being represented to the Respondent that EY had reached an adverse conclusion in their report and for which the Respondent had to reimburse Berau Energy is incorrect. Thus, there was a material misrepresentation.

107. The Respondent contends that he was induced to enter into the Deed by reason of the misrepresentation.

108. The Respondent accepts that for inducement, it may be that ordinarily, he would have to show that he would not have entered into a contract but for the misrepresentation made. However, in a case of a fraudulent statement, it is sufficient inducement, if the representee seeks only to rescind the contract, that he was materially influenced by the misrepresentation merely in the sense that it had some impact upon his thinking.

Duty to co-operate under Clause 2.3 of the Deed

109. The Respondent contends that the Claimants are in breach of their duty to co-operate pursuant to Clause 2.3 of the Deed in that the Respondent was not provided with a copy of the April EY Report and the Respondent also did not have enough knowledge about some of the large disputed items, such as Chateau and Velodrome. The Respondent also contends that he was not sufficiently knowledgeable of each and every transaction making up the US$173 million.

110. The Respondent contends that the Claimants initially refused to provide copies of the EY Reports on

the grounds that they were *"confidential"* but subsequently provided redacted versions.

111. The Respondent contends that in law, a term should be implied for co-operation and relies in particular on a statement by Lord Blackburn in *Mackay v Dick.*[10]

112. The Respondent therefore submits that the Claimants are in breach of Clause 2.3 of the Deed.

Shareholders' Approval

113. The Respondent submits that if ARM required shareholder approval in respect of the transfer of the assets and/or the waiver, the Respondent should not be obliged to perform his obligations relating to the transfer until the requisite shareholder approval is obtained pursuant to Clauses 1.10 and 1.11 of the Deed. The Respondent contends that the documentary evidence adduced by the Claimants, including the FCA letter of 8 August 2014 with regard to shareholder approval, is insufficient and that the Claimants are prevaricating as to whether shareholder approval is required under the FCA and UK Listing Authority.

KPMG Valuation of ABL

114. The Respondent submits that it was Mr. Schirnding who requested the Respondent to finalise the valuation and contends that the KPMG Valuation is a joint valuation. Mr. Schirnding was not called by the Claimant to explain the position.

Rectification

"Correction" by interpretation, implication or rectification

115. The Respondent contends that in order for a mistake to be *"corrected",* two conditions need to be satisfied, namely:

    (i) it must be clear that a mistake has been made; and

    (ii) the correction that needs to be made in order to cure the mistake must be clearly identified.

    and the Respondent relies on the decision in *East v Pantiles (Plant Hire)*[11] as modified in *Chartbrook.*

116. The Respondent contends that the preconditions have not been satisfied. The Respondent contends that a perusal of the Deed will demonstrate that it is impossible to say that clear mistakes were made in failing to refer to payment's made in 2010 and 2013, as well as 2011 and 2012:

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[10] *[1881] 6 App. Case 251 at 263*

[11] *[1982] 263 EG 61.*

117. The Respondent contends that the need to refer to Berau Coal in the Deed was overlooked, because it was premised upon the assumption that the disputed payments were made by Berau Energy.

118. The Respondent contends that the correction of the Deed would result in a new agreement being drawn up. It is also the Respondent's contention that the Deed cannot be corrected by implication and it relies on the decision in *Equitable Life Assurance Society* v *Hyman,*[12] *R* v *Paddington and St. Marylebone Rent Tribunal,*[13] and *Trollope & Colls Ltd.* v *North West Metropolitan Regional Hospital Board.*[14]

119. The Respondent further submits that in order for the Deed to be rectified the Claimants have to establish the following:
(i) that the parties had a continuing common intention in respect of the matter in the Deed to be rectified;

(ii) an outward expression of accord;

(iii) that the intention continued at the time the Deed was executed; and

(iv) that by mistake the instrument did not reflect the common intention, and the Respondent relies on the decision in *Swainland Builders Ltd v Freehold Properties Ltd.*[15]

120. The Respondent further contends that the Claimants have not discharged their burden in this respect by failing to call Mr. Schirnding who, in their view, played an instrumental part in the execution of the Deed.

121. The Respondent contends that this is not a proper case for rectification.

Issues for Determination by the Tribunal

122. The issues set out in paragraph 71 can be summarised as follows:-
(i) Is the Deed void for common mistake?

(ii) Is there a basis to rescind the Deed for misrepresentation?

(iii) Can the errors in the Deed be corrected by way of construction, implication or rectification?

(iv) Are the Claimants in breach of Clause 2.3 of the Deed, namely, the duty to co-operate?

(v) Is there a need for regulatory and shareholders' approval pursuant to Clause 1.10 of the Deed?

(vi) Is the KPMG Valuation produced by the Respondent binding on the Claimants?

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[12] [2002] 1 AC 408, 459C-D
[13] [1947] KB 984, 990
[14] [1973] 1 WLR 601, 614A-B
[15] [2002] 2 E.G.L.R. 71 at paragraph 33

Analysis and Decision of the Tribunal on Common Mistake

Legal Principles

123. As the summaries of the submissions reveal, the circumstances in which a contract will be void for common mistake under English law are not in dispute, except for tire Parties' state of mind.[16] The Claimants and the Respondent referred the Tribunal to the judgment of Lord Phillips in *Great Peace Shipping Ltd* in which he said the following:

> *"If one applies the passage from the judgment of Lord Alverstone CJ in Blakeley* v *Muller & Co 19 TLR 186, which we quoted above to a case of common mistake, it suggests that the following elements must be present if common mistake is to avoid a contract: (i) there must be a common assumption as to the existence of a state of affairs; (ii) there must be no warranty by either party that that state of affairs exists; (iii) the non-existence of the state of affairs must not be attributable to the fault of either party; (iv) the non-existence of the state of affairs must render performance of the contract impossible; (v) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible."* [17]

Lord Phillips (who gave the judgment of the Court of Appeal) went on to refer with approval to the decision of the High Court, Australia in *McRae* v *Commonwealth Disposals Commission.*[18]

124. The Claimants contend that a positive mistaken belief is required for the purposes of the doctrine of mistake, whereas the Respondent submits that a tacit assumption •will suffice. The Tribunal was referred to the first instance decision in *Lady Hood of Avalon* v *Mackinnon*[19] and the recent decision of the Supreme Court in *Pitt v Holt*[20] among other authorities. Having reviewed those authorities, the Tribunal is of the view that whether one characterizes it as a belief or an assumption, there has to be a positive state of mind about a state of affairs as distinct from not applying one's mind to something.

Alleged Common Mistakes

125. The two related mistakes alleged by the Respondent have already been identified as rendering the Deed void, but, for ease of reference, they are repeated:
(i) a common mistaken belief that the payments classified as "other exceptional costs" in the table in the 2012 ARM Annual Report had all been made by Berau Energy, and

(ii) a common mistaken belief that Mr. Roeslani would obtain a release from all potential claims for

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[16] Respondent's opening submission paragraph 16 and Claimant's Skeletal Arguments, paragraphs 50 and 51.
[17] [2003] QB 679 at paragraph 76
[18] [1951] 84 CLR 377
[19] [1909] 1 Ch 476
[20] [2013] 2 AC 108

those payments by reducing and extinguishing his liability in respect of them upon the transfer of the assets referred to in the Deed.[21]

126. Several meetings and discussions took place between the parties and their representatives, but what follows are the most material to the issue of the common mistakes.

127. On 8 May 2013 a meeting took place at Berau's offices in Jakarta attended by Mr. Roeslani, Mr. Tan, Mr. Lawler, Mr. Pankhania, Mr. Winzenreid and Mr. Sunaryadi. The Tribunal heard the testimony of all those persons except Mr. Pankhania who was not called as a witness.

128. Mr. Roeslani testified that he and Mr. Tan met first and Mr. Tan used a white board to identify payments whose business purpose Mr. Tan doubted. In any event, it is common ground that prior to the meeting a summary and accompanying schedules had been prepared by PWC and was referred to at the meeting attended by all (the 8 May Schedule). It is also common ground that Mr. Tan took Mr. Roeslani line by line through the summary, but it was disputed how much attention was given to the attached schedules. The position became clearer at the hearing.

129. Mr. Winzenreid testified that he prepared the 8 May Schedule, In response to a question from a member of the Tribunal he said the following:
"So my memory of the meeting is that, as an introduction, I walked through the summary, page 3, so I would have named each of the items on that page 3 summary, said the amount that was on the schedule. We then turned to the more detailed summary on the next page which showed what period it was — the costs were incurred in, which is page 4 on this blown-up version. But not in a great level of detail because it's effectively the same figures as were on the front summary. And then we looked at page 5 and page 6, but not in detail. We didn't go through line by line in my recollection. Now, whether that was separately done between Mr Tan and Mr Roeslani, I don't know, but I did not see us go through line by line during that meeting.

MR SUTTON: But in your presence, there was discussion with Mr Roeslani, as I understand it, about these schedules, that is pages 5 and 6?

A. That's right.

MR SUTTON: But not in detail?

A. Not line by line, that's right."[22]

130. The Respondent did not recollect discussion of the schedules, as opposed to the summary, at the meeting, although he testified that he did look at the vendor list and the bottom line on page 5. It was put to him that he did request a copy of the clip of paperwork from Mr. Winzenreid:
"Do you remember making that request?

A. Yes.

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[21] Respondent's Opening Submission paragraph 17 as well as the Agreed List of Issues, paragraph 2.

[22] (Transcript Day 2, 22,4-25 and 23, 1)

Q. And when did you make the request?

A. Before I left the meeting."[23]

The Tribunal prefers Mr. Winzenreid's recollection of what he discussed with Mr. Roeslani at the meeting on 8 May 2013.

131. The total appearing on the summary of the 8 May Schedule at the beginning of the meeting was US$304.3 million. However, it is common ground that Mr. Roeslani objected to the following three items on that summary:
(i) Land improvement/feasibility study US$6.9 million

(ii) Chateau Investment Fund (inch fees of US$ lm); and US$76.1 million

(iii) Velodrome Consultancy Services (2011 - 2012) US$48.0 million

and that for various reasons Mr. Tan agreed that they should not continue to be included on the summary.

133. As mentioned, Mr. Roeslani asked for a copy of the 8 May Schedule which was sent to him later that day by Mr. Winzenreid in two files; the first being the summary and the second providing "the details", that is, the accompanying six schedules and a breakdown of certain items.[24] The summary was the unrevised version. Mr. Roeslani testified that he did not read the schedules upon receipt of Mr. Winzenreid's email but he forwarded it to his in-house counsel to look at.[25]

134. Mr. Roeslani also asked for a copy of the April EY Report which was mentioned on the schedule as the "EY report". The significance of that report to Mr. Roeslani's claims is discussed in this Award under the heading "Misrepresentation". He was not given a copy at the meeting on 8 May but as mentioned hereafter, he did receive a copy at a meeting three days later.

135. On 10 May 2013, another meeting took place at Berau, which was attended by Mr. Roeslani and Mr. Sunaryadi as well as two other individuals. Mr. Sunaryadi testified that he brought with him to that meeting a copy of the April EY Report and an access letter that he had typed. He placed them on the meeting table in front of the seat occupied by Mr. Roeslani. He summarized for Mr. Roeslani the findings in the report before several other persons joined the meeting. Mr. Roeslani then left.

136. Mr. Sunaryadi testified that he saw Mr. Roeslani pick up the documents when he left the room. Mr. Sunaryadi sent Mr. Roeslani text messages after the meetings because he was worried that Mr. Roeslani had not signed the access letter, which among other things restricted the use of the copy of the April EY Report. He did not receive a response to those text messages.

137. Mr. Roeslani testified that he picked up the access letter but not the copy of the April EY Report that was underneath it. He said that he wanted to read the letter before signing it, and other people had

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[23] (Transcript Day 3, 88, 9-13)

[24] (Hearing Bundle, Vol. 3 Tab. 35)

[25] (Transcript Day 3, 104, 17)

arrived to join the meeting. He did not sign the letter because, after he read it, he was not satisfied with its contents, including the indemnity provision, but he did not suggest any amendments. Having heard the witnesses, the Tribunal prefers the evidence of Mr. Sunaryadi on this issue, and finds that Mr. Roeslani did pick up the copy of the April EY report on 10 May 2013 and took it away with him.

138. Further discussions followed between Mr. Roeslani and Mr. Tan, which need not be set out in this Award. As already stated, on 20 June 2013, Mr. Roeslani received a copy of the summary of the 8 May Schedule marked-up by Mr. Tan. According to the Claimants, the total of US$173 million on that summary recorded the value of the assets in millions of US dollars which Mr. Roeslani had agreed at the meeting on 8 May to transfer to the Claimants, subject to a release and being able to reduce that amount as described hereafter.

139. Mr. Roeslani instructed Clyde & Co to prepare a draft agreement, which was sent to Freshfields, the Claimants' solicitors. Negotiations followed and several drafts were exchanged before the Deed was signed on 23 June 2013. Some of those drafts are referred to hereafter.

First Common Mistake

140. Potential Claims, for which Mr. Roeslani is claimed to be liable, is defined in Clause 2.2 of the Deed as follows:
"any present or future action, right, or claim which the Companies may have against RR in respect of any payment made by Berau during 2011 and 2012 which Berau has not been able to substantiate as having a clear business purposes and which Berau has specified as such in the annual report and accounts for Bumi for the financial year ended 31 December 2012."

141. How Potential Claims should be defined is discussed later in this Award, but for the purpose of this part it is sufficient to draw attention to the reference to the annual report and accounts for Bumi PLC (re-named Asia Resource Mineral PLC) for the financial year ended 31 December 2012 (referred to as the "2012 ARM Annual Report"). The financial statements in that report include the subsidiaries of ARM (i.e. they are consolidated accounts) and refers in notes 2.1 (c) and 3.1 to the financial position of PT Berau.

142. Clause 2.3 of the Deed refers in particular to a table at page 79 of the 2012 ARM Annual Report entitled "other exceptional costs". The narrative to note 6 in that report, which contains the table, reads as follows:
"As referred to in notes 2.1(c) and 3.1, new management conducted an extensive review of the financial position of PT Berau and identified significant expenditure, principally in 2012, that had no clear business purpose. Previous management at PT Berau had attributed these costs to hauling roads and other construction in progress, land related payments, consulting services and acquisition related goodwill. These amounts are shown separately in the Consolidated Income Statement to separate them from costs incurred in the ordinary course of business.

The review also identified that certain costs incurred in 2011 had no clear business purpose. In the

comparative numbers, they have been reclassified mainly from cost of sales to other exceptional costs.

An analysis of other exceptional costs is set out below".[26]

143. The analysis appears in the table, which is reproduced below, but it is relevant to the issue of common mistake to say that, although the above quoted note appears in the consolidated accounts of Bumi the term "PT Berau" is defined there as PT Berau Coal Energy Tbk.

144. The table itself is as follows:

	Year to 31 December 2012 $m	Year to 31 December 2011 $m
Expenditure attributed to hauling roads and other	79	22
construction in progress		
Expenditure attributed to land related payments	42	-
Consulting services	24	24
Expenditure attributed to goodwill	5	-
Other	2	3
Total other exceptional costs	152	49

145. The sum of three of the items in that table as well as the total do not correspond to those in the 8 May Schedule or the 20 June Schedule. For instance, the total for construction in the two schedules is US$90.7 million whereas the sum of the two years for construction in the table is US$101 milion. Nevertheless, as appears from the First Witness Statement of Mr. Lawler,[27] the figures are reconcilable and there is no doubt that the total expenditure of US$101 million attributed to hauling roads and other construction in progress in the two years specified in the 2012 ARM Annual Report includes the sum of US$90.7 million for construction in the 8 May Schedule and the 20 June Schedule. The second item of other exceptional costs attributed to expenditure in 2012 for land related payments and amounting to US$42 million corresponds exactly to the amount for "land compensation through agents" appearing in the May and June schedules.

146. The reconciliation mentioned above is relevant to the first mistake because the schedules that are attached to the summary of the 8 May Schedule contain a breakdown of the totals appearing in the

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[26] *(Hearing Bundle Vol. 4 Tab 52)*

[27] Paragraph 61

summary. Thus, among other things, schedule 1 describes each project that was included in the total sum of US$90,676,922 and the description of the majority of those projects begins with the letters "BC". It is apparent from the breakdown of items to be included in other expenses outside the normal course of business which follows the summary in the 8 May Schedule that "BC" refers to Berau Coal and "BCE" refers to Berau Energy.

147. Anyone looking at the whole of the 8 May Schedule and particularly Mr. Roeslani who had been President Director of BC and BCE, even if he did not learn from other sources, would have realized that the expenditure attributed to the majority of the projects described in schedule 1 to the 8 May Schedule was incurred by Berau Coal and not by Berau Energy.

148. Mr. Roeslani testified that he did not study the 8 May Schedule either at the meeting on 8 May or when he received them from Mr. Winzenreid later that day. Having heard the evidence from several of the witnesses who attended that meeting, the Tribunal finds it hard to believe that Mr. Roeslani was of the view that all the expenditure included in the other exceptional costs was incurred by Berau Energy alone.

149. It is common ground however that for common mistake, it is not sufficient that Mr. Roeslani believed (if he did) that all the expenditure was incurred by Berau Coal, because he must also establish that his belief was shared by the Claimants. Having heard the testimony of Mr. Tan and Mr. Lawler, including the investigation Mr. Lawler undertook on behalf of the audit committee of Berau Energy, the Tribunal has no doubt that the Claimants knew full well that Berau Energy had not incurred all the expenditure and that a large part of it in respect of construction in progress and land related payments had been incurred by Berau Coal. In the circumstances, the Tribunal finds that the first alleged mistake was not a common mistake.

Second Common Mistake

150. It is common ground that as part of the settlement recorded in the Deed Mr. Roeslani should obtain a release from the Potential Claims upon transfer of the Assets as defined. The issue between the parties is how that release was to be given. Mr. Roeslani contends that the release was intended to be a self-executing release given exclusively by the companies defined in the Deed and that as Berau Coal is not a party to that Deed, a fundamental and common mistake had occurred. He relies in particular on the terms of the Deed. The Claimants point out that although the Deed refers to a waiver in Clause 1.10 and an extinction of claims in Clause 2.1, it does not specify how the release is to be given.

151. In order to reach a decision on whether there was a common mistake over the release, the Tribunal has considered the Deed in its admissible background. That background includes discussions that Mr. Roeslani had with Mr. Tan and others starting on about 8 May 2013 which took place in Jakarta and the later discussions between the parties' lawyers that took place in London.

152. There is no evidence that the form of the release was discussed at the meeting on 8 May 2013. In response to a question about the understanding at that meeting, Mr. Tan said at the hearing:
"Well, long story. Until the minute that I believe settlement deed was actually signed, Mr Roeslani

was still pushing for a complete blanket release and discharge for anything happen during his tenure in the Berau Group. Finally, what was signed is what I call a dollar for dollar release and exchange."[28]

153. Mr. Roeslani may not have thought at the time of the particular companies which would be parties to that release, but as already mentioned, Berau Coal was referred to in the 8 May Schedule and from his former role as President Director, Mr. Roeslani was aware of the activities of that company which was the main operating subsidiary. He would have expected a release from Berau Coal as well as Berau Energy and Mr. Tan would have understood that expectation.

154. Mr. Tan's recollection is borne out by the Memorandum of Understanding dated 29 May 2013 prepared by Mr. Connerty of Clyde & Co. A copy of that memorandum signed by Mr. Roeslani was forwarded to him on 29 May 2013 by Mr. Schirnding.[29] The parties to that memorandum are expressed to be the Claimants, described as the "Companies" and Mr. Roeslani.

155. Paragraph 3.2 of the memorandum reads as follows:
"The companies agree that Mr Roeslani is released and discharged from any liability of any nature to the Companies and any Related Parties, whether direct or indirect, foreseen or unforeseen, ascertained or unascertained, known or unknown, quantified or unquantified, contingent or actual, present or future, arising out or capable of arising out of, or in any way connected with relating to, or in respect of the contracts referred to above and/or the Directorships and/or their employment by or relationship with the Companies and any Related Parties including any claims for interest and costs."

156. The expression "Related Parties" is defined as *"any of the Companies' subsidiaries, assignees, transferees, representatives, principals, agents, officers or directors."* Mr. Connerty testified that the definition was standard and that, unlike Mr. Roeslani, he did not know of the existence of Berau Coal when he drafted the memorandum.[30] Nevertheless his intention was to "sweep up any claim of whatever nature, including claims that he was unaware of."[31]

157. It appears that when Freshfields, who acted for the Claimants, first responded to Mr. Connerty's Memorandum of Understanding[32] they had not focused on the release because they omitted it as well as the reference to Related Parties.

158. The position became clearer, however, on 12 June 2013 when the proposed settlement was discussed in the course of the telephone conference call. Mr. Connerty made a note of that call which records that Mr. Roeslani as well as representatives of ARM and Freshfields were in attendance.[33] The note mentions that Mr. Roeslani proposed to transfer two shareholdings, which he then considered had a value close to US$173 million in return for which he would be released from "all claims known and unknown". Freshfields objected to the prospect of settling unknown claims. Mr.

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[28] (Transcript Day 1, 140,3-8)
[29] (Hearing Bundle Vol. 4 Tab 43)
[30] (Transcript Day 4, 10,18- 11, 15)
[31] (Transcript Day 4, 16,22-24)
[32] (Hearing Bundle Vol 3 Tab 44)
[33] (Hearing Bundle Vol 5 Tab 58)

Connerty then asked what the figure of US$173 million represented, and one of ARM's representatives, Mr. Vicke rs, said that Berau's financial statements had identified certain unexplained expenditures.

159. It is apparent from this note that the figure of US$173 million was known by Mr. Roeslani prior to 20 June 2013 to represent the expenditures which the companies were expecting him to reimburse by way of settlement unless he could satisfy them that some or all of the expenditures had a clear business purpose. As already mentioned, that amount had been discussed between Mr. Roeslani and Mr. Tan at the meeting of 8 May 2013 and at least Mr. Tan, Mr. Lawler and Mr. Winzenreid understood that the majority of the expenditures had been incurred by Berau Coal. Thus, when Mr. Vickers referred on 12 June 2012 to the Berau financial statements, it would have been understood by him and the company he represented as referring to the 2012 Berau accounts then in draft.

160. On 22 May 2013, Mr. Tan had forwarded to Mr. Roeslani a copy of that draft which was entitled "PK Berau Coal Energy TBK and subsidiaries" and in two emails sent later that month, Mr. Roeslani had provided comments on the draft.[34] In his first witness statement[35] Mr. Lawler reconciles the Berau Annual Report as well as the 2012 ARM Report with the 8 May Schedule.

161. It is apparent from Mr. Connerty's note that the form of a release was not discussed on 12 June 2013. That discussion related to the scope of the release which continued to occupy the parties and their solicitors[36] until the final version of the Deed was signed on 26 June 2013. As mentioned, the Deed referred to waiver of Potential Claims (as defined) and to the possibility of extinguishing them, but it does not state in terms that the release should be self-executing. Having construed the Deed against the background on which evidence was adduced, the Tribunal is unable to find that the parties intended that Mr. Roeslani's release would only be executed by the Deed. In particular, the review of their witness testimony and the contemporaneous documents convinces the Tribunal that what concerned Mr. Roeslani and Mr. Connerty was the scope of the release rather than how it would be executed.

162. On 18 August 2014, the Claimants entered into an agreement with PT Berau Coal. That agreement which is expressed to be governed by English law provides that in consideration for the transfer of any Assets pursuant to the Deed, Berau Coal would release Mr. Roeslani from liability on a dollar for dollar basis in respect of Potential Claims by an amount equal to the value of the Assets transferred. Mr. Roeslani has not yet transferred any Assets to the Claimants, but he has been given a copy of the 18 August 2014 agreement.

163. In order to establish a common mistake, Mr. Roeslani must satisfy the Tribunal that, among other things, the non-existence of the state of affairs, that is, a self-executing release, renders performance of the contract impossible. Even though Berau Coal is not a party to the Deed, the Claimants have procured by the agreement of 18 August 2014 that Berau Coal will give Mr. Roeslani a full release of any Potential Claims that it may have against him. Accordingly, the Claimants have demonstrated to the satisfaction of the Tribunal that they are able to perform their obligations under the Deed if and when Mr. Roeslani transfers the Assets. For the reasons stated, the Tribunal finds that the second mistake as well as the first mistake alleged by the Respondent are not common mistakes and thus

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[34] (Hearing Bundle Vol 4 Tab41 and Vol 4 Tab 42)

[35] (Paragraph 61)

[36] (Hearing Bundle Vol 5 Tab 63 and Vol 5 Tab 68)

the Deed is not void.

Analysis and Decision of the Tribunal on Misrepresentation

Legal Principles

164. It is common ground that a contract is voidable for misrepresentation where
i) one party makes an untrue representation and

ii) this induced the other party, relying on the representation, to enter into the contract.

165. It is also common ground that a contract is voidable for fraudulent misrepresentation where the representation is made knowingly or recklessly without belief in its truth. [37]

The allegations

166. The Respondent's submissions have already been summarised, but, for ease of reference, they are restated in this section of the Award.

167. Mr. Roeslani alleges that Mr. Tan misrepresented to him, based on the breakdown given in the 20 June Schedule, [38] that US$173 million was the final amount classified as "other exceptional costs" by the Claimant, whereas US$19.8 million of that amount had not been so classified. The latter sum is made up as follows:

i) US$7.8 million relating to *"Stockpile facility (PT-SAM)"* and

ii) US$12 million relating to *"operating exp without clear business purpose."* [39]

168. Mr. Roeslani also alleges that the 20 June Schedule falsely represented that:
i) in respect of US$90.7 million worth of payments relating to "construction" the April EY Report found there to be "no *evidence of assets, no valid invoices or reports, no substance to contractors, common mgt/shareholders amongst contractors, all same bank branch"* and

ii) That in respect of a further US$7.8 million worth of payments relating to "Stockpile facility (PT-SAM)", the April EY Report had concluded that there was "no *progress of construction, does not support value, contract terms are not commercial.*" [40]

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[37] See Defence paragraphs 159 & 160 and Reply paragraph 34)

[38] (Hearing Bundle Vol 5 Tab 62)

[39] See paragraphs 161-166 of Defence.

[40] See paragraphs 76-83 of Rejoinder.

As an alternative to his case on common mistake, Mr. Roeslani claims that the Deed must be rescinded for misrepresentation.[41] For reasons discussed hereafter, the Claimants deny that any actionable misrepresentations were made by Mr. Tan sending the 20 June Schedule to Mr. Roeslani.[42]

The schedule

169. It is useful to begin the discussion with a description of the 20 June Schedule, including its origin. It is the summary prepared by Mr. Winzenreid for the meeting that took place on 8 May 2008[43] as amended in manuscript by Mr. Tan. The documents that comprise tire 8 May Schedule include several schedules that backed up the summary that PwC had also produced and which were referred to at the 8 May meeting. At Mr. Roeslani's request the whole of the 8 May Schedule was sent to him later that day.[44]

170. The Tribunal has already found that in the course of the meeting on 8 May 2013, Mr. Tan amended the summary in manuscript in order to remove 3 items to which Mr. Roeslani specifically objected. At his request on or about 20 June 2013 Mr. Roeslani was sent the amended summary by Mr. Tan.[45] It became known as the 20 June Schedule.

171. It is also relevant to mention that a telephone conference call had taken place on 12 June 2013 in which Mr. Connerty had asked the participants of the 8 May meeting, which included Mr. Roeslani, what the figure of US$173 million represented. Although Mr. Vickers gave an explanation, it is likely that Mr. Roeslani followed up with his request for the 20 June Schedule. In any event, the origin of that schedule, with which Mr. Roeslani was familiar, is relevant to the alleged misrepresentations because he knew that it recorded the discussions that he had with Mr. Tan and others on 8 May 2013.

The misrepresentations

172. In the Respondent's opening statement the particular misrepresentations alleged were addressed separately as those appearing in the Defence (the "first group") and those raised in the Rejoinder (the "second group"). The issue identified in respect of the first group is whether the two items in that group were included in the table of "other exceptional costs" in the 2012 ARM annual report. As has been mentioned, Mr. Lawler's first witness statement included a reconciliation of that table with the 20 June Schedule among others.[46] The relevant items are shown as follows:

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[41] See paragraph 84 of Rejoinder.

[42] See paragraphs 61-67 of Claimant's Skeleton Arguments.

[43] See Transcript Day.2, 11, 16- 12, 12.

[44] (Hearing Bundle Vol 3 Tab 35).

[45] (Hearing Bundle Vol 5 Tab 62).

[46] See paragraph 61.

Items	20 June Schedule	Table in 2012 ARM annual report
Stockpile facility at PT-SAM	7.8 million	Expenditure attributed to hauling roads and other construction in progress: 79 for 2012 and 22 for 2011
Operating expenses without clear purpose	12 million	

Mr. Lawler explained that the two items, amounting to US$19.8 million were subsumed in the total of US$101 million, being the total of the sums of US$79 million and US$22 million for the specified expenditures in the relevant two years.[47] Although he was cross-examined about his reconciliation of certain feasibility studies,[48] his evidence about the two items mentioned above was not challenged.

173. It is relevant to repeat that at the meeting on 8 May 2013, Mr. Tan had taken Mr. Roeslani item by item through the summary that was then part of the 8 May Schedule. That exercise would have included the two entries listed in the previous paragraph. There was no change to them in the 20 June Schedule. The presence of representatives of ARM's auditors and EY as well as Mr. Tan's action at the meeting on 8 May 2013 would have left Mr. Roeslani in no doubt that, in the absence of a proper explanation, ARM and its auditors were likely to classify the two entries as exceptional costs in the 2012 ARM annual report.

174. As for the second group of misrepresentations, the Tribunal had already found that at the meeting with Mr. Sunaryadi on 10 May 2013, Mr. Roeslani was shown a copy of the April EY Report which he took away with him. That was the report which was referred to in the 8 May Schedule although by 20 June 2013 EY had prepared another report, the May EY Report.[49]

175. With a copy of the April EY Report, Mr. Roeslani or his advisors could have verified what the 20 June Schedule said about the conclusions in that report. However, as Mr. Roeslani admitted in cross examination, his interest in the 20 June Schedule was in the figures rather than in the text on the right hand side of the document.[50] On re-examination Mr. Roeslani claimed that although he just "glanced" at the writing on the right hand side, it was significant to him.[51] If it had been significant as he claimed, the Tribunal finds that he or his advisors would have enquired about the descriptions, but they did not do so.

176. In fact, Mr. Roeslani must have realised from his receipt of the April EY Report as well as from his discussions with Mr. Tan, Mr. Lawler, Mr. Winzenreid and Mr. Sunaryadi that the description of the items was not specific to that report but included preliminary conclusions of ARM and PwC on which EY had begun to enquire. Mr. Roeslani's own testimony together with the other evidence adduced about the 8 May Schedule convinces the Tribunal that they were not something on which

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[47] See paragraph 62.1 of Mr. Lawler's witness statement.

[48] See Transcript Day 2,94, 3-97, 17.

[49] (Hearing Bundle Vol 4 Tab 54).

[50] See Transcript Day 3, 129, 11-19.

[51] See Transcript Day 3, 159, 13-160, 16.

he relied.

177. In conclusion, having heard the witnesses' testimony and considered the written evidence, the Tribunal finds that Mr. Roeslani was not induced by the 20 June Schedule to enter into the Deed by any representation, untrue or otherwise, made by or on behalf of the Claimants.

Analysis and Decision of the Tribunal on Construction, Implication and Rectification of the Deed

178. In the light of the finding by the Tribunal that there are no common mistakes and that the Deed is not void, the issue that arises is whether the Deed can be rectified in the manner proposed by the Claimants.

179. The Claimants at the close of the hearing, produced a marked-up document and contended that the Deed could, by the process of construction, implication and/or rectification, be corrected in the manner set out in the marked-up document.

180. The amendments are to Clauses 2.1 to 2.3 of the Deed. Clauses 2.1 to 2.3 as amended are set out below:-

"2.1 If the approval of Bumi's shareholders is required (in accordance with clause 1.10), then the Companies will advise RR of that requirement and the steps taken to obtain it. Subject to that approval being obtained and RR transferring the relevant Asset(s) (or other property in substitution of such Asset(s)), RR's liability to the Companies [REDACTED] in respect of Potential Claims shall be reduced by an amount equal to the value of the Assets transferred pursuant to clause 1 (as determined by the reputable independent third party appointed by the Parties or as otherwise agreed between the Parties), such reduction being on a dollar for dollar basis and shall only be effective following receipt of the valuation referred to above, until the value of the Assets transferred pursuant to clause 1 (as determined by the reputable independent third party appointed by the Parties or as otherwise agreed between the Parties) equals no less than US$173,000,000 whereupon RR's liability to the Companies [REDACTED] in respect of Potential Claims shall be extinguished."

"2.2 *Potential Claims means any present or future action, right, or claim which the Companies [REDACTED] may have against RR in respect of any payment [REDACTED] made by Berau [REDACTED] during* [REDACTED] *2011 and 2012 which Berau has not been able to substantiate as having a clear business purpose and which Berau has specified as such in the annual report and accounts for Bumi for the financial year ended 31 December 2012."*

"2.3 The Companies shall carefully consider any new or additional information provided by RR in respect of the payments [REDACTED] made by Berau [REDACTED] during [REDACTED] 2011 and 2012 which Berau has not been able to substantiate as having a clear business purpose and has been specified as such in the annual report and accounts for Bumi for the financial year ended 31 December 2012. If a reputable independent audit firm appointed by the Parties confirms that the information provided by RR evidences a clear business purpose for a payment previously classified by Berau as not having such purpose, the aggregate value of the Assets to be transferred by RR

to the Companies (being US$173,000,000) shall be reduced by the amount which such reputable independent audit firm confirms (i) has a clear business purpose, and (ii) relates to the matters set out in [REDACTED] *lines 1, 2, 4 and 5 of the table entitled "other exceptional costs " at page 79 [REDACTED] of Bumi's annual report and accounts for the financial year ended 31 December 2012."*

181. The correction of the Deed in Clause 2.1 is to add the words *"and PT Berau Coal(BC)"* and *"and BC".*

182. The correction of Deed in Clause 2.2 is to add the words *"and/or BC", "or accrual", "or BC"* and *"2010 ".*

183. The correction of Deed in Clause 2.3 also adds the words *"or accruals", "or BC",* the year *"2010"* and an additional amendment which is *"and (b) line 8 of the table entitled "Property, plant and equipment" at page 86".*

184. The question that arises is can the alleged errors in the Deed be corrected either by way of construction, implication or rectification? It cannot be disputed that the majority of the payments were made by Berau Coal and the spreadsheets and the April EY Report substantiate this. The background material which includes the ARM 2012 Accounts and the 8 May Schedule also indicate that the payments were made by Berau Coal. The fact that some were payments and others are accruals, does not detract from the fact that the Deed does not reflect the true factual position. The other addition is to make reference to the year 2010. These errors which are set out in Clause 2.1 to 2.3 of the Deed are merely errors in description and correction of dates.

185. The payments that the Respondent should make in order to obtain a release are set out in the 20 June Schedule. Therefore, the correction to Clause 2.2 does no more than reflect this fact.

186. The issue that arises is whether the errors in the Deed can be corrected by applying the proper principles of construction.

187. The Claimants and the Respondent refer to the decision of *East v. Pantiles (Plant Hire) Ltd.*[52] The Respondent contends that in order to correct a mistake by construction, one has to show that a mistake was made, the correction that needs to be made in order to cure the mistake is clear and that the mistake must be capable of being cured. The Claimants on the other hand contend that the decision in *East v Pantiles* confers jurisdiction to correct mistakes by the process of construction and relies on the following statement in the leading judgment given by Brightman LJ:

"Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction." [53]

188. The Claimants contend that the Tribunal should not only look at the *"face of the instrument"* but should also take into account the available background and context and they invite the Tribunal's attention to what Lord Hoffmann said in *Chartbrook Ltd* v *Persimmon Homes Ltd,*[54] namely:

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[52] *[1981] 263 EG 61*

[53] Claimant's Closing Submissions paragraph 82 page 25.

"....in deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context. As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration."

189. The Tribunal has to ascertain objectively what the Claimants and the Respondent intended. The fact that words have been used wrongly is not an impediment to correct the Deed by construction, and the Tribunal's attention was drawn to the decision of the House of Lords in *Mannai Investment Co. Ltd v Eagle Star Life Assurance Co. Ltd.*[55]

190. Furthermore, when correcting a document by the process of construction the Tribunal is not inhibited *"to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant;*[56]

191. The Tribunal is of the view that, by adopting the approach of the House of Lords, Clauses 2.1 to 2.3 can, by the process of construction, be corrected.

192. The first set of changes are similar to those made to the definition of potential claims and the second set of changes is an insertion of line 8 of page 86 of the accounts. These corrections are simply correcting the definition of potential claims.

193. The Claimants contend alternatively the Deed can be corrected by way of implication. This pertains to Clause 2.1 namely that *"RR's liability....in respect of Potential Claims shall be reduced"* or "extinguished" upon the transfer of Assets. This clause must have intended to include potential claims that vested in Berau Coal.

194. The Claimants rely on the decision of *Attorney-General of Belize v Belize Telecom Ltd*[57] in support of their application namely that the words used to express the release obligations must mean that the Potential Claims include claims by Berau Coal.

195. The Respondent on the other hand is of the view that in order to correct a mistake by implication, the proposed correction must satisfy the strict test for implying a term,[58] namely that an implication cannot be made if it conflicts with an express term of the contract,[59] and further it must be clear how the term which is to be implied is to be framed.[60]

196. In respect of tire issues of which is the correct entity to whom payments were made and of accruals and dates in the ARM Accounts at the time of the execution of the Deed, it is in the Tribunal's view, obvious in the light of the documents which constitute the background, that a bystander would have

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[54] [2009] 1 AC 1101 at paragraph 24.

[55] [1997] AC 749 at 779H

[56] Chartbrook, para 25, per Lord Hoffmann.

[57] *[2009] 1 WLR 1988.*

[58] *Mediterranean Salvage and Towage Ltd. V Seamar Trading & Commerce Inc. (The "Reborn")* [2009] 2 Lloyd's Rep. 639, at [15].

[59] *Equitable Life Assurance Society* v. *Hyman* [2002] 1 AC 408,459C-D.

[60] *R* v. *Paddington and St. Marylebone Rent Tribunal* [1947] KB 984, 990.

said that a mistake has been made and that this mistake can be corrected by way of implication.

197. As a further alternative, the Claimants also submit that the Deed can be rectified.

198. The Claimants contend that there was no mistake as to the fact that the payments had in the majority of cases, been made by Berau Coal and this would have been obvious from a perusal of the spreadsheets which were discussed on 8 May 2013, copies of which were sent to the Respondent. The errors with regard to the payments referred to Berau Energy rather than Berau Coal and they did not take into account payments that were made in 2010 and some accruals at the end of 2012. This, the Claimants contend, are merely errors in the description of the subject matter which has otherwise been sufficiently identified.

199. The Claimants rely in particular on the decision of the House of Lords in *Chartbrook Ltd v Persimmon Homes Ltd*[61] and are of the view that the Deed can be rectified and did produce at the hearing a copy of the Deed, which has been marked-up to correct the errors. They are mis-description errors.

200. The Respondent contends that the test for rectification is a strict one. The Respondent further contends that in order for rectification to take place:
(1) parties must have a continuing common intention in respect of the matter in the instrument to be rectified;

(2) an outward expression of accord;

(3) that the intention continued at the time the Deed was executed; and

(4) that by mistake the instrument did not reflect the common intention.

201. The Respondent relies on the decision of the Court of Appeal in *Swanland Builders Ltd.* v *Freehold Properties Ltd.*[62] The Respondent also contends that Mr. Schirnding, who could give critical evidence with regard to the circumstances leading to the execution of the Deed, was not called in as a witness and therefore, an adverse inference may be drawn.

202. The Respondent further contends that more fundamentally, a rectification will involve correcting the kind of mistake that occurs when the document incorrectly records or incorrectly gives effect to what the parties actually agreed, The Respondent contends that the waiver is to be given by Berau Coal and, as Berau Coal was not added as a party, the Deed cannot be rectified. The Respondent also contends that the proposed marked-up Deed is in fact patching up defects in the original Deed which cannot be done by way of rectification. Further, the mistake is not just linguistic and the Respondent places great reliance on the words of Lord Clarke in *Mediterranean Salvage and Towage Ltd. v Seamar Trading & Commerce Inc. ("The Reborn")*[63] that what is being attempted by the Claimants is *ex post facto* correction of a Deed and that whilst it is tempting, it is wrong to do so.

203. Having carefully considered the authorities and the submissions of the Claimants and the

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[61] *[2009] 1 AC 1101, paragraphs 59 to 66 in particular*

[62] [2002] 2 E.G.L.R. 71, at [33]

[63] *Mediterranean Salvage and Towage Ltd. V Seamar Trading & Commerce Inc. (The "Reborn") [2009] 2 Lloyd's Rep. 639, at [18].*

Respondent, the Tribunal is of the view that the Deed can be rectified. The Deed as marked-up merely is a correction of errors. It was in the contemplation of the parties, as revealed by the admissible evidence, that the majority of the payments were in fact made by Berau Coal and not by Berau Energy, and the Deed is merely being rectified to correct this.

204. The Tribunal adopts the words of Lord Hoffman in *Chartbrook* where he said that there is no *"limit to the amount of red ink or verbal rearrangement or correction which the court is allowed".* Therefore, in addition to the decision reached by way of construction and implication, the Tribunal is of the view that the Deed can be rectified and orders the rectification in the manner of the marked-up Deed attached to this Award as Schedule A.

Analysis and Decision of the Tribunal on Duty to Co-operate pursuant to Clause 2.3

205. Clause 2.3 of the Deed without amendment reads as follows:-
"The Companies shall carefully consider any new or additional information provided by RR in respect of the payments made by Berau during 2011 and 2012 which Berau has not been able to substantiate as having a clear business purposes and has been specified as such in the annual report and accounts for Bumi for the financial year ended 31 December 2012. If a reputable independent audit firm appointed by the Parties confirms that the information provided by RR evidences a clear business purpose for a payment previously classified by Berau as not having such purpose, the aggregate value of the Assets to be transferred by RR to the Companies (being US$173,000,000) shall be reduced by the amount which such reputable independent audit firm confirms (i) has a clear business purpose, and (ii) relates to the matters set out in lines 1, 2, 4 and 5 of the table entitled "other exceptional costs" *at page 79 of Bumi's annual report and accounts for the financial year ended 31 December 2012."*

206. The clause requires the Claimants to consider any new or additional information provided by the Respondent in respect of payments which Berau Energy has not been able to substantiate as having a clear business purpose and for a reduction of the Assets transferred where a specified confirmation is given by a reputable independent audit firm appointed by the Parties.

207. The Respondent's contention is that pursuant to the clause, the Claimants had a duty to provide the Respondent *"with such explanation, information and documents as may be required by the Respondent to understand why payments were classified as other exceptional costs",* and, as already mentioned, the Respondent relies on the decision in *Mackay v Dick.* However, the facts clearly indicate that the Respondent was President Director of Berau Energy and Berau Coal, and hence, he must have been aware of the relevant payments and may have even authorised some of the payments.

208. The Respondent was also given the opportunity on many occasions to consult with the auditors and the new management of Berau Energy and Berau Coal with regard to these payments. The Respondent was provided with a copy of the April EY Report. Furthermore, the Respondent was subsequently provided with redacted copies of all the EY Reports. The evidence persuades the

Tribunal that the Claimants did co-operate with the Respondent by providing him with information with regard to the payments, which the Claimants alleged had no clear business purpose. Moreover, the Respondent was given many opportunities to seek further information but did not do so and neither did he provide any new information to the contrary that the payments had a clear business purpose.

209. It is therefore the Tribunal's decision that there has been no breach of Clause 2.3 of the Deed.

Analysis and Decision of the Tribunal on Shareholders' Approval.

210. Clause 1.10 and 1.11 of the Deed read as follows:-

"1.10 The Parties agree that if Bumi is required by law or regulation or its constitutional documents to obtain shareholder approval in respect of the waiver of the Potential Claims pursuant to clause 2.1 or any transfer of the Assets (or other property in substitution of the Assets) under this Deed, the approval sought from Bumi's shareholder shall comprise (i) the approval for the transfer of the Assets under this Deed (or other property in substitution of the Assets), and (ii) the waiver in respect of the corresponding proportion of the Potential Claims pursuant to clause 2.1, and that any such shareholder approval shall comprise both (i) and (ii).

If Bumi requires shareholder approval in respect of the waiver of the Potential Claims pursuant to clause 2.1 or any transfer of the Assets (or other property in substitution of the Assets) under this Deed, then RR shall not be obliged to perform his obligations under this Deed which relate to such transfer which requires shareholder consent until Bumi has obtained the requisite shareholder approval."

"1.11 Subject to clause 1.6, RR agrees that:

(a) prior to the date of the completion of the separation of Bumi from PT Bakrie & Brothers Tbk and Long Haul Holdings Ltd and from PT Bumi Resources Tbk (in whatever form such separation shall take) (the Separation Completion Date), he shall transfer, or procure the transfer, to Berau of the Asset referred to in clauses 1.3(a) and 1.3(b) (or, if the relevant transfer requires the Companies to obtain regulatory or shareholder approvals in relation to such, binding documentation in respect of the relevant transfer shall be signed by all Parties by the Separation Completion Date and the transfer shall be completed as soon as practicable thereafter); and

(b) prior to the date which is three months after the date of this Deed (the First Payment Deadline), he shall transfer, or procure the transfer, to Berau of cash (in US Dollars) of at least US$30,000,000 (or, if the relevant transfer requires the Companies to obtain regulatory or shareholder approvals in relation to such, binding documentation in respect of the relevant transfer shall be signed by all Parties by the First Payment Deadline and the transfer shall be completed as soon as practicable thereafter); and

(c) prior to the date which is six months after the date of this Deed (the Second Payment Deadline), all of the transfers of the Assets equal (as determined by a reputable independent third party appointed by the Parties or as otherwise agreed between the Parties) to, in aggregate, US$173,000,000 pursuant to clause 1 shall be completed (or, if the relevant transfer requires the

Companies to obtain regulatory or shareholder approvals in relation to such, binding documentation in respect of the relevant transfer shall be signed by all Parties by the Second Payment Deadline and the transfer shall be completed as soon as practicable thereafter)."

211. The Claimants contend that there is no requirement for shareholders' approval in England and or under the ARM Articles of Association. It had been the Claimants' original understanding that the transfer of assets to the value of US$173 million would require shareholder approval in the Listing Rules R10 and R11. However, the Claimants sought guidance from the Financial Conduct Authority ("FCA") as to whether shareholder approval was required and in the course of the hearing, produced a letter from the FCA dated 8 August 2014. The letter states that shareholder approval is not required and that the relevant Listing Rules have been complied with.

212. The Respondent maintains his contention that his transfer of assets and associated release from the Potential Claims require shareholder approval in view of the UK Listing Rules. The Respondent relies on the exchange of correspondence between his solicitors and the Claimant's previous solicitors where an initial view was taken that shareholder approval would be required, and he refers to the fact that the Claimants in their Reply and Defence to Counterclaim now allege that shareholder approval would not be needed. He contends that the Claimants have not adduced any documentary or witness statement evidence to support that assertion other than the FCA letter, which relies on information provided by the Claimants.

213. The Respondent contends that the Claimants' position has changed dramatically in that in December 2013, the Claimants' solicitors were emphatic that shareholder approval was required. [64] The Respondent adds that the FCA letter raises more questions and answers and hence submits that shareholder approval is a pre-requisite.

214. There is no doubt that the Claimants equivocated on this matter. However, in March of 2014, they informed the Respondent that they were seeking UK Listing Authorities' confirmation whether shareholder approval was required. Eventually, on 8 August 2014, the letter from the FCA was produced in time at the Hearing.

215. Having considered the submissions of the Claimants and the Respondent and having studied the letter of 8 August 2014, the Tribunal is satisfied that shareholder approval is not required in respect of any of the matters referred to in Clauses 1.10 and 1.11 of the Deed.

Analysis and Decision of the Tribunal on whether the parties to the Deed are bound by the KPMG Valuation

216. Clause 1.3 of the Deed reads as follows:-
"The Assets shall comprise, subject to due diligence satisfactory to the Companies and subject to valuation by a reputable independent third party appointed by the Parties or as agreed otherwise

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[64] MacFarlanes' letter dated 20 December 2013 Vol 5 Tab 110.

between the Parties:

(a) a 49 per cent. shareholding in PT Asian Bulk Logistics (and it is noted that the other 51 per cent. shareholding not being transferred comprises 2 per cent. non-voting shares and 49 per cent. voting shares);

(b) a 75 per cent. shareholding in PT Borneo Parapatan Lestari which the Parties agree shall be valued for the purposes of this Deed at US$20,000,000; and

(c) such amount in cash (in US dollars) as equals the difference (if positive) between:

(i) US$173,000,000; and

(ii) the aggregate value of the Assets referred to in clauses 1.3(a) and 1.3(b) at the time such assets are transferred (as determined by a reputable independent third party)."

217. The Respondent contends that the Claimants are bound by an indicative valuation by KPMG of the 100% equity in ABL made pursuant to a letter of engagement dated 8 July 2013.[65] The Respondent adds that the KPMG Valuation complies with the terms of Clause 1.3(a), because it affects the 49 per cent shareholding in ABL identified in that clause as an Asset.

218. It is apparent from the letter of 8 July 2013 that KPMG was instructed by PT Revessel Indonesia, a company controlled by the Respondent, which Mr. Roeslani confirmed.[66] There was no joint letter of appointment by the Claimants and the Respondent. Nevertheless, the Respondent maintains that Mr. Schirnding instructed him to obtain a valuation and hence the valuation is a joint valuation.

219. Although Mr. Schirnding did not give evidence, the Tribunal was referred to an exchange of e-mails between him and Mr. Roeslani in September 2013[67] on which the Respondent relies in addition to Mr. Roeslani's own testimony. The emails from Mr. Schirnding are not conclusive on this issue. In any event the clause requires a joint appointment by tire Claimants and the Respondent. That was not complied with. It also required an unqualified valuation of a 49% shareholding in ABL as opposed to an indicative valuation of the complete equity.

220. Therefore, in the Tribunal's view, having carefully weighed the evidence, the Claimants are not bound by the KPMG Valuation.

Assistance of Counsel

221. The Tribunal is grateful to all counsel for their written and oral submissions. In coming to its decision, it has not only considered the positions of the Parties as summarised in this Award, but also the arguments made in their written and oral submissions. The Tribunal has taken into account all the arguments and submissions even if not referred to expressly, or not set out in full in this Award as they are subsumed in the Tribunal's analysis.

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[65] (Hearing Bundle, Vol 5, Tab 86)

[66] (Transcript Day 3, 147,11-19)

[67] (Hearing Bundle, Vol 5, Tab 93)

XV INTEREST

222. The Tribunal on 29 October 2014 requested a submission on interest from the Claimants and the Respondent. The Respondent sent its submissions on interest to the Tribunal on 3 November 2014 and the Claimants sent their submissions on interest to the Tribunal on 4 November 2014. There was also a response from the Respondent to the Claimant's submissions on interest, which was received by tine Tribunal on 6 November 2014.

223. The Tribunal having considered the submissions of the claimants and the Respondent, awards simple interest at 1% above the US prime rate as published from time to time to the Claimants in respect of the sum of US$173 million, which interest is to be paid in 2 tranches, namely:-
(i) on the sum of US$30 million from 26 September 2013 to the date of the Award; and

(ii) on the sum of US$143 million from 26 December 2013 to the date of the Award.

XVI COSTS OF ARBITRATION

224. Pursuant to Rule 31 of the SIAC Rules, the Tribunal shall specify in the award the total amount of the costs of the arbitration. The costs of the arbitration as determined by the Registrar of SIAC pursuant to Rule 31 of the SIAC Rules is SGD 963,626.81.

The costs of the arbitration are broken down as follows:

	SGD
Tribunal's Fees & Expenses	
Tan Sri Cecil Abraham (Presiding Arbitrator)	
Tan Sri Cecil's Arbitrator's Fees	347,399.46
Tan Sri Cecil's Expenses	6,145.10
Sub-total	*353,544.56*
Bank Charges	*20.00*
Mr David Sutton (Co-Arbitrator)	
Mr Sutton's Arbitrator's Fees	260,549.60
Mr Sutton's Expenses	11,803.30
Sub-total	*272,352.90*

Professor Michael Pryles (Co-Arbitrator)	
Prof Pryles' Arbitrator's Fees	260,549.60
Prof Pryles' Expenses	7,812.09
Sub-total	*268,361.69*
Bank Charges	*19.76*
TOTAL ARBITRATOR'S FEES & EXPENSES	**894,298.91**
SIAC Fees & Expenses	
Administration Fee	49,875.00
SIAC Incidentals + Room rental etc	18,180.28
GST on Expenses (7%)	1,272.62
TOTAL SIAC ADMINISTRATION FEES & EXPENSES	**69,327.90**
TOTAL COSTS OF ARBITRATION	**963,626.81**

The costs of the arbitration shall be paid from the deposits made by the parties to SIAC. Thereafter, the Respondent shall reimburse to the Claimants any amount which the Claimants have paid towards the costs of the arbitration.

XVII LEGAL COSTS AND DISBURSEMENTS

225. The Tribunal, pursuant to Rule 33 of the SIAC Rules, has the authority to order legal and other costs of a party to be paid by the other.

226. The Claimants have claimed a sum of £1,826,512.66 being their legal costs and disbursements, inclusive of the fees deposited with tire SIAC, full particulars of which are set out in their Submissions on Costs dated 24 October 2014.

227. The Respondent has claimed a sum of USD5,698,517.24 being legal costs and disbursements, inclusive of the fees deposited with the SIAC, full particulars of which are set out in the Respondent's Submissions for Costs dated 24 October 2014 and letters dated 3 November 2014 and 6 November 2014.

228. The Tribunal having considered the Submission of the Claimants and the Respondent, is of the view that the Claimants are not entitled to recover the following costs:-
(1) Freshfields' fees of £82,151.36 ;

Clyde & Co acted for the Claimants throughout this arbitration. Freshfields' role, if any, was unclear. No one from Freshfields attended the hearing as a witness. Therefore, the Tribunal does not find any basis for the fees to be recovered from the Respondent.

(2) Counsel's fees of Mr. Iain Milligan QC ("Mr. Milligan") of £9,450.00 ;

The Claimants retained Mr. Milligan. However, the Respondent raised an issue that there could be a conflict in view of tine fact that two members of the Tribunal are also members of the same set of Chambers as Mr. Milligan. Hence, the Claimants instructed Mr. Christopher Pymont QC and Mr. David Mumford. Both of those counsel charged fees for work done before as well as during the hearing. The Tribunal does not consider that three sets of counsel fees should be recoverable in a case such as this. Therefore, this claim is disallowed.

(3) Fees incurred by the 3 non-English law legal advisors in the sum of £18,873.71.

No justification is made out for Mr. Olbourne's fees. The Singapore legal adviser, other than Clyde & Co, is not identified. There is also no explanation of why Indonesian legal advice was needed. The arbitration is governed by English law and the involvement of Indonesian law if any is peripheral. Hence, the Tribunal is of the view that the Claimants are not entitled to recover from the Respondent any of the fees or expenses incurred in respect of the 3 non-English law legal advisors.

229. The Claimants are in the Tribunal's view pursuant to Rule 33 of the SIAC Rules, entitled to the sum of £1,342,823.48 by way of legal costs and disbursements.

XVIII SUMMARY OF THE TRIBUNAL'S DECISION

230. The decision of the Tribunal is summarised as follows:
Issue 1

The Deed is not void by way of common mistake.

Issue 2

The Deed is not capable of rescission because of misrepresentation.

Issue 3

The mis-description in the Deed can be corrected by way of construction, implication or rectification.

Issue 4

There is no breach of the duty to co-operate pursuant to Clause 2.3 of the Deed.

Issue 5

There is no necessity for the Claimants to seek shareholder approval pursuant to Clauses 1.10 and 1.11 of the Deed.

Issue 6

The Claimants are not bound by the KPMG Valuation produced by the Respondent.

XIX HOLDING OF THE AWARD

231. For the reasons set out above, the Tribunal Declares, Orders and Awards as follows:
(i) Specific performance of the Deed dated 26 June 2013, as amended in accordance with the schedule to this Award;

(ii) The Respondent transfers to Berau Energy assets equal in value to US$173 million including:

(a) the transfer of a 49% shareholding in ABL;

(b) the payment or transfer of such amount in cash (in US dollars) as equals the difference between US$173 million and the value of the 49% shareholding in ABL;

(c) alternatively, the Respondent pays the sum of US$173 million together with simple interest at 1% above the US prime rate as published from time to time to the Claimants which interest is to be paid in 2 tranches, namely:-

(i) on the sum of US$30 million from 26 September 2013 to the date of the Award; and

(ii) on the sum of US$143 million from 26 December 2013 to the date of the Award.

(iii) The Claimants are not in breach of Clause 2.3 of the Deed;

(iv) That regulatory or shareholder approval of ARM is not required pursuant to Clauses 1.10 and 1.11 of the Deed;

(v) The Claimants are not bound by the KPMG Valuation;

(vi) The Claimants are not entitled to any damages;

(vii) The Respondent's counterclaim be dismissed;

(viii) The Respondent shall pay the Claimants' legal costs and other-expenses incurred by the Claimants in this arbitration in the sum of £1,342,823.48;

(ix) That the costs of the arbitration in the sum of SGD 963,626.81 as determined by the Registrar of SIAC be paid from the deposits made by the parties to SIAC, and thereafter, that the Respondent reimburse to the Claimants any amount which the Claimants have paid towards the costs of the

arbitration.