SIAC (SINGAPORE INTERNATIONAL ARBITRATION CENTRE)

SIAC Case No. ARB084/15/KJ

BETAMAX LTD. V. STATE TRADING CORPORATION

FINAL AWARD

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05 June 2017

Tribunal:
Michael C. Pryles (Sole arbitrator)

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Final Award

I. Introduction

A. Parties and their Legal Representatives

1. The Claimant is Betamax Ltd **(Betamax** or **Claimant),** a company organised under the laws of Mauritius, with the following contact details:

Betamax Ltd
La Tour Koenig
Pointe aux Sables
Mauritius
Tel: +(230) 243 0800
Email: v.bhunjun@betonix.intnet.mu

2. The Claimant is represented in this arbitration by Mr Rishi Pursem SC and Mr Bilshan Nursimulu of Benoit Chambers and Mr Stuart Isaacs QC and Mr Ben Burnham of King & Spalding LLP **(K&S),** with the following contact details:

Mr Rishi Pursem, Senior Counsel / Mr Bilshan Nursimulu
c/o Benoit Chambers
Level 9, Orange Tower
CyberCity, Ebene
Mauritius
Tel: +(230) 403 6900
Fax: +(230) 403 6910
Email: rp@bc.intnet.mu / bn@bc.intnet.mu

and

Mr Stuart Isaacs QC / Mr Ben Burnham
c/o King & Spalding LLP
125 Old Broad Street
London EC2N AR1
United Kingdom
Email: SlsaacsQC@kslaw.com / Bburnham@kslaw.com

3. The Respondent, State Trading Corporation **(STC** or **Respondent,)** is a Mauritian public body operating as a body corporate under the aegis of the Ministry of Industry, Commerce and Consumer

Protection **(MOI).** The Respondent's contact details are as follows:

State Trading Corporation
3rd Floor, Fon Sing Building
12 Edith Cavell Street
Port Louis
Mauritius
Tel: +(230) 208 5440
Fax: +(230) 208 8359
Email: stc@stcmu.com

4. The Respondent is represented by Mr Kelvin Poon and Ms Alessa Pang of Rajah & Tann Singapore LLP **(R&T),** Mr Andre Robert of BLC Robert & Associates **(BLC)** and Mr Ravindra Chetty, SC of 5 St James Court **(5 St James)** with the following contact details:

Mr Kelvin Poon / Ms Alessa Pang
Rajah & Tann Singapore LLP
9 Battery Road, #25-01
MYP Centre
Singapore 049910

and

Mr Andre Robert, Senior Attorney
c/o BLC Robert & Associates
8, Georges Guibert Street
Port Louis
Mauritius

and

Mr Ravindra Chetty, SC
c/o 5 St James Court
5 St James Court
St Denis Street
Port Louis
Mauritius

B. Background to the dispute

5. The Claimant is one of a group of approximately 20 companies owned by the Bhunjun family **(Bhunjun Group).** [1] The Bhunjun Group has an annual turnover of approximately USD 110 million and has fixed assets valued at approximately USD 200 million. [2] The activities of the Bhunjun Group have historically been focused on property development and the construction industry, but also

[1] Witness Statement of Veekram Bhunjun, 5 April 2016 (First Bhunjun Statement), [1] and [3].
[2] First Bhunjun Statement, [5].

now include hotel and shipping interests.[3] Betamax's immediate parent company is Betonix Ltd **(Betonix),** which manufactures readymix concrete.[4] Betamax was incorporated on 6 May 2009.[5] Veekram Bhunjun is the CEO of the Bhunjun Group and a director of Betamax.[6]

6. The Respondent was set up in October 1982 under the State Trading Corporation Act 1982 (amended in 1988) **(STC Act).** STC acts under the aegis of the MOI, which, since 2010 is the ministry assigned the responsibility of trade and shipping. Before that, the MOI was called the Ministry of Industry, Small and Medium Enterprises, Commerce and Cooperatives and the Ministry of Trade and Shipping.[7]

7. Under section 5 of the STC Act, STC is administered by a Board consisting of representatives of five Ministries, the Director of the Mauritius Ports Authority (formerly the Mauritius Marine Authority), up to three other members appointed by the responsible Minister and a chairman appointed by the responsible Minister with the Prime Minister's approval. Under section 10, the responsibility for the execution of the Board's policy lies with STC's General Manager, who is appointed by the Minister with the Prime Minister's approval and who must act in accordance with such directions as he may receive from the Board. Under section 14, the Minister may, in relation to the exercise by STC of its powers, give such directions of a general character to STC, not inconsistent with the STC Act, as he considers necessary in the public interest and STC must comply with those directions.

8. Mauritius imports all of the oil it uses, and STC is responsible for arranging these imports. STC is also responsible for importing liquefied natural gas. STC also supplies the domestic Mauritian market with commodities such as flour and rice.[8]

9. Until 31 July 2010,[9] all of the oil was imported by Pratibha Shipping Co. Ltd **(Pratibha)** (transporting white oil) and ST Shipping & Transport **(ST Shipping)** (transporting black oil) under three-year contracts.[10]

10. The dispute between Betamax and STC concerns the agreement between the parties signed on 27 November 2009 **(CoA)** under which Betamax would replace Pratibha and ST Shipping as the supplier of all of Mauritius' oil imports.

11. The terms of the CoA required Betamax to construct, own, lease, operate and maintain a vessel **(Vessel),** and to make available to the Respondent the freight capacity of the Vessel.

12. Under the CoA, STC was obliged to:

    (a) hire and pay for 100% of the freight capacity of the Vessel for a period of 15 years; and

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[3] First Bhunjun Statement, [5].
[4] First Bhunjun Statement, [4].
[5] First Bhunjun Statement, [3].
[6] First Bhunjun Statement, [1].
[7] Witness Statement of Balram Asyrigadoo, 7 April 2016 (First Balram Statement), [6] and [7].
[8] First Balram Statement, [8].
[9] Letter from STC to MOB, 20 November 2008 [Bundle D(l), D30],
[10] First Bhunjun Statement, [57], letter from STC to BDO, 20 October 2009 [Bundle D(lll), D87].

(b) grant Betamax a right of first refusal to transport the quantity of petroleum products imported into Mauritius by the Respondent that exceeded the freight capacity of the Vessel.

13. As regards the freight payable under the COA, the Claimant expected to receive USD 17.6 million for the first year, which sum shall increase annually by a percentage that escalates throughout the 15-year term of the CoA. The escalation rate was:

(a) 1 % for the first 5 years;

(b) 1.5% for the next 5 years; and

(c) 2% for the remaining 5 years.

Essentially, the terms of the CoA envisaged that the Claimant would earn at least USD 290 million over the 15-year term of the CoA, regardless of the actual prevailing market freight rates.

14. On 4 February 2015, STC informed Betamax that STC was "unable to avail itself of [Betamax's] services for the transport of petroleum products from New Mangalore any longer". [11]

15. On 5 February 2015, Betamax served notice on STC, purportedly under clause 10.2.2 of the CoA, to comply with its obligations under the CoA within 60 days. [12] However, by a letter dated 23 February 2015 from its lawyer, STC reiterated that it was "unable" to avail itself of Betamax's services. [13]

16. On 7 April 2015, Betamax sent STC a termination notice under clause 10.6.1 of the CoA. [14]

II. Procedural history

17. On 15 May 2015, Betamax filed a Notice of Arbitration dated 14 May 2015 in respect of this matter with the Singapore International Arbitration Centre **(SIAC)** and this arbitration was deemed to have commenced on 18 May 2015.

18. In its Notice, Betamax relied on clause 12 (specifically, clause 12.4) of the CoA. The arbitration agreement between Betamax and STC is set out at clauses 12.4 to 12.7 of the CoA, which, relevantly provide as follows.

Dispute Resolution

12.4 If a Dispute cannot be settled within twenty (20) Business Days by mutual discussions pursuant to clause 12.1 following notice from one Party to the other Party that a Dispute exists, and is not required to be referred by this Agreement to an Expert, either Party may refer the Dispute

[11] Letter from STC to Betamax, 4 February 2015 [Bundle D(V), D140].
[12] Notice from Betamax to STC, 5 February 2015 [Bundle D(V), D141].
[13] Letter from STC's solicitors to Betamax, 23 February 2015 [Bundle D(V), D142].
[14] Notice from Betamax to STC, 7 April 2015 [Bundle D(V), D145].

by notice to the other to be finally and bindingly determined by an Arbitrator in accordance with the SIAC Rules, as amended from time to time. The Arbitrator shall possess skills in the interpretation, negotiation or implementation of procurement contracts or financial and economic analysis (as appropriate) and shall not, directly or indirectly, be associated with either Party as officier, employee, consultant, contractor or otherwise. The Parties will jointly appoint an arbitrator within twenty (20) Business Days of the referral of the Dispute to arbitration. If an Arbitrator is not appointed within the time limits set forth in the preceding sentence, either Party may request the SIAC to appoint an Arbitrator as quickly as possible (and the SIAC Court shall be the appointing authority under the SIAC Rules). The Arbitrator shall be engaged on such reasonable terms as the Arbitrator shall accept. The Parties undertake to implement the arbitration award. The place and seat of the arbitration shall be Port Louis and the language of the arbitration shall be English.

12.5 In the event that the Arbitrator fails or is unable to act in relation to the Dispute for a continuous period of one (1) Month or (being a firm or partnership) is dissolved or discontinued or (being a company) goes into liquidation other than for the purpose of a scheme of reconstruction or amalgamation, or commences carrying on its business under an administrator, receiver, manager or liquidator for the benefit of its creditors, then the parties to the Dispute shall agree on a substitute Arbitrator. The substitute Arbitrator shall be selected in accordance with the procedure specified in clause 12.4.

12.6 The Arbitrator shall apportion the costs of the arbitration including incidental expenses between the Parties as he shall think fit. The award rendered shall be in writing and shall set forth in reasonable detail the facts of the Dispute and the reasons for the Arbitrator's decision.

12.7 During the course of any arbitration under this clause 12:

(a) the Parties shall to the maximum extent possible continue to perform their respective obligations under this Agreement;

(b) neither Party shall exercise any other remedies under this Agreement with respect to the matters in Dispute.

19. This arbitration is being administered under the Arbitration Rules of the Singapore International Arbitration Centre (5th Edition, 1 April 2013) **(SIAC Rules)** and the seat of arbitration is Mauritius.

20. Clause 13.15 of the CoA provides that the governing law is Mauritian law, as follows.

13.15 Governing Law

The interpretation and performance of this Agreement and each of its provisions and any Disputes shall be governed and construed in accordance with the Laws of the Republic of Mauritius.

21. On 1 June 2015, STC filed a Response to the Notice of Arbitration. On 8 June 2015 STC filed an Amended Response to the Notice of Arbitration.

22. On 30 June 2015, pursuant to Rule 6.3 of the SIAC Rules, the President of the Court of Arbitration of SIAC appointed me, Dr Michael Pryles as the sole arbitrator in this arbitration **(Sole Arbitrator** or T **ribunal).** On 2 July 2015, SIAC notified the parties that I had accepted the appointment following the parties' joint nomination. The Tribunal's contact details are as follows.

Dr Michael Pryles AO PBM
c/o Dispute Resolution Services Pty Ltd
Suite 304, 521 Toorak Road
Toorak, Victoria 3142, Australia
Tel: +61 3 8590 5642

23. On 6 July 2015, the Tribunal circulated Procedural Order No. 1 in draft form for the parties' consideration and comment. Betamax submitted comments. However, in light of its foreshadowed jurisdictional challenge, STC did not propose to comment on the draft Procedural Order on the basis that the draft mainly pertained to the proceedings on the merits.

24. Additionally, by the letter dated 6 July 2015, the Tribunal proposed that Mr Timothy Maxwell be appointed as Tribunal Secretary to assist with administrative matters. Betamax agreed to Mr Maxwell's appointment by email of the same date, and STC agreed by email of 7 July 2015.

25. On 14 August 2015, Betamax submitted its Statement of Claim.

26. In accordance with Rule 16.3 of the SIAC Rules, on 20 August 2015 the Tribunal held a preliminary meeting with the parties by telephone. By letter dated 21 August 2015 the Tribunal confirmed the orders made at the preliminary meeting, which established a timetable for the disposition of STC's application to have the question of the Tribunal's jurisdiction heard as a preliminary issue.

27. In accordance with the directions recorded in the letter of 21 August 2015, on 3 September 2015 STC submitted an application to have some, but not all, of its objections to the Tribunal's jurisdiction determined as preliminary issues. Further, on 14 September 2015, Betamax provided submissions in opposition to STC's application for bifurcation of the jurisdictional issue. On 21 September 2015, STC provided submissions in reply. On 7 October 2015, the Tribunal issued Procedural Order No. 2 concerning STC's application for certain jurisdictional objections to be determined as preliminary issues.

28. By letter dated 7 October 2015, the Tribunal noted the position with respect to the draft of Procedural Order No. 1. At the invitation of the Tribunal, STC provided comments on 23 October 2015, to which Betamax responded on 24 October 2015. On 25 October 2015 the Tribunal issued Procedural Order No. 1. The parties' comments and proposed amendments were considered in preparing the final version.

29. On 21 October 2015, STC submitted its Statement of Defence, in accordance with the Tribunal's directions of 1 September 2015.

30. On 6 November 2015, Betamax submitted its Statement of Reply.

31. On 6 November 2015 STC submitted its proposed procedural timetable, noting that the proposal accommodated timelines for STC's Amended Statement of Defence, as well as Betamax's Amended Statement of Reply (if so required). The Tribunal observed that this was, in substance, an application to amend the Statement of Defence. At the invitation of the Tribunal, Betamax submitted brief comments on the application. On 10 November 2015 the Tribunal granted leave for STC to serve an Amended Statement of Defence and Betamax an Amended Statement of Reply.

32. On 10 November 2015 the Tribunal issued Procedural Order No. 3, which established a procedural timetable for the arbitration, following due consideration of the parties' respective submissions dated 6 November 2015.

33. In accordance with Procedural Order No. 3 (as amended) and other directions from the Tribunal, the parties provided the following materials to the Tribunal:

(a) Pleadings and submissions

(i) STC's Amended Statement of Defence dated 12 November 2015;
(ii) Betamax's Amended Statement of Reply dated 13 November 2015;
(iii) STC's Rejoinder dated 10 December 2015;
(iv) STC's Second Amended Statement of Defence submitted on 5 July 2016 **(Statement of Defence (Amendment No. 2));**
(v) Betamax's Outline of Submissions dated 29 July 2016;
(vi) STC's Outline of Submissions dated 29 July 2016;
(vii) Betamax's Closing Submissions dated 5 October 2016 **(Betamax's primary closing submissions);**
(viii) STC's Closing Submissions dated 5 October 2016 **(STC's primary closing submissions);**
(ix) Betamax's Reply Closing Submissions dated 26 October 2016 **(Betamax's reply closing submissions);**
(x) STC's Reply Closing Submissions dated 26 October 2016 **(STC's reply closing submissions);**
(xi) Betamax's Statement of Costs dated 26 October 2016 **(Betamax's submissions on costs);** and
(xii) STC's Statement of Costs dated 26 October 2016 (as amended by email dated 27 October 2016) **(STC's submissions on costs);**

(b) Witness statements - Betamax

(i) Witness Statement of Mr Veekram Bhunjun dated 5 April 2016 **(First Bhunjun Statement);** and
(ii) Supplemental Statement of Mr Veekram Bhunjun dated 2 May 2016;

(c) Witness statements - STC

(i) Witness Statement of Mr Balram Asyrigadoo dated 8 April 2016 **(First Balram Statement);**
(ii) Witness Statement of Mr John Lam Choo dated 8 April 2016; and
(iii) Supplemental Witness Statement of Mr Balram Asyrigadoo dated 13 May 2016;

(d) Expert reports - Betamax

(i) Report of Mr Charles Lawrie dated 9 May 2016;
(ii) Report of Mr Peter Daniel dated 11 May 2016;
(iii) Supplementary Report of Mr Peter Daniel dated 14 July 2016 **(Daniel's Supplementary Report);**

and
(iv) Supplementary Report of Mr Charles Lawrie dated 14 July 2016 **(Lawrie's Supplementary Report);**

(e) Expert reports - STC

(i) Report of Ms Jean Richards dated 15 June 2016, together with a Table of Errata to this Report submitted on 24 June 2016 **(Richards' Primary Report);**
(ii) Supplementary Report of Ms Jean Richards dated 14 July 2016; and
(iii) Second Supplementary Report of Ms Jean Richards dated 26 July 2016;

(f) Joint expert reports

(i) Joint Report signed by Ms Jean Richards and Mr Charles Lawrie dated 5 July 2016 **(Richards and Lawrie Joint Report);** and
(ii) Joint Report signed by Ms Jean Richards and Mr Peter Daniel dated 4 July 2016; and

(g) Other

(i) an agreed chronology of events submitted 8 July 2016;
(ii) agreed dramatis personae submitted 8 July 2016;
(iii) an agreed list of abbreviations submitted 8 July 2016; and
(iv) Ms Jean Richards' Revised Calculation for Termination under clause 10.7.1 dated 20 September 2016.

34. Following exchanges by the parties, on 3 February 2016, the Tribunal determined the parties' outstanding requests for the production of documents.

35. By an email dated 20 April 2016, STC informed the Tribunal of its concern that "details of the present arbitration proceedings have been leaked to the Mauritian press". STC further said that it "would also like to put on record its concerns about the impact (and possible prejudice) that the disclosure of information would have on the present proceedings", without elaboration. Betamax responded to this allegation by email dated 21 April 2016. On 21 April 2016, the Tribunal confirmed receipt of Betamax's email and attachment, and observed that it did not propose to read it unless a party formally put it on the record. STC's allegation that confidential details of the proceeding were leaked was not the subject of any subsequent application to the Tribunal.

36. On 20 April 2016, STC applied for an order that Betamax produce a category of documents listed in a further Redfern Schedule dated 20 April 2016. Following an exchange by the parties, on 27 April 2016 the Tribunal determined that there be no order in respect of STC's further application for production of documents.

37. On 21 April 2016, STC requested that certain paragraphs of the First Bhunjun Statement be struck out and excluded as evidence. Betamax submitted a response dated 22 April 2016, STC submitted a reply dated 27 April 2016, and Betamax submitted a rejoinder dated 29 April 2016. On 2 May 2016, the Tribunal ordered that the specified paragraphs of the First Bhunjun Statement be struck from the record.

38. On 3 June 2016, STC applied for the evidentiary hearing to be held in Singapore. On 4 June 2016, Betamax provided its comments on the application. On 6 June 2016, the Tribunal issued Procedural Order No. 4, ruling that the evidentiary hearing be held in Mauritius. STC subsequently confirmed that it did not object to the hearing taking place at the Oberoi Hotel in Mauritius, and Procedural Order No. 4 was amended accordingly.

39. On 15 June 2016, the Tribunal ruled upon the Betamax's application for specific document production dated 9 June 2016. On 21 June 2016, STC disclosed the subject documents.

40. On 5 July 2016, STC purported to submit a Second Amended Defence. On 8 July 2016 Betamax noted that it did not oppose the application, and that it took the view that an amended statement of reply was not necessary or cost effective. As recorded in Procedural Order No. 5, the Tribunal granted STC's application to amend its Statement of Defence, such that Statement of Defence (Amendment No. 2) stands as the Statement of Defence.

41. On 8 July 2016, the Tribunal held a case management conference with the parties by telephone. In advance, the Tribunal circulated a Pre-Hearing Checklist for consideration. Following the case management conference, the Tribunal issued Procedural Order No. 5 dated 11 July 2016, embodying the orders made.

42. On 14 July 2016, the Tribunal issued a settled List of Issues, following due consideration of Betamax's proposal dated 8 July 2016 (as amended 13 July 2016) and STC's proposal dated 12 July 2016.

43. On 3 August 2016, Betamax purported to submit the Third Witness Statement of Mr Veekram Bhunjun dated 2 August 2016. STC objected to the attempt to tender the Third Witness Statement. At the hearing the Tribunal ruled that the Third Witness Statement of Veekram Bhunjun, together with the annexures, would not be admitted. [15]

44. An evidentiary hearing was held at the Oberoi Hotel in Mauritius from 8 August 2016 through 10 August 2016 **(Hearing).** In addition to the Sole Arbitrator and the Tribunal Secretary, the following persons were present at the Hearing:

(a) For Betamax:

(i) Mr Veekram Bhunjun (Betamax party representative)
(ii) Mr Dinesh Kalikaparsad (Betamax)
(iii) Ms Deepa Baynath (Betamax)
(iv) Mr Charles Lawrie (expert witness)
(v) Mr Peter Daniel (expert witness)
(vi) Mr Rishi Pursem SC (Benoit Chambers)
(vii) Mr Bilshan Nursimulu (Benoit Chambers)
(viii) Mr Clarel Benoit (Benoit Chambers)
(ix) Mr Anjeev Hurry (Benoit Chambers)
(x) Mr Stuart Isaacs QC (K&S)
(xi) Mr Benjamin Burnham (K&S)

[15] Hearing day one, T5.8-12.

(xii) Mr Balaji Singh Teeka (Executive Ship Management Pte Ltd)

(b) For STC:

(i) Mr Rajanah Dhaliah (STC party representative)
(ii) Mr Balram Asyrigadoo (fact witness)
(iii) Mr John Lam Choo (fact witness)
(iv) Mr Jean Richards (expert witness)
(v) Mr Kelvin Poon (R&T)
(vi) Ms Alessa Pang (R&T)
(vii) Ms Cindy Ko (R&T)
(viii) Mr Stefan Wandrey (R&T)
(ix) Mr Andre Robert, SA (BLC)
(x) Mr Ravindra Chetty, SC (5 St James Court)
(xi) Ms Zeenat Cassamally (5 St James Court)
(xii) Ms Drishti Ramdewar (5 St James Court)
(xiii) Ms Varuna Govinden (5 St James Court)

45. During the Hearing, the Tribunal asked whether STC was pleading that there was a breach of the "earlier act", being the Central Tender Board Act 2000 (Act 32/2000) **(CTB Act).** On 26 August 2016, STC provided a response to this issue. At the invitation of the Tribunal, Betamax submitted responsive comments on 31 August 2016.

46. On 9 December 2016, the Tribunal refused Betamax's application of 24 November 2016 for leave to admit a further document dated 23 November 2016 to the record.

47. On the basis of the decision that the Tribunal reached on all of the substantive matters in dispute, on 13 April 2017, the Tribunal sought the assistance of the parties' experts with the application of the appropriate discount rate to the sum to be awarded to Betamax for damages. This was in accordance with the Tribunal's proposal that, if necessary, the Tribunal communicate directly with the parties' respective experts on the specific issue of the application of the discount factor. Betamax agreed to this proposal through counsel at the hearing,[16] and STC agreed by email dated 22 August 2016.

48. The Tribunal received a response from STC's expert, Ms Richards, on 13 April 2017, and a response from Betamax's expert, Mr Daniel, on 15 April 2017. In response to a request from the experts, on 18 April 2017, the Tribunal gave Ms Richards and Mr Daniel permission to communicate with another of Betamax's experts, Mr Lawrie. Pursuant to the instructions of the Tribunal, on 19 April 2017, the Tribunal received the jointly agreed discounting calculations of the award, including two alternative calculations of the figures reflecting the opposing positions of Ms Richards and Mr Lawrie on a discrete issue concerning how damages are to be calculated. Ms Richards and Mr Lawrie provided separate reports to the Tribunal, both of 20 April 2017, explaining their opposing positions on that issue. The issue on which they are opposed is discussed in paragraphs 302 and 303 below.

[16] Hearing day three, T151.14.

49. The proceedings were closed on 2 June 2017 by a letter sent by email to the parties.

III. Contract of affreightment

A. Inception of the Tanker Project and invitation of expressions of interest

50. In March 2006, the then Government of Mauritius constituted a steering committee to study various approaches that Mauritius could take to expand and strengthen the Mauritian national shipping line, Mauritius Shipping Corporation Limited **(MSCL).**[17]

51. One of the suggested approaches that the then Government wished to study was for MSCL and/or STC to bareboat or time charter an oil tanker for the transportation of part of Mauritius's petroleum products or alternatively for MSCL to acquire its own tanker.[18]

52. One of the concerns identified at that time was that the importation of petroleum products, which is a captive cargo and vital for security and for the economy, was exclusively dependent on foreign operators who may at any time be reluctant to service Mauritius for reasons beyond the control of the then Government.[19] A critical goal of the feasibility study was to explore "all possible options for stabilization of maritime freight rates."[20]

53. In 2007, Maritime Logistics and Trade Consulting **(MLTC)** conducted the study pursuant to the recommendations of the steering committee. MLTC made the following findings in its final report dated 25 May 2007.[21]

(a) The dependence on foreign tanker operators should be reduced and security through timely supplies ensured because petroleum products are a captive cargo for Mauritius and the country's product requirements are expected to double in the years to come.

(b) Between USD 12.6 million and USD 13.5 million could be saved by STC using its own tanker through:

(i) better control over pricing, delivery and the timing and volume of imports;
(ii) improved purchasing of appropriate volumes of petroleum products; and
(iii) no shortages and reduced operating costs through control over voyage patterns and creation of new jobs.

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[17] First Balram Statement, [21], Letter from MOI to STC, 3 March 2006.

[18] First Balram Statement, [22], Letter from MOI to STC, 3 March 2006, pp 2 to 3.

[19] First Balram Statement, [22], Letter from MOI to STC, 3 March 2006, p 2.

[20] Letter from MOI to STC, 3 March 2006, pp 2 to 3, and see pp 12 to 13, Letter from Shipping Ministry to STC, 27 Feb 2007.

[21] First Balram Statement, [23] to [24], Letter from Shipping Ministry to STC, 27 Feb 2007 [RBD: R3], Letter from Shipping Ministry to STC, 3 October 2007 [RBD: R5], Letter from MSCL to STC, 17 August 2007 [RBD: R4]; First Bhunjun Statement, [15] to [16]; Extract from final feasibility study, 25 May 2007 [Bundle D(l), D7].

(c) MSCL should acquire a new tanker as a means of expanding and strengthening the national shipping line of Mauritius.

54. On 23 October 2007, the Mauritius Chamber of Commerce and Industry **(MCCI)** sent an email circular to its members, which included the following statements.[22]

Government has decided to go ahead with the purchase of a 47,000 DWT double hull tanker. The project value is presently USD 51M.

The Ministry of Public Infrastructure, Land, Transport and Shipping is exploring possibilities of financing by local private companies. Members who are interested in the equity participation are invited to submit their contact details to the Chamber for on-ward transmission to the Ministry.

55. The Bhunjun Group responded shortly after receiving the email, expressing its interest in the project.[23]

56. On 18 January 2008, the Ministry of Public Infrastructure, Land, Transport and Shipping (MPI) held a meeting with the six private companies that had expressed interest.[24] Mr Bhunjun attended that meeting on behalf of the Bhunjun Group.[25] At that meeting, the following points were explained by government representatives to the private company participants.[26]

(a) The feasibility study commissioned by the Government showed that the tanker project was profitable and viable. The Government had therefore decided to invite private sector participation. The Government would guarantee that the new company that will own the tanker will be provided with cargo from STC for 15 years.

(b) The study recommended the purchase of a double hull tanker of 47,000 dead weight tonnes (DWT) which would carry around 90% of the country's petroleum products and 10% of the remaining cargo by chartering of vessels. Financial analysis showed there were substantial savings of USD 13.5 million per annum based on an investment of USD 47 million.

(c) The freight rate of the cargo would be determined by international market forces, and the Government would not subsidise the freight rate. The private sector would finance and manage the project.

(d) Formal expressions of interest would be sought.

57. On 4 March 2008, MPI sent the Bhunjun Group a formal request for an expression of interest in the procurement, financing, operation and management of a 47,000 DWT to 53,000 DWT double-hull tanker vessel **(Tanker Project).**[27] On 28 March 2008, the Bhunjun Group responded with a formal

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[22] First Bhunjun Statement, [11] to [12], email from MCCI, 23 October 2006 [Bundle D(l), D15].

[23] First Bhunjun Statement, [17].

[24] First Balram Statement, [29]; First Bhunun Statement, [23]; Minutes of the meeting of 18 January 2008 [Bundle D(l), D19].

[25] First Bhunjun Statement, [23]; Minutes of the meeting of 18 January 2008 [Bundle D(l), D19].

[26] First Balram Statement, [32]; First Bhunun Statement, [24]; Minutes of the meeting of 18 January 2008 [Bundle D(l), D19].

expression of interest.[28] The Bhunjun Group proposed that Betonix would partner, in a joint venture, with Executive Ship Management Pte Ltd **(ESM),** a Singaporean company that provided comprehensive shipping management services (the **JV).**[29] The JV's formal expression of interest was the only one submitted that complied with the requirements set out in MPI's request of 4 March 2008.[30]

B. Negotiation of the CoA

58. On 12 January 2009, MPI wrote to Betonix, informing it that the Government agreed in principle to the JV "acquiring and operating a double-hull tanker vessel for the transportation of petroleum products for Mauritius for a period of 15 years as from August 2010" under the following terms and conditions.[31]

(a) Betonix Ltd would hold 85% and ESM 15% of the shares in the new company which will own and manage the new tanker vessel.

(b) The JV would fully finance the purchase of the double-hull tanker vessel from their own funds and without any financial commitment and involvement whatsoever from the Government.

(c) The vessel would be registered locally.

(d) Freight rates to be charged in connection with the transportation of petroleum products would have to be jointly agreed upon between the JV on the one side, and STC on the other, and would be based on rebates available with regard to indicative market rate **(Freight Condition).**

(e) STC would provide the JV with a guarantee of a 15-year captive cargo so long as the Freight Condition was respected.

59. The JV then met with its financiers and advisors over a period of months and developed its response to the letter of 12 January 2009. The JV also discussed the likely terms of that response with port officials, STC and MPI.[32]

60. On 30 March 2009, the JV wrote to STC, providing a draft contract of affreightment and implementation agreement.[33] The proposed agreements provided for the following key terms.

(a) The tanker would be 64,320 DWT, and built new in South Korea.

(b) The vessel would be owned by a Mauritian company and fly the Mauritian flag.

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[27] Letter from MPI to Mr Bhunjun, 4 March 2008 [Bundle D(l), D20],

[28] First Bhunjun Statement, [33].

[29] First Bhunjun Statement, [20].

[30] First Balram Statement, [34]; First Bhunjun Statement, [33].

[31] Letter from MPI to Mr Bhunjun, 12 January 2009 [Bundle D(l), D31].

[32] First Bhunjun Statement, [45] to [46], [52], [54] and [69] to [70].

[33] First Bhunjun Statement, [76]; letter to STC, 30 March 2009 [Bundle D(l), D39],

(c) It proposed a rate of USD 17.19 per metric tonnes (MT) for the freight capacity of the vessel for a round trip to Mangalore.

(d) That rate would increase by a percentage set out in the CoA each year.

61. On 7 April 2009, the JV wrote to the Ministry of Finance and Economic Empowerment (MOFED) seeking a guarantee of STC's obligations for the duration of the 15-year contract, in the form of an Implementation Agreement.[34] The Government agreed to provide this guarantee shortly before the CoA was signed.[35]

62. In April and May 2009, the terms of the contract were negotiated between the JV and STC.[36] As a result of those negotiations, the following changes were made to the proposal put by the JV on 30 March 2009.[37]

(a) The escalation rate was reduced by 0.2%.

(b) Demurrage was reduced from USD 50,000 to USD 42,500.

(c) The lay times (during which STC was entitled to unload the vessel's cargo) were increased from 130 to 180 hours.

(d) The JV was required to provide a performance bond equivalent to 5% of the annual freight revenue, to be renewed in May of each year.

63. On 6 May 2009, STC's board approved the revised terms, including the following.[38]

(a) A15-year captive cargo agreement at the rate of USD 17.19 per MT based on a yearly requirement of 1,024 million MT of petroleum products,

(b) That freight rate would escalate by 1% for the first 5 years, 1.5% for the next 5 years and 2% for the remaining 5 years.

64. Further, on 6 May 2009, Betamax was incorporated.[39]

65. On 3 July 2009, STC sent Betamax a revised draft of the CoA, proposing changes to the termination clause and the Government guarantee.[40]

66. The parties continued to negotiate the details of the CoA, in particular the termination clause, for

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[34] First Bhunjun Statement, [77] and [103]; letter to MOFED, 7 April 2009 [Bundle D(l), D44].

[35] First Bhunjun Statement, [79].

[36] First Bhunjun Statement, [83].

[37] First Bhunjun Statement, [84], and see Extract of the minutes of the meeting of the board of STC, 28 April 2009 [Bundle D(l), D56].

[38] Extract of the minutes of the meeting of the board of STC, 6 May 2009 [Bundle D(l), D62]. excluding port dues cost, taxes and bunkering costs which will be borne by STC.

[39] First Bhunjun Statement, [96].

[40] First Bhunjun Statement, [101], email from STC to Betamax, 3 July 2009, attaching revised draft CoA [Bundle D(ll), D68].

the next three to four months [41]

67. During this period, in October 2009, STC engaged a consultancy firm, BDO De Chazal Du Mee **(BDO),** to review the then current offer by comparing it to the rates then being paid under the existing supply contracts with Pratibha and ST Shipping. [42] In its final report, BDO concluded that Betamax's price proposal was, on average, more competitive. [43]

68. STC then engaged BDO to verify the project costs on which Betamax's proposal was based. [44] BDO found that most of the project costs seem reasonable, given the assumptions BDO made. [45]

69. On 27 November 2009, the parties signed the CoA. [46]

C. *Performance of the CoA and subsequent events*

70. The Vessel's maiden voyage began on 25 April 2011, when she left the shipyard in South Korea and sailed to the Mangalore Refinery. On 20 May 2011, she sailed from Mangalore and reached Mauritius on 27 May 2011, [47] From May 2011 to December 2014, Betamax received freight income of more than USD 101 million [48]

71. At the time the CoA was concluded, the government of Mauritius consisted of the Labour Party in coalition with the Parti Mauricien Social Democrate **(PMSD).** Following a general election on 5 May 2010, the government consisted of the Labour Party in coalition with the PMSD and the Mouvement Socialist Militant **(MSM).** On 26 July 2011, the MSM withdrew from the government, followed on 5 June 2014 by the PMSD. A general election was held in Mauritius on 10 December 2014 which was won by a coalition called the *Alliance Lepep,* whose members included the MSM and PMSD. [49]

72. On 30 January 2015, the new government of Mauritius - which was not a party to the CoA - announced at a press conference that it had terminated the CoA. [50] The exchange of letters between STC and Betamax that led to Betamax issuing a termination notice on 7 April 2015 then followed.

73. Also after that announcement, the police began criminal investigations. Criminal proceedings, or provisional criminal proceedings, were commenced against the following people for their roles in the allocation and eventual signing of the CoA: [51]

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[41] First Bhunjun Statement, [102] to [120].

[42] Letter from STC to BDO, 1 October 2009 [Bundle D(lll), D87], letter from BDO to STC, 1 October 2009 [Bundle D(lll), D88], letter from STC to BDO, 20 October 2009 [Bundle D(lll), D89].

[43] Report of BDO on evaluation of proposal made by Betamax Ltd, 26 October 2009, p 14 [Bundle D(lll), D92].

[44] Letter from STC to BDO, 9 November 2009 [Bundle D(lll), D98].

[45] Report of BDO on "Verification of Project Costs Proposed by Betamax 867 Ltd", 26 November 2009 (received by STC on 27 November 2009), p 10 [Bundle D(lll), D105].

[46] First Balram Statement, [60]; First Bhunjun Statement, [121]; Signed contract between Betamax and STC dated 27 November 2009 [Bundle D(lll), D107].

[47] First Bhunjun Statement, [137].

[48] First Bhunjun Statement, [146].

[49] First Bhunjun Statement, [145] to [150].

[50] Transcript of press conference, 30 January 2015.

(a) Mr R S Soomarooah (the former General Manager of STC) was arrested on 8 April 2015 on charges of conspiracy and breach of the Public Procurement Act 2006 **(PPA);**

(b) Mr R Hosany (the former Permanent Secretary of STC) was arrested on 20 April 2015 on charges of conspiracy to do a wrongful act, and influencing a public official;

(c) Mr Anil Bachoo (a former Minister with MPI) was arrested on 4 June 2015 on charges of conspiracy to do a wrongful act, and influencing a public official;

(d) Dr Ramgoolam (former Prime Minister of Mauritius) was arrested on 24 June 2015 on charges of conspiracy to do a wrongful act, and influencing a public official;

(e) Mr Bhunjun was arrested on 12 *I* 14 October 2015 and provisionally charged with the offences of conspiracy, influencing a public official, bribery of public officials, and breach of the PPA; and

(f) Mrs Kalindee Bhanji (former Permanent Secretary at the Prime Minister's Office) was arrested on 18 November 2015 and provisionally charged with the offence of fraudulent alteration of public documents, which related to the CoA.

IV. Credibility

74. Betamax adduced evidence from one lay witness, Mr Bhunjun. It is not contested that Mr Bhunjun was directly involved in the negotiation of the CoA and the other events the subject of the parties' dispute. The Tribunal found Mr Bhunjun to be a credible and well informed witness.

75. STC adduced evidence from two lay witnesses, Mr Balram Asyrigadoo **(Mr Balram),** and Mr John Lam Choo **(Mr Lam Choo).** Mr Balram had little direct knowledge of the events in question in these proceedings. In 2008 to 2009, he was not one of the two desk officers responsible for petroleum products, but was the desk officer for other commodities imported by STC.[52] His knowledge of the events in question was derived from documents he had read and, as he added in cross-examination, discussions with his colleagues at STC's management meetings.[53] It became apparent from his evidence in crossexamination that there were a number of other potential witnesses who could have given direct evidence but whom STC chose not to call as witnesses.[54]

76. Mr Lam Choo also had little direct knowledge of the events in question. He was unable to explain why other STC board members at the material times, whose knowledge of the events in question would have been greater than his, had not given evidence.[55] Further, on at least two occasions, he also said in terms that he would prefer not to answer questions that were put to him.[56]

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[51] First Balram Statement, [18] and [70].

[52] The two desk officers for petroleum products were Mr Geerdharry and Mr Chooramun, neither of whom gave evidence: hearing day two, T71.19 to T71.29.

[53] Hearing day two, T21.3 to T21.6, T23.9 toT23.11, T97.24 to T98.9.

[54] Hearing day two, T27.7 to T35.6.

[55] Hearing day two, T142.8 to T143.11.

[56] Hearing day two, T161.1 T161.4, T163.15 T163.17.

77. Mr Bhunjun's evidence is therefore generally to be preferred to that of STC's witnesses.

V. Issues to be determined

78. On 14 July 2016, following the parties' proposals, the Tribunal settled the following list of issues to be determined.

(a) *Issue 1:* Does the Tribunal have jurisdiction over the present dispute (including whether the present dispute is arbitrable)?

(b) *Issue 2:* Was Betamax entitled to terminate the CoA on 7 April 2015 pursuant to clause 10.6.1 of the CoA?

(c) *Issue 3:* Is the CoA (including the arbitration agreement therein) illegal and unenforceable on the ground that it was entered into in breach of the PPA?

(d) *Issue 4:* Is the CoA (including the arbitration agreement therein) illegal and unenforceable pursuant to Articles 1131 and 1133 of the Mauritian Civil Code **(C.Civ)?**

(e) *Issue 5:* Is the CoA (including the arbitration agreement therein) therefore null and void pursuant to Articles 1111 and 1116 of the C.Civ?

(f) *Issue 6:* Is the CoA (including the arbitration agreement therein) illegal and unenforceable by reason of it having been entered into as part of a conspiracy to benefit Betamax at the expense and to the detriment of the Republic of Mauritius?

(g) *Issue 7:* Is STC able to rely on the alleged impossibility of performance of the CoA?

(h) *Issue 8:* Is Betamax entitled to recover damages and, if so, in what amount?

(i) *Issue 9:* Interest

(j) *Issue 10:* Costs

79. At the Hearing, STC abandoned Issue 5,[57] and so naturally STC does not address that issue in its closing submissions. Adopting this development, the list of issues that are addressed in this award is as follows.

(a) *Issue 1:* Does the Tribunal have jurisdiction over the present dispute (including whether the present dispute is arbitrable)?

(b) *Issue 2: Was* Betamax entitled to terminate the CoA on 7 April 2015 pursuant to clause 10.6.1 of the CoA?

(c) *Issue 3:* Is the CoA (including the arbitration agreement therein) illegal and unenforceable on the ground that it was entered into in breach of the PPA?

[57] Day 1, T68.13-T68.17.

(d) *Issue 4:* Is the CoA (including the arbitration agreement therein) illegal and unenforceable pursuant to Articles 1131 and 1133 of the C.Civ?

(e) *Issue 5:* Is the CoA (including the arbitration agreement therein) illegal and unenforceable by reason of it having been entered into as part of a conspiracy to benefit Betamax at the expense and to the detriment of the Republic of Mauritius?

(f) *Issue 6:* Assuming the CoA is valid and enforceable, is STC able to rely on the alleged impossibility of performance of the CoA?

(g) *Issue 7:* If STC is proved to be liable for wrongful termination, is Betamax entitled to recover damages, and, if so, in what amount?

(h) *Issue 8:* Interest

(i) *Issue 9:* Costs

VI. Issue One: Jurisdiction

80. The position of STC on this issue has evolved in the course of the proceedings. The Tribunal will be guided by STC's closing submissions, in which its two grounds for asserting the Tribunal does not have jurisdiction are as follows. [58]

(a) *First Ground* - the disputes in the arbitration are incapable of arbitration as a matter of the law of Mauritius, as they involve matters concerning public order for the purposes of Article 2060 C.Civ. [59]

(b) *Second Ground* - the arbitration agreement is void pursuant to article 2061 C.Civ, which provides that an arbitration clause is void unless otherwise provided by law.

81. The Tribunal accepts STC's submissions that the question of whether the dispute between the parties is arbitrable must be determined according to Mauritian law. [60] Betamax does not dispute this point. [61] The parties do, however, dispute what follows from this, which dispute is discussed further below.

A. First Ground - Article 2060 - ordre public

82. Article 2060 C.Civ, when translated, reads: [62]

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[58] STC's primary closing submissions, 5 October 2016, [42].
[59] STC's primary closing submissions, [46].
[60] STC's primary closing submissions, [54] and [58].
[61] Betamax's reply closing submissions, 26 October 2016, [18].
[62] Respondent's Bundle of Authorities dated 29 July 2016, Tab 2.

One cannot enter into a compromise agreement about matters of status and capacity of persons, matters relating to divorce and judicial separation and more generally in all matters concerning public order.

83. STC submits that this clearly expresses the will of Parliament that issues concerning public order are not arbitrable,[63] and so issues three and five are not arbitrable as they concern issues of public order for the purposes of Article 2060.

84. In response, Betamax submits that:[64]

(a) the Mauritian *International Arbitration Act 2008* **(IAA)** applies to exclude Article 2060 C.Civ;

(b) in any event, the Tribunal is not being invited to deal with questions of *ordre public* for the purposes of Article 2060 C.Civ, properly understood; and

(c) the trend of international arbitration is that disputes of a commercial nature are arbitrable, and this is such a dispute.

85. STC disputes that the IAA has the effect for which Betamax contends, although it concedes that the arbitration is an "international arbitration" for the purposes of the IAA.[65] In the event, it is unnecessary to decide this question concerning the application of the IAA, as the Tribunal has determined the issue on the basis of the second and third matters raised by Betamax.

(1) Applicability of French authority decided after 1972

86. Both parties submit that, as Article 2060 C.Civ is based on provisions in the French Civil Code, French law is persuasive when interpreting it. They differ as to which authorities should be considered persuasive, however. STC submits that only those authorities decided before July 1972 should be considered persuasive, for the following reasons. Betamax submits that there is no such restriction, for reasons that are set out in paragraph 89 below.

87. Article 2060 C.Civ was based on Articles 1003 and 1004 of the French Civil Code as in force until 1972. In 1972, those provisions were replaced by Article 2060 of the French Civil Code. STC submits that the French provisions then diverged from those in the C.Civ. In particular, STC points out that the following emphasised language in the French Article was added in July 1972, and has no equivalent in Article 2060 C.Civ.[66]

One cannot enter into a compromise agreement about matters of status and capacity of the

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[63] STC's primary closing submissions, [44] to [47], relying on Larsen Oil & Gas Pte Ltd v Petroprod Ltd (in official liquidation) [2011] 3 SLR 414 (Singapore Court of Appeal) at [44].

[64] Betamax's reply closing submissions, [7].

[65] Hearing day one, T68.12-T68.13.

[66] STC's opening submissions, 29 July 2016, [85] to [87].

persons, matters relating to divorce and judicial separation ***or matters of disputes involving public bodies and institutions*** *and more generally in all matters concerning public order.*

However, some categories of public institutions of an industrial or commercial character may be authorized by decree to enter into compromise agreements. [67]

88. These differences relate to disputes involving public bodies, such as STC. On that basis, STC submits that only earlier French authorities should be relied upon when interpreting Article 2060 C.Civ, [68] and contends that the following passage from the decision in *Vivian Oxenham CSK v France Maritime Agency Ltee (FMA)* 2016 SC J 10 ***(Oxenham No 2)*** supports its view.

It is, however, clear that the Mauritian legislator has not followed suit. Our own article 1004 of the Code de Procedure Civile has not been amended as in France. We *are, therefore, of the opinion that the respondent cannot avail itself of the amendments to French law in the present case.* We *find that our law is the same as that which prevailed in France prior to 2011.*

89. As noted above, Betamax disputes STC's assertion that French authority decided later than 1972 is unpersuasive when interpreting Article 2060. It does so on the basis that the substance of the French and Mauritian Articles is the same. [69] Betamax further contends that *Oxenham No 2* does not have the effect that STC asserts. Betamax points out, correctly, that there is no general statement in *Oxenham No 2* that only French authorities before 1972 will be persuasive when interpreting Mauritian law. [70]

90. The Tribunal accepts Betamax's submissions on this issue. The substance of the French and Mauritian Articles is relevantly the same, as can be seen from the text extracted above. That the French Article now deals specifically with public bodies, such as STC, does not alter that fact.

91. Further, in *Oxenham No 2,* the Court was relevantly concerned with whether an arbitration clause was not enforceable for failing to designate the arbitrator or provide a means for designation, and so failing to fulfil one of the explicit requirements of Article 1004 C.Civ as then in force. [71] The party seeking to uphold the impugned arbitration clause sought to rely on the fact that the equivalent French Article had been amended, and the relevant requirement removed by that amendment. It was in that specific context that the Court found that later French authority could not avail the party seeking to rely on it. [72]

(2) The relevance of trends in international jurisprudence

92. STC rejects Betamax's submissions relying on international trends in jurisprudence that support

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[67] Respondent's Bundle of Authorities dated 29 July 2016, Tab 5 (emphasis added by STC).

[68] STC's primary closing submissions, [79]; STC's reply closing submissions, 26 October 2016, [17] to [19].

[69] Betamax's primary closing submissions, 30 September 2016, [35].

[70] Betamax's reply closing submissions, [20].

[71] Oxenham No 2, pp 4 to 5.

[72] Oxenham No 2, p 6.

the view that transactions of a commercial nature are arbitrable. It does so on the basis that reference to these trends is inconsistent with the principle that arbitrability must be determined by domestic law, [73] a principle that Betamax accepts. [74]

93. In particular, STC asserts that Betamax primarily relies on a decision of the Paris Court of Appeal in 1993, *Labinal SA v MORS and Westland Aerospace Ltd (Labinal),* and that decision represents an application of the French doctrine of "delocalisation". In STC's submission, delocalisation is the view that international arbitrations are divorced from local laws. [75]

94. Whilst Betamax accepts that arbitrability must be determined by local law, it submits that this does not preclude reference to international trends in jurisprudence concerning international arbitration. [76] To do so is not to rely on a doctrine of delocalisation, but rather to interpret domestic legislation in the context of international arbitration. [77] That is the approach taken by the Mauritius Supreme Court when considering whether an award should be set aside as inconsistent with the public policy of Mauritius. The Court stated that "it is public policy in the international context that will matter and not the public policy that would normally apply when challenging a domestic award." [78]

95. Those international trends are to permit arbitration of commercial disputes, even if they relate, in a broad sense, to public policy. [79] This is particularly so where, as here, what is at issue is a commercial contract to which the Republic of Mauritius is not directly a party, although STC is a public body. [80]

96. The Tribunal accepts that arbitrability can only be determined by domestic law, and that a doctrine of "delocalisation" is of no assistance when determining arbitrability. However, the Tribunal also accepts that this does not preclude reference to international jurisprudence regarding the issue. In the Tribunal's view, when considering international arbitrations, that jurisprudence is likely to assist in interpreting the relevant domestic legislation, here Article 2060 C.Civ. The Tribunal expands on this point in paragraphs 104 to 107 below.

(3) Does the dispute concern *ordre public?*

97. Consistently with its approach to the French authorities, STC relies on a 1972 decision of the Orleans Court of Appeal, *Jean Tardits* [81] (in which the earlier relevant French provisions are interpreted), in support of its submission that *ordre public,* for the purposes of Article 2060, extends to "economic public order".

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[73] STC's primary closing submissions, [72] to [73].

[74] Betamax's reply closing submissions, [18].

[75] STC's primary closing submissions, [18].

[76] Betamax's reply closing submissions, [18].

[77] Betamax's reply closing submissions, [21].

[78] Cruz City 1 Mauritius Holdings v Unitech Limited & Anor 2014 SC J 101.

[79] Betamax's primary closing submissions, [38], relying on Born, International Commercial Arbitration, 2nd ed, 2014, 5.03[D].

[80] Betamax's primary closing submissions, [38].

[81] *Jean Tardits et Cie v Jydsk Andels Foderstof Forretning 89 JDI (Clunet) 140.*

98. In that decision, the Court found that the dispute was not arbitrable because it necessarily involved the interpretation of French export regulations governing the export of corn, which was the subject matter of the contract out of which the arbitration arose. This, according to that decision, therefore impermissibly involved "the interpretation and application of public policy rules of the French economic organization". [82]

99. STC further contends that the PPA, as a public procurement law, is an economic policy law. In STC's submission, the PPA therefore concerns economic public order, and so Issue 3, concerning whether the CoA was entered into in breach of the PPA, is not arbitrable. [83]

100. STC submits that this position is fortified by strong policy reasons against arbitrating issues that give rise to questions of whether public procurement laws have been violated. STC puts this point in the following way. [84]

> *Like the procurement process itself, disputes concerning the proper utilisation of the state's resources and the civil consequences flowing therefrom should be resolved in a forum with maximal transparency and publicity. The notion that such disputes should be kept away from the public eye by the convenient shield of confidentiality in arbitration proceedings is anathema to principles of accountability and good governance that underpin the PPA.*

101. STC contends that the position is even clearer in relation to Issue 5, which concerns STC's allegation that the CoA was entered into as part of a criminal conspiracy for the purposes of section 109 of the Mauritian Criminal Code. [85] STC asserts that it is immaterial whether criminal charges have been laid. [86] If the Tribunal is to determine the dispute between the parties, it must determine whether a crime has been committed. This it cannot do under Article 2060 C.Civ.

102. Finally, STC accepts that there are jurisdictions in which it is permissible for an arbitral tribunal to decide questions of criminal law when determining the *civil consequences* of a crime in the context of international arbitrations. STC further accepts that the Tribunal is not called upon here to determine the criminal consequences of finding that any crime has been committed. However, STC submits that this is not the position in Mauritius because Article 2060 of the Mauritius Civil Code expressly provides that *"all matters* concerning public order" (emphasis STC's) are not capable of resolution by arbitration. [87] STC submits that Betamax's assertions to the contrary are effectively an invitation to the Tribunal not to give effect to the express words of Article 2060 ("One cannot enter into a compromise agreement about...all matters concerning public order"). [88]

103. In response, Betamax contends as follows. [89]

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[82] Jean Tardits et Cie v Jydsk Andels Foderstof Forretning 89 JDI (Clunet) 140 at 149.
[83] STC's primary closing submissions, [54].
[84] STC's primary closing submissions, [56].
[85] Statement of Defence (Amendment No. 2), [50].
[86] STC's primary closing submissions, [175].
[87] STC's primary closing submissions, [176].
[88] STC's primary closing submissions, [75].
[89] Betamax's reply closing submissions, [3] to [21].

(a) The view expressed in *Jean Tardits* is inconsistent with French authorities decided before and after it. In those other decisions, French courts have consistently found the simple fact that a public policy rule applies to the dispute is insufficient to demonstrate that the dispute is not arbitrable as involving *ordre public.*[90] A dispute will not be arbitrable only if "the nonarbitrability relates to the subject matter - in that it is very closely linked to international public policy and strictly excludes the jurisdiction of the arbitral tribunal as a result of the nullity of the arbitration agreement".[91]

(b) Further, the simple fact that allegations of criminal wrongdoing have been made cannot mean that a dispute is not arbitrable.[92] Where, as here, all that is being arbitrated is the civil consequences of an alleged criminal breach, the dispute remains arbitrable.[93]

104. The Tribunal accepts Betamax's submissions. The parties now both accept that the arbitration is an "international arbitration" for the purposes of the IAA. When the Tribunal is interpreting Article 2060 C.Civ, the concept of *ordre public* must therefore be interpreted in a manner that is relevant to international arbitration, and consistent with the Mauritian Parliament's purposes when passing the IAA, which is based on the UNCITRAL Model Law. The latter is an internationally drafted model law which has been enacted in many jurisdictions throughout the world.

105. Those purposes were explicitly to "promote the use of Mauritius as a jurisdiction of choice in the field of international arbitration"[94] and to promote the objective of "creating a favourable environment for the development of international arbitration".[95] The Tribunal notes that this legislative change is part of a broader program in Mauritius to foster international arbitration. This has included establishing a permanent branch of the Permanent Court of Arbitration of The Hague in Mauritius, and the launch of the LCIA-MIAC Arbitration Centre, an independent arbitral institution founded in cooperation with the London Court of International Arbitration.[96] There have been other initiatives including the hosting in Mauritius of the Congress of the International Council for Commercial Arbitration in 2016.

106. There is, therefore, a clear legislative intent to establish a legal regime in Mauritius appropriate to, and in accordance with, contemporary international practice, approaches and jurisprudence. In the light of such developments it would be surprising indeed if the courts in Mauritius adopted a parochial and narrow interpretation of arbitrability which precluded reference to international jurisprudence. The Tribunal is not persuaded that this is the approach in Mauritius.

107. Reading Article 2060 C.Civ as permitting arbitration where the tribunal is called upon only to determine the civil consequences of a possible breach of a public policy rule, or criminal act, is consistent with the development of international arbitration jurisprudence. It is also consistent with the approach taken by the Mauritian Supreme Court when interpreting "public policy" in the

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[90] *CA Paris, 15 June 1956; cf CA Douai, 5 May 1993; CA Paris, 12 September 2002.*

[91] CA Paris, 29 March 1991.

[92] Betamax's reply closing submissions, [15].

[93] JurisClasseur, Fasc. 1024, Notes 51-52.

[94] IAA, preamble.

[95] Travaux preparetoirs to the IAA, p 161.

[96] Salim A.H. Moollan, "A brief introduction to the Mauritian International Arbitration Act 2008", in The Mauritian International Arbitration Act 2008 Text and Materials (Government of Mauritius, 2016), p 16.

context of determining whether an award should be set aside.[97] This is particularly appropriate where, as here, the contract is clearly commercial in nature, despite one of the parties to it being a public body.

B. Second Ground - Article 2061 C.Civ - the arbitration is not provided for by law

108. Article 2061 C.Civ. provides that an arbitration clause is void unless otherwise provided for by law, and STC alleges that there is no specific provision for arbitration which applies to the CoA.

109. STC contends that the CoA is subject to the PPA, which, if its requirements are met, permits public procurement contracts to contain an arbitration clause under section 67. STC further contends that, as the negotiation and signing of the CoA did not comply with the PPA's requirements, Betamax cannot rely on section 67 of the PPA and the arbitration is not permitted.[98]

110. As Betamax contends that the PPA does not apply to the CoA, it does not rely on section 67 of that Act to support the arbitration agreement. Rather, it relies on Article 1003 C.Civ, which, according to the Mauritius Supreme Court in *Pillay,* "contains wide provisions covering any contractual situation in which parties have agreed to have recourse to arbitration."[99] When following this decision in *Oxenham,* the Court found that "the exception provided by article 2061 and its evolution in France has been amply catered for by the comprehensive provisions of article 1003 of the Code de Procedure Civile which covers any contractual relationship".[100]

111. The CoA, in clause 12.4, provides for arbitration of disputes arising under the contract. In Betamax's submission, this is clearly sufficient to overcome any impediment imposed by Article 2061 C.Civ.

112. In response, STC contends that Article 1003 C.Civ may only be relied upon as "providing for" arbitration, and so protecting an arbitration agreement from invalidity under Article 2061, if there is no other, more specific provision providing for arbitration.[101] Article 1003 could not "amply cater for" Article 2061, if by this it is meant that Article 2061 no longer has any operation, as if that were the Parliament's intent it would simply have repealed Article 2061.[102]

113. According to STC, this interpretation is supported by Article 2059 C.Civ, which provides that "All persons may enter into a compromise agreement on rights of which they have the free disposal." Disposal is not "free" where there is "Mauritian law regulating the arbitration agreement".[103] Similarly, in 2010, the Supreme Court found that:[104]

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[97] See paragraph 94 above.

[98] STC's primary closing submissions, [125] to [136], STC's reply closing submissions, [32], and see STC's opening submissions, [62] to [64] and [102] to [103].

[99] Pillay v Apavou 2005 SCJ 286, penultimate paragraph.

[100] Oxenham v France Maritime Agency Ltee 2013 SCJ 205 (Oxenham).

[101] STC's closing submissions, [140(c)], [145] to [146], [150] to [151], ; STC's reply closing submissions, [33] and [34].

[102] STC's closing submissions, [155].

[103] STC's closing submissions, [162].

[104] Malaysian Airline System Berhad v Airworld Limited 2010 SCJ 352, p 3.

It is permissible under articles 1003 to 1005 of the Code de Procedure Civile for parties to have recourse to a "clause compromissoire" to settle future disputes arising in the execution of a contract by arbitration provided of course they are not contrary to the provisions of articles 2059 to 2061 of the Code Civil.

114. STC asserts that Betamax relies upon *Pillay* and *Oxenham* as showing that Article 1003 will *always* allow an arbitration clause to escape the operation of Article 2061, and so "effectively nullifies" Article 2061.[105] STC correctly points out that *Oxenham* was overturned[106] on the basis that the arbitration clause there at issue had failed to comply with the specific requirements of Mauritian law that applied to it. In particular, the clause failed to specify the mode of appointment of the arbitrator, contrary to Article 1004.[107]

115. The principle that STC therefore distils from its careful examination of the authorities is that "Article 2061 [will] be engaged to void an arbitration agreement if parties to an arbitration agreement did not comply with certain requirements required by Mauritian law".[108] As a result,[109]

Article 1003 would not go so far as to validate an arbitration agreement that had otherwise been invalidated by Mauritian law. Rather, the reasoning of the court in Pillay was *that Article 1003 would permit arbitrations agreements in contracts where Mauritian law has not expressly permitted (or prohibited) arbitration agreements in those contracts.*

116. At one point, STC appears to suggest that it is adopting a broader position. STC states, correctly in the Tribunal's view, that the Court in *Pillay* found that "if Mauritian law does not regulate or set out the requirements for an arbitration agreement for a particular contractual situation, [...] Article 1003 could serve to fill the gap and permit the arbitration agreement for such contractual situation, so long as the parties explicitly agreed to arbitration."[110] STC then goes on to assert that the Court in *Pillay* provided no legal basis or justification for this conclusion, and that the conclusion was rejected in *Oxenham No* 2.[111]

117. STC does not base any of its conclusions concerning the invalidity of the arbitration agreement on this reasoning. Rather, those conclusions are based on the allegation that the CoA failed to comply with the specific requirements of the PPA, which applied to the CoA. Strictly speaking, it is therefore unnecessary to address this broader argument. For completeness, however, the Tribunal rejects STC's submissions in support of this broader argument. The decision in *Oxenham No 2* clearly turns on the failure to comply with the specific requirements of Article 1004 C.Civ as then in force.[112] Further, if STC's broader argument were accepted, Article 1003 would never apply. As STC points out in relation to Article 2061, if that were Parliament's intention it would simply repeal Article

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[105] STC's closing submissions, [137].
[106] In Oxenham No 2.
[107] As discussed in paragraph 91 above of this award.
[108] STC's closing submissions, [150].
[109] STC's closing submissions, [164].
[110] STC's closing submissions, [140(c)].
[111] STC's closing submissions, [140(d)].
[112] As discussed in paragraph 91 above.

1003.

118. On the narrower case that STC advanced, the CoA was a public procurement contract for the purposes of the PPA, and the PPA expressly permitted arbitration agreements. If, therefore, the CoA failed to comply with the specific requirements of the PPA, Article 1003 could not save the arbitration clause in the CoA from the operation of Article 2061 invalidating that clause. [113]

119. It is not clear to the Tribunal that Betamax's submissions are as broad as STC contends. It appears to the Tribunal that a more limited position is being adopted, namely that the PPA does not apply to the CoA, due to the exemption discussed in paragraphs 155 to 160 below, and so Betamax may rely on Article 1003 as a law providing for the arbitration clause contained in the CoA.

120. In any event, as noted, the Tribunal has found that the PPA did not apply to the CoA by reason of that exemption. The Tribunal accepts STC's narrower reading of the authorities and Articles 2061 and 1003 of the C.Civ as requiring any arbitration clause to comply with any specific legislation regulating clauses of the relevant kind. Parliament cannot be taken to have intended to override those specific requirements by the enactment of the general permission provided by Article 1003 C.Civ. Given the Tribunal's finding that the PPA did not apply to the CoA, however, there is no impediment to Betamax relying on Article 1003. The Tribunal therefore finds that Article 2061 C.Civ does not apply to invalidate the arbitration clause in the CoA, as Article 1003 C.Civ provides for that clause.

121. Having found that neither of STC's objections to jurisdiction is made out, the Tribunal finds that it has jurisdiction to hearing the dispute. It now turns to the consideration of the other issues.

VII. Issue Two: Was Betamax was entitled to terminate the CoA?

122. Betamax asserts it was entitled to terminate the CoA under clause 10.6.1, which relevantly provides as follows.

> *10.6 Termination due to Event of Default and consequences of termination*
>
> *10.6.1 Termination due to Event of Default*
>
> *(a) Upon the occurrence of an Event of Default which has not been cured within the applicable cure period, the non-defaulting Party shall have the right to declare a date... upon which this Agreement shall terminate.*
>
> ...

123. Under clause 10.2.2(a) of the CoA, a failure by STC to make any payment required under the CoA or to comply with any other obligation under the CoA which results in a material adverse impact on Betamax constitutes an Event of Default.

[113] STC's closing submissions, [158], [165] to [166].

124. Under clause 10.6.1 of the CoA, upon the occurrence of an Event of Default by STC which has not been cured within the applicable cure period, Betamax has the right to declare a date on which the CoA shall terminate.

125. As noted above, on 30 January 2015, the new government of Mauritius - which was not a party to the CoA - announced at a press conference that it had terminated the CoA.[114] Betamax's solicitors, Legis Consult, then wrote to STC on 2 February 2015.[115] Legis Consult informed STC that the Vessel was due to complete a discharge on 4 February 2015 and that, in the absence of a response from STC by midday on 3 February 2015, on completion of discharge the Vessel would sail to the refinery in Mangalore as planned. However, on 4 February 2015, Betamax received a letter from STC, which was copied to the MOI, in which STC stated that it "is unable to avail itself of your services for the transport of petroleum products from New Mangalore any longer".[116] On 7 April 2015, Betamax purported to terminate the COA pursuant to clause 10.6.1.[117]

126. Betamax asserts that the letter of 4 February 2015 is a clear statement that STC would no longer comply with its obligations under the COA and so constituted an Event of Default. Betamax asserts that it was thereby entitled to terminate the CoA under clause 10.6.1 by its letter of 7 April 2015.[118]

127. STC does not challenge any of the facts set out in paragraph 125 above, and the Tribunal makes those findings. Further, on the basis of those findings and the Tribunal's findings regarding Issue 7 below, the Tribunal finds that, subject to STC's submissions on Issue 2, the letter of 4 February 2015 constituted an Event of Default for the purposes of clause 10.6.1.

128. Although it does not challenge those factual matters set out in paragraph 125 above, STC does assert that Betamax was not entitled to terminate the CoA, for the following reasons.

(a) The CoA is illegal and unenforceable, having been entered into in breach of the PPA (Issues 3 and 4). As the Tribunal has found against STC on these issues,[119] this submission is rejected.

(b) The CoA is unenforceable as a matter of Mauritian public policy, having been entered into pursuant to a conspiracy to defraud the State (Issue 5). As the Tribunal has found against STC on this issue,[120] this submission is rejected.

(c) The Cabinet Decision taken on 30 January 2015 constituted a *force majeure* event for the purposes of Article 1148 of the C.Civ (Issue 6). The CoA was therefore terminated on that date, and Betamax could not have terminated it on 7 April 2015. As the Tribunal has found against STC on this issue,[121] this submission is rejected.

(d) Alternatively, the Cabinet Decision was a Force Majeure Event for the purposes of clause

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[114] Transcript of press conference, 30 January 2015.
[115] Letter from Legis Consult to STC, 2 February 2015; second letter from Legis Consult to STC, 2 February 2015.
[116] Letter from STC to Betamax, 4 February 2015.
[117] Notice of Termination of Contract of Affreightment, 7 April 2015.
[118] Betamax's primary closing submissions, [43],
[119] See the discussion of these issues in the relevant sections below.
[120] See the discussion of this issue in the relevant section below.
[121] See the discussion of this issue in the relevant section below.

11 of the CoA, which further provides that no party shall be liable for any failure or delay in performance of its obligations caused by such an event (also Issue 6). Again, as the Tribunal has found against STC on this issue, [122] this submission is rejected.

129. STC put no further submissions concerning Issue 2, and appears to accept that, should the Tribunal find against it on Issues 3,4, 5 and 6, it follows that Betamax was entitled to terminate the CoA on 7 April 2015. [123] The Tribunal therefore finds that Betamax was entitled to terminate the CoA on 7 April 2015.

VIII. Issue Three - Is the CoA and its arbitration agreement illegal and unenforceable for violation of the PPA?

A. STC's allegations

130. Most broadly, STC alleges that on its face the CoA breaches the PPA, because STC is a "public body" for the purposes of the PPA, the CoA is a "major contract" under the PPA and the Central Procurement Board **(CPB)** did not approve the award and signing of the PPA. [124] This comment is helpful to convey the gravamen of STC's arguments. However, in the Tribunal's opinion, the detailed analysis of the application of the specific provisions to the CoA undertaken by both parties is what will determine the issue.

131. In its Statement of Defence (Amendment No. 2), STC alleges that the COA was entered into in breach of the PPA because the award of the COA was not approved by the CPB, relying on sections 14(4)(b) and 14(5) of the PPA. [125]

132. Section 14(4)(b) of the PPA provides that no public body shall award a major contract unless the award has been approved by the CPB.

133. Section 14(5) of the PPA provides that no person shall sign a major contract with a public body unless the award has been approved by the CPB.

134. It is common ground between the parties that the negotiation and agreement of the CoA did not follow these requirements. STC therefore alleges that the CoA and its arbitration agreement are illegal and unenforceable. Betamax submits in response that the PPA did not apply to the CoA.

135. The PPA came into force on 17 January 2008. It repealed and replaced the CTB Act. The tender process for the CoA was therefore on foot for some time while the CTB Act was in force. STC does not allege that the CTB Act was breached. [126]

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[122] See the discussion of this issue in the relevant section below.

[123] STC's reply closing submissions, [21].

[124] STC's primary closing submissions, [89].

[125] Paragraphs 37 to 41.

136. As STC rightly identifies, it is common ground between the parties that "STC is a "public body" for purposes of the PPA and the CoA is a "major contract" under the PPA. It is also common ground that the CPB did not approve the award and the signing of the CoA." [127]

137. Betamax submits, however, that the CoA falls within the PPA's exemption for contracts for services incidental to the purchase or distribution of goods purchased for resale, and so the CoA cannot have violated the PPA. That exemption was introduced by the Public Procurement (Amendment No. 2) Regulations 2009 (GN No. 68 of 2009) **(PP Regulations 2009),** which came into effect on 29 June 2009.

138. STC now contends that the CoA was awarded to Betamax on 12 January 2009, when MPI sent Betamax a "letter of award". [128] The PPA's exemption could not therefore have applied to the CoA when it was awarded.

139. Betamax contends that the CoA was only awarded when it was signed by the parties on 29 November 2009. In the alternative, it submits that even if the contract was awarded on 12 January 2009, this is irrelevant *(nihil ad rem)* in circumstances where the CoA was not executed until after the PPA applied to it. [129]

140. As it is the Tribunal's finding that the CoA was not awarded for the purposes of the PPA until 29 November 2009, it is unnecessary to decide Betamax's argument in the alternative, and that argument is not addressed further in this Award.

B. When the CoA was awarded

141. The Tribunal must therefore first determine when the CoA was "awarded" for the purposes of section 14(4)(b) the PPA.

142. The letter of 12 January 2009 on which STC relies relevantly reads as follows.

> *I am directed to inform you that Government has agreed, in principle, to Betonix Ltd, in partnership with Executive Ship Management (ESM) Private Limited of Singapore, acquiring and operating a double-hull tanker vessel for the transportation of petroleum products for Mauritius for a period of 15 years as from August 2010 under the following terms and conditions:*
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> [...]

143. Betamax's primary submission as to why this does not constitute an award of the CoA is that it is not final, being expressly an "agreement in principle", and so cannot constitute an award of a

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[126] Email from STC's solicitors to the Tribunal, copying Betamax's legal representatives, 26 August 2016.

[127] STC's primary closing submissions, [89].

[128] This contention is what was initially pleaded by STC in its Statement of Defence (Amendment No. 2), [23], It then alleged, in its Rejoinder (at [22(a)]) that the CoA was awarded on 19 December 2008. In its final submissions, it has reverted to 12 January 2009 as the date on which it contends the CoA was awarded: STC's primary closing submissions, §VB.

[129] Betamax's primary closing submissions, [59].

contract.[130] In response, STC submits the following.

(a) There is nothing in the language of section 14(4)(b) of the PPA to indicate that an award must be of a concluded contract. In fact, as section 14(5) prohibits signing a contract unless it has been approved by the CTB, under the PPA the award of the contract must be at an earlier stage than the contract's conclusion.[131] The award of the contract is therefore the decision by the relevant government body to enter into a concluded contract. This decision was made on 12 January 2009, when the letter was sent.

(b) On this basis, STC distinguishes the authority on which Betamax relies for the proposition that "award of a contract" must mean award of a concluded contract, *Jacobs UK Ltd v Skidmore Owings & Merrill LLP* [2012] EWHC 3293 (TCC). That decision involved only private commercial parties. When seeking to construe public procurement legislation, the definition appropriate in that context cannot be "transposed wholesale".[132]

(c) Following the 12 January 2009 letter, MPI and the JV took a series of steps that were only consistent with the contract having been awarded.

(i) On 15 January 2009, MPI informed STC to take all necessary steps for the purposes of the Tanker Project.[133]

(ii) On 13 February 2009, MPI directed the JV, if had already acquired the tanker, to have it registered in Mauritius.[134]

(iii) On 30 March 2009, the JV wrote to STC attaching drafts of the Implementation Agreement for the project, and updated STC on the progress of the acquisition of the tanker. In that letter, the JV referred to the steps being taken concerning ownership of the tanker as being "further to the requirements of the letter of [MPI] dated 12 January 2009."[135]

(iv) On 30 March 2009, in the same letter, the JV sought to have the CoA "finalised at the earliest."[136]

(v) On 7 April 2009, in a letter to the Financial Secretary, the JV referred to the letter of 12 January 2009 as "a self-explanatory letter of award".

144. In STC's submission, the 12 January 2009 letter "amounted to an 'award' because a decision had been made for the JV to acquire and operate the tanker vessel for 15 years in accordance with the terms set out in that letter," and the JV recognised this at the time.[137]

145. In response, as noted, Betamax submits that "award" of a contract for the purposes of the PPA is a concluded contract, and no concluded contract was entered into until 27 November 2009.

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[130] *Betamax's primary closing submissions [53]-[57].*
[131] STC's primary closing submissions, [117].
[132] STC's primary closing submissions, [115].
[133] STC's primary closing submissions, [119].
[134] STC's primary closing submissions, [120],
[135] STC's primary closing submissions, [121], emphasis added by STC.
[136] STC's primary closing submissions, [122].
[137] STC's primary closing submissions, [124].

146. In support of its submissions that "award" means a concluded contract, Betamax submits that this is the term's ordinary meaning, as was found by Coulson J in *Jacobs UK Ltd v Skidmore Owings & Merrill LLP* [2012] EWHC 3293 (TCC) at [12] to [14], Neither the PPA nor the UNCITRAL Model Law on Procurement of Goods, Construction and Services on which the PPA is based defines the expression. [138]

147. Betamax also submits that STC's submissions concerning the PPA's distinction between the award of a contract and its sighing is not to the point. [139] Betamax's contention is not that a contract is awarded on signing, but when it is concluded. The PPA does not require a contract to be signed, and recognises that a contract may be concluded before it is signed. [140]

148. In support of its contention that the letter of 12 January 2009 did not amount to a concluded contract, Betamax made submissions in paragraphs 53 to 59 of its primary closing submissions and 32 to 34 of its reply closing submissions, the most pertinent of which are as follows. [141]

(a) The 12 January 2009 letter refers only to an agreement in principle.

(b) The parties continued to negotiate the terms of the CoA throughout 2009, including freight rates, demurrage rates and other commercial terms.

(c) On 28 July 2009, STC wrote to Betamax, and stated "We have taken no commitment so far with Betamax until final signature of COA". [142]

149. The Tribunal finds that there was no concluded contract until 27 November 2009. This point was conceded by STC's witness, Mr Balram, in cross-examination, [143] and was not contested by STC in its closing submissions. [144]

150. The Tribunal also finds that "award" for the purposes of section 14(4)(b) of the PPA means a concluded contract. Although STC submitted that authority from the commercial construction context is inapposite when interpreting public procurement legislation, it did not dispute Betamax's contention that the ordinary meaning of "award" is a concluded contract. The Tribunal finds that there is no basis for disturbing that ordinary meaning as the term appears in the PPA, for the following reasons.

(a) The text of the PPA does not, contrary to STC's submissions, provide such a reason. That section 14 of the PPA requires an award of the contract before it is signed is consistent with the ordinary

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[138] Betamax's primary closing submissions, [55].

[139] Betamax's reply closing submissions, [33].

[140] As regulation 39 of the Public Procurement Regulations provides that unless a procurement contract is required to be signed by both parties, the bidding document should indicate that a contract enters into force when a notice of acceptance is dispatched to the selected bidder.

[141] The Tribunal has, of course, carefully considered those further submissions not specifically listed here. For reasons of clarity, the Tribunal has listed only those most relevant to its decision.

[142] Letter from STC to Betamax, 28 July 2009 [Bundle D(ll), D72].

[143] Hearing day two, T82.1 to T82.23.

[144] In paragraphs [113] to [124] of its primary closing submissions STC asserts a final decision was made to award the CoA at an earlier date, but it does not assert that a concluded contract was agreed at that earlier date.

meaning, for the reasons given by Betamax.

(b) Nor is it to the point that Betamax referred to the 12 January 2009 letter as a "letter of award". The Tribunal must determine the application of section 14 to the facts it finds itself. The contemporaneous views of the parties cannot determine that question.

(c) Further, section 14 refers to the award of a "contract". As Betamax pointed out in its closing submissions, a contract only exists where the parties are in final agreement on the specific terms of their bargain.[145] As STC does not dispute that the CoA continued to be negotiated throughout 2009, its position would require disturbing the ordinary meaning of "contract" as it appears in section 14 of the PPA as well as the ordinary meaning of "award". Again, the Tribunal finds that there is no reason to do so.

151. The Tribunal therefore finds that the CoA was awarded, for the purposes of section 14(4)(b) of the PPA, on 27 November 2009.

152. The exemption to the PPA's application on which Betamax seeks to rely was therefore in force when the CoA was awarded. The Tribunal now turns to the question of whether Betamax may rely on that exemption.

C. Does the exemption apply to the CoA?

153. It is convenient first to set out a summary of the legislation providing for the exemption as it applied on 27 November 2009 when the CoA was awarded.[146]

(a) When the PPA came into force on 17 January 2008, the Public Procurement Regulations 2008 (GN No. 7 of 2008) also came into force.

(b) Section 2 of the PPA defined the expression "public body" as not including an "exempt organisation". By section 35(a) and (b) of the Finance (Miscellaneous Provisions) Act 2009, which came into force on 30 July 2009, the defined expression was changed from "public body" to "public body, other than an exempt organisation". The expression "exempt organisation" is defined by section 2 of the PPA to mean "a body which is, by regulations, excluded from the application of this Act".

(c) Regulation 2 of the Public Procurement Regulations 2008 defined the expression "exempt organisation" to mean "a public body, as specified in the First Schedule [to the Regulations], which is excluded from the application of the [PPA]". STC was not specified in the First Schedule to the Public Procurement Regulations and, accordingly, was a public body to which the PPA applied.

(d) However, that position changed in three material respects on 29 June 2009, when the PP Regulations 2009 entered into force.

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[145] Betamax's reply closing submissions, [33].

[146] The following is adapted from Betamax's closing submissions. In the Tribunal's considered view, it provides an accurate summary of the relevant legislation. STC did not take issue with that summary in its closing reply submissions.

(i) The existing definition of "exempt organisation" in the Public Procurement Regulations 2008 was deleted and replaced by a new definition, namely "a public body which is excluded from the application of the [PPA] in relation to contracts referred to in the First Schedule."[147] The "First Schedule" referred to is the First Schedule to the Public Procurement Regulations 2008.

(ii) The First Schedule to the Public Procurement Regulations 2008 was revoked and replaced by the Schedule to the PP Regulations 2009.[148]

(iii) The Schedule to the PP Regulations 2009 excluded STC (and also the Agricultural Marketing Board, the Central Electricity Board and the Outer Islands Development Corporation) from the application of the PPA in relation to contracts for "Goods purchased for resale, including services incidental to the purchase or distribution of such goods".

154. The issue therefore becomes whether the CoA is a contract for goods purchased for resale, including services incidental to the purchase or distribution of those goods.

155. STC submits that it is not, for the following three reasons.

(a) The CoA provides for an extensive range of services beyond just freight, namely relating to the acquisition, construction, financing, management and operation of the Vessel. Section 2 of the PPA defines "goods" as including "services incidental to the supply of goods, such as freight and insurance." STC contends that this is an exhaustive list. It does so on the basis that in every instance that a non-exhaustive list appears in the PPA, the list that follows "such as..." is then followed by the words "and similar services." STC submits that this is to be expected. Freight and insurance are commonly incidental to the supply of goods; other services are not.[149]

(b) Even if the list is not exhaustive, STC submits only services closely related to the purchase and distribution of the relevant goods are captured by the exemption. The additional services covered by the CoA are not necessary to the purchase and distribution of petroleum products in Mauritius in same way that freight and insurance are. The additional services are not "akin to" freight and insurance, and are more properly associated with the *ownership* of the tanker.[150] STC illustrates this point by contrast with the contracts that were in place before the CoA was entered into. Those earlier contracts were for three years, sufficient for that purpose. The CoA had a duration of 15 years, a period unnecessary for the purchase or distribution of petroleum products.[151]

(c) The Mauritian Government's primary purposes when entering into the contract were not the purchase and distribution of petroleum products in Mauritius. Rather they were:

(i) broader public benefits of improving tax revenues and developing a maritime industry in Mauritius;[152] and

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147 Regulation 3 of the PP Regulations 2009.

148 Regulation 5 of the PP Regulations 2009.

149 STC's primary closing submissions, [94] to [95].

150 STC's primary closing submissions, [98] to [99]; STC's reply closing submissions, [24].

151 STC's primary closing submissions, [100].

152 STC's primary closing submissions, [101] to [103].

(ii) to incentivise Betamax to own or acquire the tanker. In light of this latter purpose, it is similar to a contract of finance. [153]

(d) The PPA is a significant piece of legislation that plays an important role in protecting the interests of the Republic of Mauritius. [154] Exemptions to it should be read narrowly if its important purposes are to be achieved. [155] STC summarises this point as follows. [156]

Betamax's submission is also untenable as a matter of principle. Stripped to its essentials, Betamax's contention is that the Government may allocate public funds to help a private company acquire and operate a tanker without any need for a tender process to ensure that Mauritius is maximising the use of its resources, because such a service is "incidental to" the purchase and distribution of petroleum products in Mauritius. This simply cannot be right.

(e) Betamax cannot rely on the fact that the contracts STC has entered into for supply and distribution of petroleum products to replace the CoA have not been considered to fall within the PPA. The replacement contracts do not share the characteristics that STC asserts take the CoA outside the exemption to the PPA, which characteristics are summarised above.

156. Betamax contends that the CoA is nevertheless a contract for goods purchased for resale, including services incidental to the purchase or distribution of those goods. It does so for the following reasons.

(a) STC accepts that the CoA is a contract for services. [157] Those services are incidental to the purchase and distribution of petroleum products, because without the Mauritian Government paying for those goods and services Betamax would not have entered into the CoA. The additional services "were not provided gratuitously." [158]

(b) The definition of "goods" provided in section 2 of the PPA must be read as not being exhaustive, as that is what "such as" must mean. [159]

(c) There is no reason why the relevant freight and insurance must be provided by the consignor. As a result, the fact that services relating to the acquisition, construction, financing, management and operation of a tanker are not often associated with contracts for the purchase and distribution of goods is not to the point. [160]

(d) The relevant provisions of the PPA are unambiguous on their face. STC is therefore unable to have recourse to the public policy purposes of the legislation or the broader purposes of the CoA when interpreting it. [161]

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153 STC's primary closing submissions, [103]; STC's reply closing submisssions, [25].
154 STC's primary closing submissions, [105].
155 STC's primary closing submissions, [106].
156 SCT's primary closing submissions, [104].
157 Rejoinder, [26].
158 Betamax's primary closing submissions, [68].
159 Betamax's primary closing submissions, [68].
160 Betamax's reply closing submissions, [26].
161 Betamax's reply closing submissions, [27].

(e) As noted, Betamax also asserts that the replacement contracts were not found to be subject to the PPA.[162]

157. The Tribunal finds that the additional services for which the CoA provided were incidental to the purchase and distribution of petroleum products, and so it was a contract for goods purchased for resale, including services incidental to the purchase or distribution of those goods, for the purposes of the PPA. The CoA provided for the purchase and distribution of petroleum products. It also provided for services relating to the acquisition, construction, financing, management and operation of a tanker to transport those products. On the ordinary meaning of "incidental to", those additional services were incidental to the purchase and distribution of petroleum products.

158. The Tribunal makes the following comments about the parties' specific submissions on these matters.

(a) The Tribunal accepts that there is some force in STC's submission regarding the practice used in the drafting of the other lists in the PPA invariably including the words "and similar services" when providing a non-exhaustive list. However, the ordinary meaning of the words "such as" necessarily indicates a non-exhaustive list. Reading them otherwise would be such a departure from their ordinary meaning that the Tribunal finds this cannot have been intended.

(b) STC's submission that incidental services must be, in some sense, closely related to, or commonly associated with, the purchase and distribution of the relevant goods is also rejected. There is no ambiguity on the face of the PPA that would require reading in such a requirement.

(c) STC's submissions in this regard might also be seen as seeking to interpret the PPA according to the principle of *ejusdem generis,* that is, incidental services must be "akin to" freight and insurance. STC has not, however, identified a relevant *genus,* or group of like things. As Betamax points out, there is no necessity that freight and insurance be addressed in the same contract as that for the purchase and distribution of the goods.

(d) The Tribunal accepts STC's assertions, for the purposes of considering the argument, that there were multiple primary purposes of the CoA that were not simply the purchase and distribution of petroleum products. This does not, however, alter the fact that the additional services were "incidental to" that purpose in the sense set out in paragraph 157 above.

(e) Because the language of the PPA is clear on its face, there is also no justification for reading the exclusion restrictively, as STC submits is necessary, to protect the legislation's public purpose.

(f) The Tribunal accepts STC's submissions that the replacement contracts are not relevant to this issue, for the reasons STC gives.

[162] Betamax's primary closing submissions, [76] to [77].

D. Was the exclusion nevertheless not available to Betamax under regulation 2A?

159. In its Rejoinder, STC alleges in the alternative that even if the CoA falls within the exemption, it is nevertheless captured by regulation 2A of the Regulations,[163] which reads:

> *Nothing in these regulations shall be construed as excluding the application of the [PPA] to a public body referred to in the First Schedule to these regulations and the Schedule to the [PPA] in respect of a procurement contract to which the public body intends to be a party and which is specified in column 2 of the Schedule to the [PPA].*

160. Column 2 of Part V (the relevant part which applies to STC) of the Schedule to the PPA (as amended by section 35(h) of the Finance (Miscellaneous Provisions) Act 2009) refers to contracts for "Goods, Civil Engineering Works and Capital Goods Consultancy Services and Other Services" with a prescribed amount of MUR 100 million.

161. In order for regulation 2A to apply, the CoA must therefore be a contract for "Other Services". As the Tribunal has found that the CoA is a contract for "Goods purchased for resale, including services incidental to the purchase or distribution of such goods" within the exclusion, the CoA is not a contract for "Other services". To the extent that the STC continues to rely on this argument, it is therefore rejected.[164]

E. Knowing procurement

162. STC also alleged that Betamax and its officers and principals were aware that the CoA was entered into in breach of the PPA, and knowingly procured that breach.[165] As the Tribunal has found that the PPA did not apply to the CoA, there can have been no knowing involvement in its breach. The Tribunal therefore finds that this allegation was not made out.

IX. Issue Four - Is the CoA (including the arbitration agreement therein) illegal and unenforceable pursuant to Articles 1131 and 1133 of the Mauritian Civil Code?

163. STC alleges that the CoA, including the arbitration agreement, is illegal and unenforceable under Articles 1131 and 1133 C.Civ. It alleges that as the CoA has an unlawful purpose it is void and without legal effect and that consequently Betamax is precluded from claiming damages.

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[163] STC's Rejoinder, [27] to [33]. Regulation 2A was inserted by Regulation 4 of the Public Procurement (Amendment No. 2) Regulations 2009.

[164] STC did not address the argument in either its primary or reply closing submissions, despite Betamax stating in its primary closing submissions that it was unclear whether STC continued to press the argument: footnote 22.

[165] Statement of Defence (Amendment No 2), [43].

164. Article 1131 C.Civ[166] provides that an obligation without a cause or with a false cause or with an unlawful cause cannot have any effect.[167] Article 1133 C.Civ[168] provides that a cause is unlawful when it is prohibited by law, or is contrary to morality or public order.[169]

165. In STC's submissions, a cause is unlawful if prohibited by enactment.[170] STC therefore alleges that the CoA is void and without legal effect, as it was entered into in breach of the PPA.[171] As the Tribunal has determined that the PPA did not apply to the CoA, and so was not breached, STC's submissions are rejected, and the Tribunal finds that the CoA is not illegal and unenforceable pursuant to Articles 1131 and 1133 C.Civ.

166. Following the submission of the parties' reply closing submissions, there was some correspondence from the parties concerning whether Betamax had conceded that, should the Tribunal find that the CoA was entered into in breach of the PPA, Issue 4 must be decided in STC's favour.[172] As the Tribunal has determined that the PPA was not breached, it is not necessary to decide this issue. For the same reason, it is not necessary to determine whether the arbitration clause contained in the CoA would remain valid even if the CoA were to be unenforceable under Articles 1131 and 1133 C.Civ.[173]

X. Issue Five - Is the CoA (including the arbitration agreement therein) illegal and unenforceable by reason of it having been entered into as part of a conspiracy to benefit Betamax at the expense and to the detriment of the Republic of Mauritius?

167. STC alleges that the CoA was entered into as part of a criminal conspiracy, and that the CoA is therefore illegal and unenforceable.[174]

168. The parties agree that, should STC make out the allegation of a criminal conspiracy, the CoA would be unenforceable.[175] The parties also agree that, to show a criminal conspiracy for the purposes of section 109(1) of the Criminal Code,[176] STC would have to demonstrate:[177]

(a) there was an agreement;

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166 Claimant's authorities (Part 1), tab 2, p 18; Respondent's authorities, tab 2.
167 STC's opening submissions, [122]; Betamax's closing submissions, [84].
168 Respondent's authorities, tab 2; Claimant's Authorities (Part 1), tab 2 p 18.
169 STC's opening submissions, [123]; Betamax's closing submissions, [85].
170 Weg v Patel [1991] MR 239.
171 STC's primary closing submissions, [167] and [170].
172 Email from counsel for Betamax to the Tribunal, 4 November 2016; email from counsel for STC to the Tribunal, 9 November 2016.
173 Betamax's primary closing submissions, [87].
174 Statement of Defence (Amendment No. 2), [50].
175 Betamax's reply closing submissions, [45].
176 Betamax's primary closing submissions, [90]; STC's primary closing submissions, [178] to [179].
177 STC's reply closing submissions, [37]; Betamax's primary closing submissions, [90].

(b) between two or more people;

(c) to carry out an unlawful act.

169. STC further alleges that, under Mauritius law, an "unlawful act" may be constituted by either an illegal act or an act that is harmful to another person.[178] Betamax does not dispute that, under Mauritian law, conspiracy to commit an act harmful to another person may satisfy the test. Betamax asserts, however, that STC's counsel at the hearing explicitly disavowed reliance on this argument, limiting STC's case to the unlawful act being constituted by the alleged breach of the PPA.[179] STC asserts that no such concession was made.[180]

170. For reasons that follow, the Tribunal has found that STC has failed to discharge its burden of showing that the CoA was agreed as part of a conspiracy to commit an unlawful act under either interpretation. It is therefore unnecessary to decide whether STC made the concession Betamax alleges, and the Tribunal makes no finding on that issue. As the Tribunal has found that the PPA was not breached, the focus of the reasons that follow is on whether there was an agreement to commit an act that was harmful to STC or the Government more broadly.

171. STC's allegation is therefore that there was an agreement between Mr Bhunjun and the then Government to enter into the CoA in breach of the PPA in order to harm STC to Betamax's benefit.

172. STC further contends that it need not rely on direct evidence to discharge its burden of showing that the CoA was entered into as part of a criminal conspiracy. Rather, it is sufficient if STC can show that an inference of such a conspiracy should be drawn from circumstantial evidence. STC puts its submissions on this issue as follows.[181]

As such, in deciding whether there was a criminal conspiracy as alleged, the Tribunal should consider the conduct of both the then Government and Betamax and to ask itself if there is any reasonable explanation for the way in which the CoA was eventually allocated to Betamax. In this regard, STC urges the Tribunal to consider the following questions. If, as Betamax contends, there was no conspiracy to benefit Betamax and at the expense of the Republic of Mauritius:

a. Why was there a sudden and unexplained change in the tanker project?

b. Why was this change in the tanker project not publicised so that other interested private companies may participate in it?

c. Why was there so much secrecy and haste surrounding the negotiations and the approval process for the signing of the CoA ?

d. Why were the terms of the CoA so overwhelmingly in favour of Betamax?

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[178] Relying on Kessoownath v R [1986] MR 227.

[179] Betamax's primary closing submissions, [92], citing to hearing day one, T45.13 to T45.21.

[180] STC's reply closing submissions, [39].

[181] STC's primary closing submissions, [181].

173. The Tribunal accepts that STC's burden of proof may be discharged by inference from circumstantial evidence, and it does not appear that Betamax disputes this. However, the way in which STC frames the issues in the passage extracted above appears to the Tribunal to attempt to reverse the burden of proof. In that passage STC appears to suggest that, having referred to the four circumstances listed, the question becomes whether Betamax has offered a reasonable innocent explanation for those circumstances. If this is what STC intended by those submissions, the Tribunal rejects them. STC has not drawn the Tribunal's attention to any authority that would justify departing from the ordinary position, namely that the burden remains with the party seeking to advance a proposition, in this case STC.

174. The Tribunal notes one final preliminary matter. The allegation that Mr Bhunjun was involved in a criminal conspiracy with the then Government was not put to him. He was therefore not given the opportunity to provide the reasonable innocent explanation that STC alleges Betamax has failed to give.

175. Bearing this in mind, the Tribunal now turns to examine each of the matters on which STC relies in its closing submissions as grounding the inference for which it contends. The Tribunal notes that the circumstances on which STC now relies, in its closing submissions, differ in several material respects from those STC relied on in its Statement of Defence (Amendment No 2) and its opening submissions. The Tribunal will decide the issue on the basis of the closing submissions, as the earlier matters have been abandoned by STC. The circumstances alleged in STC's closing submissions are as follows.

(a) The final CoA provided for Betamax to own the Vessel, whereas the project initially provided for the Government to own the Vessel.

(b) The Freight Condition described in paragraph (d) above was not the basis on which the freight rate was calculated under the final CoA.

(c) Contrary to the original position, the Government provided a financial commitment under the CoA.

(d) The legal advice provided by the State Law Office **(SLO)** was ignored.

(e) The CoA was unfairly skewed in favour of Betamax.

A. Ownership of the Vessel

176. The Tribunal is willing to accept, for the purposes of considering this argument, that the Tanker Project changed during negotiations. For those purposes, the Tribunal is also willing to accept that initially the Government intended to *own* the Vessel, with private parties providing *finance* for its acquisition in return for the profits to be made from the 15-year contract of affreightment. As set out in paragraphs 58 to 63 above, the negotiations were protracted, and it is unsurprising that the ultimate agreement changed in material respects from the original proposal.

177. STC further alleges, however, that:

(a) there was no possible benefit to STC from this change; [182] and

(b) Mr Bhunjun, when giving evidence, "concealed the truth as to when and where he was told of the then Government's decision that private companies (specifically JV) would acquire the vessel". [183]

178. Regarding the first assertion, Betamax points out that the primary benefits that the Government had sought from the Tanker Project, were "to be derived from the elimination of dependence on foreign tanker operators and the assurance of a stable and guaranteed long-term supply of petroleum products for reasons of national security (see STC's own Opening Statement §8), cost reductions and the consequential receipt of tax revenues from Betamax." [184] In response, STC asserts that all of these benefits, save tax revenues, were available to the Government under the Tanker Project as originally conceived, and in the context of the cost of the project, the tax revenues were insufficient to justify the change. [185]

179. The point the Tribunal understands Betamax to be making, however, is that the change in ownership did not undermine the Government's primary goals in pursuing the Tanker Project. As such, it is plausible that they would be willing to abandon that requirement during negotiations. Further, it is also plausible that a private party, such as Betamax, would consider that the returns from the 15-year contract were insufficient to justify financing a tanker it would not ultimately own. Mr Balram's suggestion that a private party would be willing to finance the acquisition for "national reasons" [186] is an implausible explanation.

180. Something more is therefore required if these circumstances are to base an inference of conspiracy. STC alleges this is provided by Mr Bhunjun being "evasive about the truth behind the Government's eventual decision to change its plans." [187] In his first statement, Mr Bhunjun states he attended the meeting between six interested private parties and Government representatives on 18 January 2008. [188] He further states that it was then clear that the Government "would not itself be purchasing and owning a tanker but that it would be the private sector which would be doing so without any financial assistance from the Government." [189]

181. STC alleges that all of the correspondence surrounding this meeting, and the minutes of the meeting itself, refer to private parties financing the acquisition, and not owning the Vessel. [190] STC further submits that there is no explicit communication of this change in the project until the letter of 12 January 2009. [191] On this basis, STC alleges that Mr Bhunjun's evidence that he was informed

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[182] STC's reply closing submissions, [43].

[183] STC's primary closing submissions, [191]; STC's reply closing submissions, [41].

[184] Betamax's primary closing submissions, [94(1)], and see the documents referred to in paragraphs 52 and 53 above and the letter from MPI to Mr Bhunjun, 4 March 2008 [Bundle D(l), D20], providing the formal request for expressions of interest.

[185] STC's reply closing submissions, [43].

[186] Hearing day 2, T53.8 to T53.9.

[187] STC's reply closing submissions, [44].

[188] First Bhunjun Statement, [24].

[189] First Bhunjun Statement, [25].

[190] STC's primary closing submissions, [184] to [192].

[191] STC's primary closing submissions, [192].

of the change at the meeting of 18 January 2008 is untrue. STC goes on to submit that the Tribunal should draw "the irresistible inference that there was a private agreement between [Mr Bhunjun] and the then Government that the Bhunjun Group would be allowed to acquire the [Vessel]. There is no other explanation why [Mr Bhunjun] would conceal these facts if the transaction were completely above board as he would have this Tribunal believe." [192]

182. The Tribunal rejects these submissions. Specifically, the Tribunal does not find that Mr Bhunjun gave evidence that was untrue in his first statement, or at all, for the following reasons. First, the correspondence to which STC refers does not state, in terms, that the Government was to own the Vessel. It merely refers to private parties financing the acquisition, and inviting "participation" in the Tanker Project. When these matters were put to Mr Bhunjun in cross examination, he explained that he understood earlier references to "participation" as not clearly indicating whether, and if so, in what proportion, the Government intended to be an owner of the Vessel. [193]

183. Second, when Mr Bhunjun was taken to the minutes of the meeting of 18 January 2008 in cross examination, and his statement in his first witness statement was put to him, he explained his understanding of what was conveyed by the Government at that meeting as follows: [194]

Yes, that's what I understood after I went into the meeting of the 18th, whereby they said that government would not be willing to participate in this project and they were not willing to provide any kind of financial assistance for this project.

184. This explanation is plausible, and entirely consistent with Mr Bhunjun's first witness statement. Having found that Mr Bhunjun was not untruthful, as alleged by STC, that allegation cannot provide a basis for the Tribunal to draw the inference alleged.

B. The Freight Condition

185. STC alleges that the Freight Condition, set out in the letter of 12 January 2009, was simply disregarded by the JV when it put its proposed CoA. In STC's submission, the Freight Condition required that freight rates be set as a rebate from international market rates. Quoting from the MLTC's report to the then Government, STC alleges that this means "the volumes and regularity of shipments are relatively precisely agreed but the freight rate is adjusted for each cargo transported in accordance with a pre-defined formula." [195] In the JV's proposal, instead of the Freight Condition, the JV proposed a fixed Freight Rate, not set by reference to a market rate, that escalated over the course of the agreement.

186. When the then Government received this proposal, rather than rejecting it as failing to conform with the requirements set out in the letter of 18 January 2009, it instead asked BDO, Betonix's auditors, to assess the offer. STC insinuates that BDO was, because of its relationship with Betonix, not independent. It further alleges that BDO was not equipped to conduct the assessment, and that

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[192] STC's primary closing submissions, [191].

[193] Hearing day one, T159.11 to T159.21.

[194] Hearing day one, T158.22 to T159.1.

[195] STC's primary closing submissions, [198], quoting from MLTC

the methodology adopted by BDO was inappropriate, because it compared the JV's proposal to the current agreements, which were struck in 2006.

187. STC also queries why MLTC, which had conducted the earlier study of the Tanker Project, was not engaged to conduct this assessment. Finally, STC alleges that, in the face of these serious issues, the then Government pressured STC into accepting the CoA. In support of this last allegation, STC alleges that:

(a) despite questions raised by STC's board members, there was no consideration of the terms of the CoA leading up to its approval; and

(b) it was ultimately the then Government that issued directions to the STC board to approve the CoA despite earlier warnings about a failure to comply with the PPA.

188. Again, STC concludes that "Only the existence of a private agreement or understanding between the then Government and [Mr Bhunjun] can explain the then Government's surprising conduct."

189. There is some controversy between the parties as to whether there was ever relevantly any freight condition of the kind STC alleges.[196] For the purposes of determining this issue, the Tribunal has assumed that there was, at least until the letter of 12 January 2009, and that Betamax's proposed CoA departed from it. Even assuming those facts in STC's favour, the Tribunal rejects STC's submissions, for the following reasons.

190. First, the simple fact that the then Government did not reject Betamax's proposal, without more, cannot base any inference of the kind STC alleges. Again, the negotiations were protracted following the letter of 12 January 2009. The failure to reject the proposal was consistent with a straightforward commercial negotiation, in that it was treated as a counter proposal to the letter of 12 January 2009.

191. Second, in cross examination, STC's witness, Mr Balram, accepted that BDO's report was independent.[197] The relationship of BDO to Betonix, and Betonix's status as Betamax's parent, was disclosed at the time of the engagement.[198]

192. Third, the allegation that the then Government pressured STC into accepting the CoA is not supported by the evidence. In cross examination, Mr Lam Choo accepted that the STC board must exercise its own judgment when deciding whether to comply with a specific direction from the responsible Minister, although bound under the STC Act to comply with ministerial directions of a general character.[199] Ultimately, Mr Lam Choo also accepted, in response to questions from the Tribunal, that the STC board had taken the view that the CoA should be entered into and that it was not coerced by the Government into signing the CoA.[200]

193. In this context, STC's remaining allegations (that BDO was ill-equipped to conduct the assessment

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196 Betamax's primary closing submissions, [94(2)].

197 Hearing day two, T86.1 to T86.3, T91.1 to T91.4.

198 Letter from BDO to STC, 1 October 2009 [Bundle D(lll), D88].

199 Hearing day two, T142.24 to T143.5.

200 Hearing day two, T165.20 to T166.11.

and that they used an inappropriate methodology) cannot provide a basis for the inference for which STC contends.

C. Financial commitment

194. At least until 12 January 2009, the Government had stipulated that the Vessel would be acquired "without any financial commitment and involvement whatsoever from the Government." However, it is common ground between the parties that the Implementation Agreement provided a Government guarantee of STC's performance of its obligations under the CoA.

195. Again, STC invites the Tribunal to infer, on the basis that the Government had therefore ultimately agreed to a commitment that ran counter to its earlier stipulations, that the CoA was an illegitimate transaction. However, it is more plausible that this change was simply the product of the parties' protracted commercial negotiations. The Tribunal also rejects these submissions.

D. The SLO's advice

196. On 28 April 2009, the Attorney-General's office advised STC as follows.[201]

> *On the basis of the information supplied to this Office, it appears that the procedures as laid down in the PP Act have not been followed, and the approval of the Central Procurement Board has not been obtained [...] It is therefore our considered view that, unless the approval of the Central Procurement Board is obtained, the STC will be precluded from signing the contract.*
>
> [...]
>
> *It follows from the above that a major issue to be resolved is the procurement issue prior to STC looking into the specific issues on which we have commented above.*

197. STC alleges that, as this advice was provided before the exemption on which Betamax relies was enacted, even on Betamax's own case, STC was prohibited at that time from entering into the CoA.[202]

198. STC further alleges that, rather than addressing this issue, the then Government hastily convened a meeting of STC's board to approve the CoA on 6 May 2009. Mr Lam Choo testified that the board was effectively being asked to approve the CoA "blind", because the CoA had not been discussed,[203] and STC's General Manager failed to provide information that the board requested.[204] On the basis of the then Government's and Betamax's alleged disregard of this advice, and the Freight Condition, STC alleges that:[205]

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[201] Letter from the Attorney-General's Office to STC, 28 April 2009 [Bundle D(l), D52], as extracted at STC's primary closing submissions, [206].

[202] STC's primary closing submissions, [207].

[203] Witness Statement of Mr Lam Choo, 7 April 2016, [15].

[204] Cross examination of Mr Lam Choo, hearing day two, T148.17 to T149.6.

there must have been a conspiracy between certain members of the then Government and Betamax for the latter to enjoy the benefit of acquiring a tanker secured with a 15-year captive cargo from STC. There is no other explanation for the utter lack of transparency on the part of the then Government in connection with the allocation of the CoA.

199. Again, the assertion that the SLO's advice was ignored is not supported by the evidence. The evidence shows that there were extensive discussions between the SLO and Betamax's solicitors, and that those discussions included a direct response to the issues raised regarding the PPA in the letter of 28 April 2008.[206] This is consistent with Mr Balram's evidence on cross-examination that Betamax had "several meetings" with his colleagues at STC and "many, many meetings" with the SLO, in which these issues were "thrashed out".[207]

200. The Tribunal therefore finds that these allegations are also incapable of grounding an inference that there was a criminal conspiracy between Mr Bhunjun and members of the then Government.

E. Whether the CoA was unfairly skewed in favour of Betamax

201. Finally, STC alleges that the terms of the CoA were so heavily skewed in favour of Betamax that "No doubt, the objective was to maximise Betamax's gains at the expense of the Republic of Mauritius."[208] As noted, the Tribunal has found that the PPA did not apply to the CoA. In order for STC to show that a criminal conspiracy was entered into, it must show that the alleged agreement was to cause harm to STC. To that end, STC identifies the following factors as indicating that the CoA was skewed in Betamax's favour. STC also relies on the allegation that the CoA was skewed in Betamax's favour to support the inference of conspiracy it alleges the Tribunal should draw.[209]

202. Betamax commissioned a Panamax tanker, of 75,000 DWT, significantly larger than the medium range tanker, of 47,000 to 53,000 DWT, that was originally contemplated. STC alleges that Betamax knew that a tanker larger than 60,000 DWT would have difficulties berthing in Port Louis. The larger the tanker, however, the larger Betamax's potential profits.[210]

203. STC's expert, Ms Jean Richards, was of the view that Mauritius would have been better served by two medium range tankers,[211] and that the CoA was "ultimately geared towards maximization of profits for Betamax, whilst allowing Betamax to compromise on the Vessel's performance."[212] Ms Richards therefore concluded that the CoA "resulted in STC (and the Republic of Mauritius) being excessively short-changed, given the premium it was paying under the CoA."[213] In her view, the

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[205] STC's primary closing submissions, [209],

[206] Letter from the General Manager of STC to the Attorney-General's Office, 5 May 2009, attaching the comments of Betamax's solicitors [Bundle D(l), D60].

[207] Hearing day two, T130.1 to T130.7.

[208] STC's primary closing submissions, [210].

[209] STC's primary closing submissions, [218].

[210] STC's primary closing submissions, [211] to [213].

[211] Expert Report of Jean Richards, 15 June 2016 (Richards' Primary Report), [4.8].

[212] Richards' Primary Report, [4.9].

CoA was "heavily weighted in favour of Betamax, at the expense of STC". [214]

204. Betamax's expert, Mr Charles Lawrie, agreed that the terms of the CoA were "unusual", [215] and both experts considered that the CoA "was not a normal contract of affreightment and was more similar, although not identical, to a project full pay out charter over 15 years." [216]

205. The reason Ms Richards held the much stronger view that the CoA heavily favoured Betamax was that the CoA provided for STC to pay Betamax a range of costs that were, in her opinion, unnecessary and not what would be expected in a standard contract of affreightment. These costs were as follows.

2.2 STC paid not just for the hire of Aggregate Freight Capacity, but also for additional unnecessary costs:

(i) Under the COA, STC paid not only for hire of the Vessel's freight capacity, but also for voyage costs such as fuel and port charges and delay charges.

(ii) STC paid additional compensation to Betamax by way of demurrage: The COA provides for the hire of the Vessel for consecutive voyages. As such, any delays would be a direct cost to STC, not Betamax. To allow Betamax to charge for demurrage allows for double-compensation.

(iii) STC ended up having to pay for additional vessels: A typical contract of affreightment would allow a Charter to make a claim against the Owner if additional vessels had to be chartered. The reverse was true under the COA. STC had to foot the costs of having to hire additional vessels if excess cargo was required.

(iv) The escalation clause in the COA was wholly excessive: The inclusion of an escalation clause to increase the aggregate freight amount over the 15-year term of the COA is excessive. In a long-term charter, any increment in charter hire payments should be wholly proportionate to the Owner's actual OPEX. In this case, the escalation was arbitrability applied to the whole of the aggregate freight amount. [217]

[...]

3.32 Betamax did not need to be compensated for loss of revenue due to any port delay, nor did it need to be compensated for fuel consumed or additional port charges since it did not have to pay these. In the years that the COA was performed, the Aggregate Freight Amount has been artificially increased by this form of double compensation through demurrage [...] [218]

206. In Ms Richards' view, the CoA was very excessive, unfair, and not aligned with the interests of the Republic of Mauritius. At some points in her cross examination, she went so far as to say that it was so unfair as to call into question its validity, [219] however later accepted that this was a legal issue

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[213] Richards' Primary Report, [2.1].

[214] Richards' Primary Report, [2.10].

[215] Supplementary Expert Report of Charles Lawrie, 14 July 2016 (Lawrie's Supplementary Report), [9].

[216] Joint Report of Charles Lawrie and Jean Richards, 5 July 2016 (Richards and Lawrie Joint Report), [2.1.5].

[217] *Richards' Primary Report, [2.2].*

[218] *Richards' Primary Report, [3.32], See also Ms Richards' cross examination.*

beyond the scope of her expertise.[220]

207. The Tribunal accepts that the CoA was unusual, and more akin to a time charter than a contract of affreightment. Regarding the question of whether the greater size of the Vessel caused berthing difficulties, the evidence suggests that these difficulties were due to the port authorities providing inaccurate information regarding the depth of the port.[221] In any event, these difficulties could not support an inference of criminal conspiracy.

208. As to the additional charges that, in Ms Richards' opinion, meant that the CoA was excessive, unfair, and was not in Mauritius' interests, the Tribunal is willing to assume, when considering STC's submissions, that Mauritius made a "bad bargain", as Ms Richards testified in cross examination.[222] It does not accept, however, that the mere fact that a bad bargain was made can justify an inference of collusion between the then Government and Mr Bhunjun. Nor does the alleged bad bargain rise to the level of "harm" that could satisfy the third element of the test for criminal conspiracy.

209. As Ms Richards accepted in cross examination, commercial parties may succeed in negotiating terms that favour them over the counterparty to the contract. In the case of BP and Shell, Ms Richards made the following observation.[223]

BP and Shell acting as an owner, they do whatever is in their own best interests, because they are very big boys, and so they will extend to allow them a very long time indeed against the owner, in order not to pay demurrage.

210. Absent more, therefore, even if the Tribunal were to find that the CoA was a bad bargain for STC (which it does not do), this would not show the necessary "harm", nor provide a basis for an inference that there was a criminal conspiracy. Given that is so, it is not necessary for the Tribunal to determine whether the CoA was a "good" or "poor" bargain for either party. The parties signed a contract and are bound by it. The maxim of *pacta sunt servanda* applies to this as to all contracts.

211. The Tribunal will, however, make the following general observations in relation to Issue 5.

(a) As the Tribunal has discussed in detail, considered independently none of the circumstances on which STC relies can ground an inference that Mr Bhunjun conspired with the then Government against the interests of Mauritius. The evidence did not support most of the alleged circumstances on which STC sought to rely.

(b) If all or most of those alleged circumstances had been supported by the evidence, it would have been necessary for the Tribunal to consider whether, in the aggregate, they were able to support the inference for which STC contended. As most of the alleged circumstances were not supported by the evidence, the Tribunal finds it unnecessary to make a finding on this issue. The Tribunal observes, however, that the circumstances alleged by STC appear to fall short of the evidence

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[219] Hearing day three, T46.20 to T46.21.

[220] Hearing day three, T47.4 to T47.19.

[221] Cross examination of Mr Balram, hearing day two, T118.21 to T118.22.

[222] Hearing day three, T56.6.

[223] Hearing day three, T50.20 to T50.24.

required to establish a conspiracy.

(c) It seems clear from the evidence that much of the negotiations were carried out directly between Government ministries and Betamax.[224] It is also clear that the CoA that was ultimately signed was different, in many material respects, from the Tanker Project as originally conceived by the then Government. Neither of these matters can support an allegation of a criminal conspiracy.

(d) STC led no evidence from any person who could have given direct evidence of a conspiracy. As noted, the Tribunal accepts that direct evidence is not a prerequisite of a finding of criminal conspiracy. However, as noted in paragraphs 75 and 76 above, the witnesses testifying to the circumstantial matters STC alleged grounded an inference that there was such a conspiracy had little or no direct knowledge of most of those matters.

(e) On a related point, in its closing submissions, STC listed a number of people who, it submits, have been the subject of criminal, or provisional criminal, charges "for their roles in the allocation and eventual signing of the CoA".[225] STC did not, however, offer any specific allegations as to what those roles might have been, or when and how the conspiracy was alleged to have been entered into.

XI. Issue Six - Assuming the CoA is valid and enforceable, is STC able to rely on the alleged impossibility of performance of the CoA?

A. STC's arguments

212. STC submits that even if the CoA is not void or unenforceable, STC was discharged from its obligations to perform the CoA under Article 1148 C.Civ as a result of the Cabinet Decision of 30 January 2015.[226] Article 1148 C.Civ, when translated, provides as follows.[227]

Damages are not due when, because of a force majeure or a fortuitous event, the debtor either was prevented from giving or doing what he was obligated to, or did what he was forbidden.

213. The Cabinet Decision of 30 January 2015 reads:[228]

Cabinet has taken note that the Contract of Affreightment regarding the transportation of petroleum products for Mauritius signed between the State Trading Corporation and Betamax Ltd,

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[224] The Tribunal refers to the documents cited in paragraphs 58 to 61 above, and the cross examination of Mr Bhunjun, hearing day one, T142.17 to T143.14, T145.2 to T146.24, and the documents referred to there by counsel for STC.

[225] STC's primary closing submissions, [38]; see also First Balram Statement, [18] and [70].

[226] The following summary of the parties' positions is drawn from the helpful and clear summary provided by STC in paragraphs [220] to [225] of STC's primary closing submissions.

[227] Respondent's Bundle of Authorities dated 29 July 2016, Tab 2.

[228] Cabinet Decisions, 30 January 2015 [Bundle D(V), D133].

is being terminated forthwith in the light of, inter alia, the unlawful procedure and processes regarding the allocation of the contract.

214. The basis upon which STC submits that it was discharged from further performance of the CoA is that the Cabinet Decision of 30 January 2015 amounted to a direction that STC cease performance of the CoA.

215. STC submits that the Cabinet Decision amounts to an event of *force majeure,* in particular, an act of Government (or a *fait du prince)* which rendered further performance of the CoA illegal. As such, STC was released from its contractual obligations under the CoA from the date of the Cabinet Decision. Consequently, there was no wrongful repudiation of the CoA on STC's part on 7 April 2015 and it is not liable for the damages claimed in these proceedings.

216. In its oral opening address, Betamax objected to STC relying on the Mauritian law concept of *fait du prince* or *force majeure* on the ground that it was not pleaded. The Tribunal overruled Betamax's objection on the basis that the factual grounds were sufficiently pleaded and Betamax would have sufficient opportunity to respond on the legal arguments in its Closing Submissions. [229]

B. Betamax's arguments in response

217. In response, Betamax makes the following submissions.

(a) There was no "decision" issued by the Cabinet on 30 January 2015.

(b) The requirements of the doctrine of *fait du prince* have not been met.

(i) In Mauritian law, only the acts of the legislature, or a public authority which the legislature has delegated specific powers, can constitute *fait du prince.* In this case, the Cabinet Decision is a pure executive act.

(ii) The Cabinet Decision was neither unforeseeable, nor irresistible. STC has failed to show that the Cabinet Decision constituted a Minister's "direction" of a "general character", per section 14 of the STC Act, such that it was obliged to follow it. The fact that the Cabinet is the apex executive body of the Mauritian Government is irrelevant.

(iii) There was also no element of externality - the fact that STC is a parastatal body which acts under the aegis of the Ministry is evidence of this.

(c) The doctrine of *fait du prince* is not applicable.

(i) clause 11 of the CoA prescribes what constitutes a *force majeure* event. None of the events described in clauses 11.3.1 to 11.3.7 have occurred in the present case. The events in question also do not fall within the meaning of clause 11.4.

[229] Hearing day one, T161.22 to T162.9.

(ii) In the face of contractual provisions which identify the ambit of the application of *force majeure,* clause 11 must be construed as being exhaustive.

218. The Tribunal will address each of the parties' contentions in turn, save for those it has determined it is unnecessary to decide. Most broadly, for the reasons that follow, the Tribunal finds that the requirements of the doctrine of *fait du prince* are not satisfied in this case. It is therefore not necessary for the Tribunal to determine Betamax's contention that clause 11 of the CoA operates to exclude the operation of the doctrine.

C. Was there a Cabinet decision?

219. The Tribunal finds that there was a Cabinet decision that the CoA should be terminated. Betamax's arguments to the contrary depend on the wording of the Cabinet's statement that it "has taken note" that the CoA is to be terminated.[230] The document in which this is recorded is headed "Cabinet Decisions 30 January 2015", and each item recorded uses a similar form of words. In the Tribunal's view, it is clear that this is simply formal language by which these decisions are recorded.

D. Did the Cabinet Decision constitute fait du prince?

220. For reasons that are explained below, the Tribunal has found that the Cabinet Decision was not "irresistible" nor "unforeseeable" in the relevant sense. It is therefore unnecessary to decide whether the act in question must be done by the legislature (and not another state body) for the doctrine to apply, or whether the Cabinet Decision was "external" for the purposes of the doctrine, and the Tribunal does not do so.

E. Was *the Cabinet Decision "irresistible"?*

221. To show that the Cabinet Decision was irresistible, in addition to the Cabinet Decision itself, STC relies on a letter from the MOI to STC of 2 February 2015,[231] which relevantly reads:

> *At the meeting of Cabinet held on 30 January 2015, Government has agreed that the Contract of Affreightment regarding the transportation of petroleum products for Mauritius signed between the State Trading Corporation and Betamax Ltd be terminated forthwith in the light of the unlawful procedure and processes regarding the allocation of the contract.*

222. Betamax submits that this does not constitute a "direction" for the purposes of section 14 of the STC Act. Under section 14, the Minister may, in relation to the exercise by STC of its powers, give such directions of a general character to STC, not inconsistent with the STC Act, as he considers

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[230] Betamax's primary closing submissions, [104].

[231] Letter from the MOI to STC, 2 February 2015 [Bundle D(V), D138].

necessary in the public interest and STC must comply with those directions. Betamax contends that, in its terms, the letter does not direct STC to do anything.[232] The Tribunal considers this is an artificial reading of the letter, and this submission is rejected.

223. Betamax further submits that the letter does not constitute a "general" direction for the purposes of the STC Act. Rather, it is a specific direction to terminate a specific agreement, the CoA. Betamax gives as an example of a "general" direction a direction to STC to import pharmaceutical drugs.[233]

224. In response, STC contends that Betamax's position would require the Tribunal to find that a direction made by the Minister was *ultra vires.* Until such a decision is quashed on application to a Mauritian Court, it must be considered within power. Further, the question of whether the direction is *ultra vires* is not arbitrable.[234]

225. In the Tribunal's view, STC's submissions in this regard are misconceived. STC has the burden of demonstrating that the letter of 2 February 2015 constituted a general direction under section 14 of the STC Act. The Tribunal makes no findings regarding whether the letter of the Minister was *ultra vires,* and it is not necessary for it to do so. The only question is whether STC has met its burden. It cannot do so by relying on the assertion that all acts of the Government are assumed to be within power until determined to be otherwise, as this begs the question: only once STC has demonstrated that the letter was a general direction for the purposes of section 14 could the assumption apply. It is therefore necessary to turn to the arguments on which STC relies to demonstrate that the direction was relevantly "general".

226. STC made the following submissions in response, which the Tribunal rejects for the following reasons.

(a) "General" here means "usual" or "ordinary".[235] In the Tribunal's view, this would require departing from the ordinary meaning of the words of the section, read in context, and the Tribunal rejects this contention. In any event, STC adduced no evidence to show that the direction was "general" in the sense for which it contends. No evidence was adduced of what directions the Minister "usually" or "ordinarily" gave, nor were any submissions made to show that the letter of 2 February 2015 was of a similar kind.

(b) Accepting Betamax's submissions would require the Tribunal to read into section 14 a stipulation that directions shall deal only with matters of general policy, and there is no justification for doing so.[236] The Tribunal disagrees. The ordinary reading of the section imports the meaning "matters of general policy", without any requirement to read those words into the section.

(c) In making these submissions STC relies on the decision in *Laguna de Bay.*[237] However, the Court in that case decided the dispute on grounds other than whether the direction in question was "general" for the purposes of the Act there considered, as STC recognises.[238] It is also a decision that

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[232] Betamax's primary closing submissions, [124].

[233] Betamax's primary closing submissions, [125], relying on the debate of this issue recorded in Hansard from 15 November 1988.

[234] STC's primary closing submissions, [249] to [250],

[235] STC's primary closing submissions, [251].

[236] STC's primary closing submissions, [252].

[237] *Laguna De Bay Sdn Bhd v Majlis Perbandaran Subang Jaya [2014] 7 MLJ 545, cited in STC's primary closing submissions, [252] to [253].*

applies Malaysian legislation. Its persuasive force is therefore limited, and the Tribunal does not find it assists in determining this issue.

227. For these reasons, the Tribunal finds that STC has failed to discharge its burden of demonstrating that the direction was "general" for the purposes of section 14 of the STC Act, and so STC was compelled to follow it.

228. In addition, STC submits that, as a practical matter, the political context in which STC operated meant that it was impossible for STC to ignore the Cabinet Decision. STC submits that it "is a parastatal body which acts under the aegis of the Government. This means that STC is bound to comply with decisions emanating from the Government. [Mr Bhunjun] himself recognised this, having taken the initiative of negotiating the terms of the CoA with various representatives from the Ministry." [239]

229. Again, these submissions are not supported by the evidence. It is true that Mr Bhunjun negotiated directly with various government ministries. However, it is also the case that Mr Lam Choo accepted that STC's board exercised its own judgment when deciding to enter into the CoA. [240] This was so despite his evidence being that pressure had been brought to bear by STC's responsible ministry on STC to sign the CoA. [241] No part of the Government other than STC was a party to the CoA. It follows that only STC is capable of terminating the CoA. Just as STC's decision to enter into the CoA was one that had to be made by STC, the decision to terminate must also be made by STC. For these reasons, STC's submissions that Mr Lam Choo's evidence is irrelevant because he had left the board by the time the CoA was terminated are not to the point. [242]

F. Was the Cabinet Decision "unforeseeable"?

230. STC contends that it could not have foreseen that the Cabinet Decision would be taken. STC's submissions in support of this contention appear to be limited to the assertion that "there is simply no evidence that the Cabinet Decision could have been foreseen at the time at which parties entered into the CoA." [243]

231. Again, STC appears to be attempting to reverse the onus of proof. As STC is the party seeking to rely on the doctrine, it has the burden of showing each of its elements is satisfied. Further, the Cabinet Decision purports to be based on "unlawful procedure and processes regarding the allocation of the contract." As with all Cabinet Decisions, it is presumably also based on the Cabinet's view of the public interest. As Betamax submits, the public interest did not relevantly change between the signing of the CoA and the Cabinet Decision. [244] Further, STC has not provided any reason to believe

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[238] STC's primary closing submissions, [253].
[239] STC's primary closing submissions, [255].
[240] Hearing day two, T165.20 to T166.11.
[241] Witness Statement of Mr John Lam Choo, 7 April 2016, [15] to [20].
[242] STC's reply closing submissions, [61].
[243] STC's primary closing submissions, [243], STC's reply closing submissions, [60(a)].
[244] Betamax's primary closing submissions, [117].

that the procedures and processes said to be unlawful were not known at the time the CoA was entered into. The Tribunal therefore finds that STC has failed to demonstrate that the Cabinet Decision was "unforeseeable" in the relevant sense.

232. As a general point, the Tribunal observes, in passing, that the outcome for which STC contends would be surprising and perhaps extraordinary from a broader policy and commercial perspective. STC's position would permit any government to avoid the obligations it has freely undertaken by the simple device of having a government entity with separate legal personality undertake those obligations on its behalf, and then issuing a cabinet directive terminating those obligations.

G. Was the Cabinet Decision a force majeure event for the purposes of clause 11?

233. Betamax contends that clause 11 clearly defines the kinds of events that can constitute *force majeure* for the purposes of the CoA, and that the Cabinet Decision does not fall within one of these categories.[245] In response, STC submits that the CoA adopts an expansive approach to the definition of *force majeure,* and "includes all events and / or circumstances which satisfy the requirements of clause 11.1".[246] The Tribunal has determined, for the reasons that follow, that the requirements of clause 11.1 are not satisfied here. It is therefore unnecessary to decide whether, as Betamax contends, the Cabinet Decision is not an event capable of coming within clause 11, regardless of whether it satisfied clause 11.1, and the Tribunal does not do so.

234. Clause 11.1 reads as follows.

> *The term 'Force Majeure Event', as used in this Agreement, shall, subject to clause 11.5, mean any event, circumstance or combination of events or circumstances beyond the reasonable control of, and without the fault or negligence of, a Party occurring on or after the date of this Agreement that materially and adversely affects the performance by that Party of its obligations under or pursuant to this Agreement, provided that such material and adverse effect could not have been prevented, overcome or remedied in whole or in part by the Affected Party through the exercise of diligence, Reasonable Care and good industry practice.*

235. The clause therefore requires that:

> (a) the event be beyond STC's reasonable control, and without STC's fault or negligence;
>
> (b) the event materially and adversely affect STC's performance of its obligations; and
>
> (c) STC could not have prevented, overcome or remedied in whole or in part the material and adverse effect through the exercise of diligence, reasonable care and good industry practice.

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[245] Betamax's primary closing submissions, [106] to [108].

[246] STC's primary closing submissions, [259].

236. In submitting that these requirements are satisfied by the Cabinet Decision and the letter of 2 February 2015, STC relies on the same matters on which it relied to contend that the Cabinet Decision constituted *force majeure* at general law.[247] However, for the same reasons that the decision and letter were not "irresistible" for the purposes of the general law test, STC could have overcome their effect through the exercise of diligence, reasonable care and good industry practice. Only STC could terminate the CoA, being the only government entity party to it. STC's board was obliged to consider for itself any decision to terminate the CoA, and to terminate only if justified in doing so.

XII. Issue Seven - If STC is proved to be liable for wrongful termination, is Betamax entitled to recover damages, and if so, in what amount?

237. STC has made the following submissions in relation to Betamax's claim for damages.[248]

(a) Under clause 10.5.2(b) of the CoA, Betamax is limited to recovery of actual and direct damages; lost profit damages are excluded under the CoA. In the circumstances, Betamax's claim should be limited to that for tank cleaning costs, being USD 76,499,775.

(b) Even if Betamax is permitted to recover lost profit damages under the CoA, such lost profits should be assessed on the basis that STC had exercised clause 10.7.1 of the CoA. Accordingly, Betamax's claim should be limited to USD 21,628,645.72.

(c) Even if Betamax's lost profit damages were not limited on the basis that STC had exercised clause 10.7.1 of the CoA, Betamax's quantification of loss has been overstated because:

(i) Betamax has underestimated the Vessel's potential earnings on the market for Years 6 to 15 by USD 15,354,926.20;

(ii) Betamax has overestimated the Vessel's potential earnings under the CoA for Years 6 to 15 by USD 2,084,678.08 by including demurrage revenue in its calculation;

(iii) Betamax has overestimated the Vessel's potential earnings under the CoA for Years 6 to 15 by USD 16,101,883.23 by factoring in escalation on CoA revenue when there is no basis to presume that costs would increase warranting such escalation;

(iv) Betamax's claim for loss of revenue for transportation of Excess Petroleum Products is speculative and devoid of basis.

(d) Even if Betamax is to be awarded any lost profit damages, the discount rate of 3% for accelerated receipt of monies applied by Betamax in calculating its claims is an unjustifiably low rate that fails to take into account the particular circumstances of the case.

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[247] STC's primary closing submissions, [260(a)].

[248] The summary of the parties' positions on these issues is adapted from STC's again excellent and clear summary: STC's primary closing submissions, [266] to [267],

238. In response, Betamax has argued the following.

(a) Clause 10.5.2(b) of the CoA does not preclude Betamax's claims, which are for direct actual damages pursuant to clause 10.3.2 of the CoA.

(b) Clause 10.7.1 of the CoA is irrelevant as STC cannot establish that the conditions for the operation of clause 10.7.1 of the CoA existed.

(c) Betamax has not overstated its losses because:

(i) the historical spot market earnings rate is an accurate estimate of the Vessel's potential earnings on the market for Years 6 to 15;

(ii) demurrage would likely be incurred in Years 6 to 8 since it would fall under the period of the existing contract that STC has for buying products at New Mangalore;

(iii) Betamax is, and would have been, entitled under the terms of the CoA to earn the escalation on CoA revenue;

(iv) it is reasonably predictable that the quantity of Excess Petroleum Products which Betamax would have carried for Years 6 to 15 of the CoA based on the actual cargoes carried by the Vessel during the CoA.

(d) Applying *The Kildare*[249] approach, the applicable discount rate should be 3%, being 1.5% for the average five-year US Treasury bond rate plus the same 1.5% (as was applied in *The Kildare)* for contingency risks.

A. Is Betamax's claim for damages limited by clause 10.5.2(b)?

239. Betamax submits that it was entitled to terminate the CoA, and is entitled to claim damages from STC for all of the payments to which it would have been entitled under the CoA had it continued on foot under clause 10.3.2.[250] That clause provides as follows.

Actual Damages

Save where a remedy, penalty or right has been provided elsewhere in this Agreement as an exhaustive remedy, penalty or right in respect of the breach orevent(s) leading to the relevant Event of Default occurring, the non-defaulting Party shall be entitled to receive from the defaulting Party all of the direct, actual damages incurred by the non-defaulting Party in connection with such Event of Default, and any such damages accruing prior to the cure of the Event of Default shall constitute a part of the cure and shall not be extinguished or repayable subsequent to the cure.

240. In the alternative, Betamax submits that STC is unable to rely on any exclusion provided by clause 10.5.2(b). Under Article 1150 C.Civ, a party that has wilfully failed to perform its obligations under

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[249] *[2010] EWHC 903 (Comm).*

[250] Betamax's primary closing submissions, [182].

a contract may not rely on any clause in the contract that limits or excludes the defaulting party's liability. This is the expression of the doctrine of *faute dolosive* in Mauritian law. [251]

241. In response, STC submits that Betamax is not entitled to rely on clause 10.3.2, as clause 10.5.2(b) limits recovery to actual and direct damages. It also disputes that *faute dolosive* applies, on the basis that STC has not acted in bad faith in failing to perform the CoA. [252]

242. Clause 10.5.2(b) reads as follows.

Exclusion of other damage

[...]

(b) Neither Party shall be liable to the other Party for consequential, incidental, punitive, exemplary, or indirectly [sic] *damages, lost profits, or business interruption damages whether provided for by statue, in tort or contract (except to the extent expressly provided herein).*

243. STC contends that the damages Betamax seeks to claim are, in effect, the profits Betamax stood to make from performing the CoA. Clause 10.5.2(b) therefore applies to exclude that claim. The only element of Betamax's claim that remains available under clause 10.5.2(b) is therefore the cleaning costs claimed. STC describes Betamax's submissions as relying on the exclusion from clause 10.5.2(b), "except to the extent expressly provided herein" to permit Betamax to rely on clause 10.3.2 as a basis for claiming loss of profits.

244. In support of its contention, STC makes the following submissions.

(a) If clause 10.3.2 permitted recovery of lost profits, then the exclusion provided by 10.5.2(b) could never apply.

(b) Applying the principle of *expressio unius est exclusio alterius,* as lost profits are expressly excluded by clause 10.5.2(b), clause 10.3.2 should not be read as incorporating them. [253]

(c) This reading is further reinforced by the explicit exclusion of a statutory right to loss of profits, which would otherwise be available under Article 1149 C.Civ. [254]

(d) The parties' intention to exclude loss of profits from recovery for an Event of Default is also evidenced by their exclusion under clause 10.6 of the CoA, under which the CoA provides an option for Betamax to transfer the Vessel to STC on termination. STC submits that this intention to exclude profits from damages payable to Betamax would apply a *fortiori* in the present situation, where Betamax retains the Vessel and so continues to profit from its use. [255]

(e) The clauses in question were drafted by Betamax, and so any ambiguity in their interpretation

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[251] Betamax's primary closing submissions, [183] to [184].
[252] STC's primary closing submissions, [286].
[253] STC's primary closing submissions, [274] to [275]; STC's reply closing submissions, [66].
[254] STC's primary closing submissions, [276].
[255] STC's primary closing submissions, [277] to [278].

should be resolved in STC's favour, by operation of the principle of *contra proferentum.*[256]

245. These submissions only apply in the case of ambiguity, however. In the Tribunal's view, clauses 10.3.2 and 10.5.2(b) the CoA are clear on their face. Contrary to STC's description of Betamax's submissions, Betamax has not claimed for loss of profits, but rather loss of the payments to which it would have been entitled had the CoA been performed. Further, the concern raised by STC's contention described in paragraph (a) above, that loss of profits could never be excluded, therefore does not arise.

246. STC further contends that the exclusion for loss of profits should be extended to loss of revenue. Arguably, loss of revenue more accurately describes what is being claimed by Betamax. STC submits that, when claiming the payments to which it would have been entitled under the CoA, Betamax must deduct its expenses. What is left is profit, and so the substance of Betamax's claim is for loss of profits.

247. Again, however, there is no ambiguity on the face of the relevant clauses that would permit the Tribunal either to:

(a) read into clause 10.5.2(b) an exclusion for loss of revenue; or

(b) read down clause 10.3.2 to exclude from direct, actual damages loss of payments to which a party would have been entitled under the CoA.

248. The Tribunal therefore finds that clause 10.5.2(b) does not operate to exclude Betamax's claims for those payments to which it would have been entitled had the CoA been performed. Having so found, it is not necessary for the Tribunal to determine whether STC is unable to rely on the exclusion in clause 10.5.2(b) by operation of the *faute dolosive* doctrine, and the Tribunal does not do so.

B. Could STC have exercised its right to terminate under clause 10.7.1 of the CoA?

249. STC submits that, as at 4 February 2015 (when STC informed Betamax that it would not continue to perform the CoA), STC could have relied on clause 10.7.1 of the CoA to terminate the agreement with two years' notice. As such, Betamax's damages should be limited to that two-year period.

250. The clause relevantly reads:

STC may terminate this Agreement for its convenience at any time upon a determination in good faith that because of changed circumstances, the continuance of this Agreement is not in the public interest.

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[256] *STC's primary closing submissions, [279].*

251. STC submits that the changed circumstances that would have justified STC terminating the CoA are as follows.

(a) STC would not have been able to continue operating under the CoA given the Cabinet Decision, and it is plain that any performance of a contract contrary to the will of Cabinet is not in the public interest.

(b) If the CoA had continued to be performed after 4 February 2015 the Republic of Mauritius would have suffered economic detriment. Betamax makes a claim for damages in the amount of USD 117,729,178, being the difference between what it would have been entitled to under the CoA and the spot market rate for the relevant period.

252. The Tribunal finds that neither of these matters qualifies as a change in circumstances for the purposes of clause 10.7.1.

253. Regarding the first, as is set out in paragraphs 226 to 229 above, the Tribunal has found that STC was not compelled to cease performing its obligations under the CoA by the Cabinet Decision. Nor is the Cabinet Decision a "changed circumstance" for the purposes of the CoA. Such a change must be relevant to whether the CoA is in the public interest. Failure to conform with a decision of Cabinet cannot qualify, as otherwise the purpose of the CoA would be defeated. This is especially so given the determination contemplated by clause 10.7.1 must be undertaken "in good faith".

254. Regarding the second, the possibility that spot markets would, from time to time, have lower prices than those applicable under the CoA existed at the time the CoA was signed. Such lower prices cannot, therefore, constitute a "change" in circumstances.

C. Has Betamax overstated its quantum of loss?

255. The written expert evidence on quantum consists of a report dated 9 May 2016 and supplementary report dated 14 July 2016 by Mr Lawrie on Betamax's behalf; and a report dated 15 June 2016 and a second supplementary report dated 26 July 2016 by Ms Jean Richards on STC's behalf.[257] The quantum experts also prepared a joint memorandum dated 6 July 2016. Mr Lawrie and Ms Richards also helpfully met while in Mauritius and were able to agree quantum, subject to liability and subject to the Tribunal's determination of certain questions of principle on which they did not agree.

256. Betamax's claims for damages have evolved in the course of the proceeding. Following the preparation of expert evidence, and the hearing, the total claimed has been reduced from USD 170,663,838 to USD 148,427,420. The bulk of that reduction is due to Betamax reducing the amount it claims for loss of earnings under the CoA (following revisions to Mr Lawrie's opinion) and ceasing to claim its losses for having to breach a long-term charterparty with a third party.[258]

257. At the hearing, the position was summarised by Mr Lawrie in Exhibit C4. Since the hearing, an

[257] This summary of the expert evidence is drawn from paragraphs [129] to [131] of Betamax's primary closing submissions.

[258] These changes are helpfully summarised by STC in its amended submissions on costs, 27 October 2016, p 9.

error has been identified in relation to the sum claimed for Excess Cargo: the sum claimed is now reduced to USD 17,008,264.[259] The figure for Excess Cargo in Exhibit C4 has therefore been revised in order to correct the error. Also, Betamax no longer pursues its claim for credit insurance in the sum of USD 400,000. Accordingly, the correct table is now as follows.

Comparison of CL and JR Estimates of Quantum				
Details	**Date**	**CL**	JR	Effect on Claim
Year 4	**Total**	**3,730,944**	**3,730,944**	**0**
Tanks Cleaning Costs Loss of Earnings - Year 4 Loss of Earnings on Extra Cargo	15 Feb to 8 Mar 2015 4 Feb to 17 May 2015 4 Feb to 17 May 2015	76,500 3,620,644 33,800	76,500 3,620,644 33,800	0 0 0
Year 5	**Total**	**9,959,034**	**9,959,034**	**0**
Loss of Earnings - Year 5 Loss of Earnings on Extra Cargo **Years 6 to 15**	18 May 2015 to 17 May 2016 18 May 2015 to 17 May 2016	9,186,195 772,839	9,186,195 772,839	0 0
Total Years 6 to 15 excl excess cargo	**Total**	**117,729,178**	**83,787,691**	**-33,941,487**
Demurrage Market Rate COA Freight and OPEX/ Admin Escalation (difference) Credit Insurance	18 May 2016 to 17 May 2019 18 May 2016 to 17 May 2026 18 May 2016 to 17 May 2026 18 May 2016 to 17 May 2026	2,084,678 70,725,585 16,101,883 0	0 86,080,511 0 0	-2,084,678 -15,354,926 -16,101,883 0
Net Difference Excess Cargo (JR figure If awarded)	**18 May 2016 to 17 May 2026**	**17,008,264**	**9,211,154**	**-33,541,487-7,797,110**
Costs to be incurred for amending T&C of Financing banks		0	0	0

[259] Ms Richards is in agreement with the corrected figure and has informed Mr Lawrie that she is happy for the corrected figure to be placed before the Tribunal "provided it is made clear", as the Claimant now does, that "all the assumptions on quantity, rate, costs etc are [Mr Lawrie's] and that I had not made a similar calculation since I consider that there should be no claim for excess cargo in years 6 onwards".

148,427,420 106,688,823 -41,738,597

NON DISCOUNTED

258. In the course of the Tribunal consulting the experts on the application of the discount rate, Mr Daniel and Ms Richards determined that this total still included the USD 400,000 for credit insurance. The Tribunal has therefore deducted that sum from the two totals claimed, giving USD 148,027,420 and USD 106,288,823 respectively.

259. There was also written expert evidence on the appropriate discount rate to be applied to the damages for loss of earnings in Years 6 to 15. This comprises a report dated 11 May 2016 and a supplementary report dated 14 July 2016 by Mr Daniel on Betamax's behalf; and the 15 June 2016 report and a first supplementary report dated 14 July 2016 by Ms Richards on STC's behalf. Mr Daniel and Ms Richards also prepared a joint memorandum dated 4 July 2016.

260. As noted above, there are therefore five areas of outstanding disagreement between the parties on quantum, as follows.

(a) Whether Betamax has underestimated the Vessel's potential earnings on the market for Years 6 to 15 by USD 15,354,926.20.

(b) Whether Betamax has overestimated the Vessel's potential earnings under the CoA for Years 6 to 15 by USD 2,084,678.08 by including alleged demurrage revenue in its calculation.

(c) Whether Betamax has overestimated the Vessel's potential earnings under the CoA for Years 6 to 15 by USD 16,101,883.23 by factoring in escalation on CoA revenue.

(d) Whether Betamax's claim for loss of revenue for transportation of Excess Petroleum Products is speculative.

(e) Whether the discount rate to be applied to any award for loss of earnings for Years 6 to 15 should be 3% or 11 %.

(1) The Vessel's potential earnings on the market for years 6 to 15

261. The parties agree that the Vessel's potential earnings for years 6 to 15 must be deducted from the payments to which Betamax would have been entitled if the CoA had been performed in those years. STC, relying on Ms Richards' evidence, contends that the appropriate measure of those potential earnings is a full payout charter for a second-hand vessel that is 5 years old.[260] Betamax, relying on Mr Lawrie's evidence, asserts that the appropriate rate for assessing the Vessel's potential earnings on the market for years 6 to 15 is the spot market rate.[261]

262. STC contends that its approach is more appropriate because the CoA is more similar to a full payout

[260] STC's primary closing submissions, [302].

[261] Betamax's primary closing submissions, [154].

charter than it is to operating on the spot market.[262] Betamax does not dispute that the CoA is more similar to such a contract. However, Betamax contends that the spot market is the appropriate measure because, despite 10-year full payout charters occasionally being contracted, such transactions are unreported, so there is no reliable data available to base the calculation.[263] Further, Mr Lawrie's evidence is that such contracts are very rare, with 90% of the market being spot,[264] and usually between parties that have a long-standing business relationship.[265] Betamax relies on *The Kildare,*[266] a decision in which the Court relied on the spot market because there was no market for the charters there relevant.

263. STC contends that because Mr Lawrie accepted that there are some such contracts agreed, this is contrary to Betamax's case, which is that there is no market for 10-year full payout charters.[267] It appears to the Tribunal that this misrepresents Betamax's case and Mr Lawrie's evidence. That there is a "market" for such contracts, in that they are occasionally agreed between parties, does not appear to the Tribunal to be in dispute. Rather, Betamax is asserting that they occur "off-market" (that is, they are not reported), and so no reliable data is available to base the necessary analysis.

264. STC is right, however, to point out that this distinguishes the present case from *The Kildare,* in which there was no market for the relevant time charters.[268] Betamax's reliance on that decision is therefore misplaced. Nevertheless, the Tribunal accepts Mr Lawrie's view that the absence of publicly available data on 10-year full payout charters and their rarity make the historical spot market data the appropriate measure for this component of the damages assessment.

(2) Whether Betamax is entitled to include demurrage

265. Betamax now limits its claim for demurrage to years 6 to 8. It does so on the basis that these are the years left to run on STC's current contract to purchase products from New Mangalore. Mr Lawrie has averaged the demurrage for the each of the years that the Vessel operated under this contract and applied that number to the remaining years of the contract.[269] In Mr Lawrie's view, to seek to estimate demurrage for later years, without the background of this existing contract, would be too uncertain.[270]

266. STC asserts that any assessment of demurrage remains too uncertain.[271] As STC submits, under Mauritian law, the requirement of certainty of damage is provided for in Article 1149 of the C.Civ, which refers to the loss "suffered" and the profit which the non-breaching party is "deprived of'. As such, the consequence of the breach must be proven, and not be potential or hypothetical.[272]

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[262] STC's primary closing submissions, [306].
[263] Betamax's reply closing submissions, [79].
[264] Hearing day three, T80.17 to T80.23, T81.8 to T81.10.
[265] Hearing day three, T79.14 to T79.18, T80.2 to T80.4.
[266] *[2010] EWHC 903 (Comm).*
[267] STC's primary closing submissions, [304]; STC's reply closing submissions, [74] to [75].
[268] STC's reply closing submissions, [74].
[269] Hearing day three, T61.16 to T62.8.
[270] Hearing day three, T63.2 to T63.10.
[271] STC's reply closing submissions, [78].

Betamax and its experts have, in effect, adopted this same standard.

267. In STC's submissions the uncertainty derives from the following factors.[273]

(a) Taking the average of the previous five years of operation under the contract is no good indicator of future performance, because the parties become more familiar with the operation, and so demurrage is less likely.

(b) There were some voyages on which there was no demurrage during those five years.

(c) The CoA provides a mechanism to review and extend lay time, on the basis of the demurrage that actually occurred. STC contends that the mechanism would have been invoked, and if it had the additional lay time would have been adequate to account for Betamax's claim for demurrage.

268. In response, Betamax contends that Mr Lawrie's approach is conservative, as the parties agree that the CoA requires STC to pay Betamax demurrage, when incurred, and Betamax is claiming only for the first three years of the remaining term.[274] Mr Lawrie opines that the actual performance under the supply contract with New Mangalore is a good indicator of likely events for the balance of the contract.[275] Betamax also points out that the parties' familiarity is irrelevant to demurrage. The parties have no control over port operations, nor over the weather that will affect those operations.[276]

269. As to the mechanism under the CoA by which the parties may review lay time, Mr Lawrie simply states that it is not possible to predict whether, and how, that would be engaged.[277]

270. The Tribunal accepts Mr Lawrie's view. In the Tribunal's view, performance under the contract for supply from New Mangalore to date provides an adequate guide for the likely demurrage during the remaining three years of its performance.

(3) Whether Betamax is entitled to include escalation of the Freight Rate

271. As noted above, the CoA provided for the Freight Rate to escalate at the rate of 1 % for the first 5 years, 1.5% for years 6 to 10, and 2% for years 11 to 15.[278] Mr Lawrie applies this escalation to his calculation of the revenue to which Betamax would have been entitled had the CoA been performed. Mr Lawrie then assumes that OPEX will increase by 1 % per annum for each of those years. In his view, this is a conservative approach. He also points out that this escalation of OPEX

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[272] STC's primary closing submissions, [310], relying on Responsabilite contractuelle, Helene Boucart, June 2016, [368], in Dalloz Repertoire de droit civil.

[273] STC's primary closing submissions, [313].

[274] Betamax's primary closing submissions, [140] to [141].

[275] Hearing day three, T61.21 to T62.8.

[276] Betamax's reply closing submissions, [82].

[277] Hearing day three, T68.25 to T69.4.

[278] Clause 6.5.3 and Schedule 1 of the CoA.

will be applied no matter whether his or Ms Richards' view is preferred, and so it is immaterial to the matters that remain in dispute between the parties.[279] The Tribunal therefore does not address this matter further.

272. STC submits, based on Ms Richards' opinion, that the escalation should not be applied in years 6 to 15. In STC's submission, escalating the Freight Rate in those years would be inappropriate because the escalation rate, on Mr Bhunjun's evidence, was included to cover excepted increases in costs.[280] There being no evidence that costs have increased, escalation is inappropriate. Ms Richards opines that applying the escalation clause would overcompensate Betamax.[281]

My belief, since it's unforeseeable what the increase costs are, to actually put forward a claim for loss of profit, based on the full escalating schedule, the full escalation in the contract, with a minimal escalation of costs, unbalances what was the expectation when the contract was signed to start with, that actually costs should really be increased to the same amount, to bring the owner back to what he was going to achieve in year 1.

273. Ms Richards accepts that, had the CoA remained on foot, Betamax would have been entitled to apply the escalation rates set out in the CoA.[282]

274. Given that is so, the Tribunal accepts Mr Lawrie's approach. The approach proposed by Ms Richards would require the Tribunal to make some assessment of what the parties expected at the start of the CoA, and then attempt to determine whether applying the CoA as written "unbalances" that expectation. Even if that task were possible, the Tribunal has no mandate to undertake it. The Tribunal must apply the CoA as agreed between the parties when assessing damages.

(4) Whether Betamax can claim for excess cargo

275. Clause 6.2 of the CoA provided for the parties to agree the number of round trips that would be conducted by the Vessel each year to deliver petroleum products to Mauritius, and for STC to contract for all of that Freight Capacity. Clause 8.2 of the CoA provided that, if STC wished, in any given year, to import more petroleum products than covered by the Freight Capacity (Excess Capacity), Betamax would have the right of first refusal to carry those additional products.

276. Betamax claims USD 17,008,264 in respect of lost earnings on extra cargo, which it submits would have been carried as Excess Capacity in years 6 to 15 of the CoA. STC asserts that this claim is speculative, and no amount should be awarded on the basis of Excess Capacity.[283] In the alternative, STC asserts that, if the Tribunal finds that Betamax is entitled to compensation for Excess Capacity, that amount should be calculated at the same rate as occurred in Year 5, giving a figure of USD 9,211,154.[284]

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[279] Hearing day three, T95.9 to T95.16.
[280] STC's primary closing submissions, [324],
[281] Hearing day three, T96.15 to T96.23, extracted in STC's primary closing submissions, [325].
[282] Hearing day three, T98.3 to T98.8.
[283] STC's primary closing submissions, [331] to [332].
[284] Hearing day three, T19.8 to T19.12.

277. Mr Lawrie based his figure of USD 17,008,264 by assuming that demand for petroleum products would grow over Years 6 to 15 at the rate of 1 % per annum, and applying that rate of increase to the amount of Excess Capacity in Year 5. That assumption was supported by the following matters. [285]

(a) The projected total petroleum exports to Mauritius on STC's website averaged 1.85% or 1.9% growth per annum.

(b) The average increase in cargos carried by the Vessel over Years 1 to 5 was approximately 0.6% per annum.

(c) Adding in the cargo under the two new contracts of affreightment STC entered into in 2015, that rate of increase grows to 4%.

(d) Mauritius' economy can be expected to continue to grow, and there are various plans to develop maritime infrastructure in Mauritius.

(e) On the other hand, there is a trend towards reducing reliance on carbon-based fuel, which may affect demand in the future.

278. Betamax also points out that: [286]

(a) Mr Balram gave evidence that Mauritius' demand for petroleum products was expected to double in the years to come; and

(b) the proportion of any increase in the import of petroleum products accounted for by Betamax's competitors would be *de minimis.*

279. STC bases its submission that any claim for Excess Capacity is speculative on the following matters.

(a) No trend of growth can be identified for the import of petroleum products in Years 6 to 15. No admissible expert evidence has been provided to support such a finding. Mr Lawrie himself emphasised, in his oral evidence, that his projected growth was very uncertain. [287]

(b) Even if such growth could be shown to be likely, it would not all be accounted for by Betamax's Excess Capacity. Mauritius is liberalising its import regime. Whilst the amount of petroleum products that have been imported under the new regime is small so far, there is no limit on the number of licences that may be granted, and Mauritius intends to become a bunkering hub. If successful, that may lead to further liberalisation in the future. [288]

(c) It is not certain that Betamax would exercise its right of first refusal in any event. If it were uneconomic to do so, even Mr Lawrie accepts that Betamax would only occasionally exercise the right in the interests of maintaining its relationship with its long-term customer, STC. [289]

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[285] Hearing day three, T98.24 to T101.15.

[286] Betamax's primary closing submissions, [164].

[287] STC's primary closing submissions, [333] to [336].

[288] STC's primary closing submissions, [337] to [339].

280. The Tribunal accepts STC's submissions that Betamax has failed to discharge its burden of showing that petroleum imports would continue to grow. The evidence provided by Mr Lawrie is simply too uncertain to base a finding that growth during Years 6 to 15 was more likely than not. The Tribunal therefore does not award any amount in damages to Betamax for lost earnings on extra cargo.

281. The Tribunal therefore finds that, subject to the application of the appropriate discount rate, STC is liable to Betamax for damages in the amount of USD 131,019,156 for its default under the CoA.

(5) The appropriate discount rate

282. Betamax's expert, Mr Daniel, contends that a discount rate of approximately 3% is appropriate,[290] to be applied to a lump sum for each of Years 6 to 15, following the approach adopted in *The Kildare.* Ms Richards contends that a discount rate of 11% is appropriate, based on her assessment of the opportunity cost of money to Betamax, or its weighted average cost of capital (WACC). In the alternative, if the approach from *The Kildare* is taken, then 8.37% is appropriate. For the purposes of analysis, the Tribunal first addresses the different applications of the approach adopted in *The Kildare,* and then Ms Richards' assessment of the opportunity cost of money to Betamax.

283. Mr Daniel arrives at a rate of 3% by combining a risk-free rate of return with a further rate to account for risks. The risk-free rate is derived from the rate of return on 5-year US Treasury bills for the year up to 29 April 2016, giving 1.5%. The rate for contingency risks Mr Daniel took from the rate adopted in *The Kildare,* of 1.5%. This rate represented the Court's estimate of certain catastrophic risks (such as bankruptcy) to the particular shipping project, but not general operational risks, which the Court found it was inappropriate to include.

284. For the risk-free rate of return, Ms Richards adopted 10-year US Treasury bills, deriving a rate of 1.87%. In STC's submission, this more accurately reflects the returns the parties had in mind, given that the CoA had 10 years left to run. Ms Richards put the point as follows.[291]

> *If you take a 10-year bond, we are looking at a 10-year period. If you take the 10-year bond rate now, that is the market's perception of a reasonable interest rate return, a safe interest rate return over the whole of the period of 10 years. That was why I preferred the 10-year rate, because I don't believe that the five-year rate - the five-year rate only really gives you the market perception of a reasonable safe interest return, as of now, for the next five years. So it takes out any perception of where the market is going to go. Whereas, your 10-year perception gives you a perception of where the market thinks the rate is going to go, to give you 10 years. That was why I believe that 10 years was the right period to take. If you actually adopt a five-year bond, then after five years, you are in a position, some way five years down the road, of knowing what the bond rate is going to be for the next five years, to give you two bites at your five-year bond.*

285. In contrast, Mr Daniel explained his preference for the 5-year Treasury bills as representing the

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[289] STC's primary closing submissions, [340] to [342].

[290] As this rate has a component based on the average return on US Treasury bills (see paragraph 283 below) at the time of the application of the discount rate, it must be updated when applied.

[291] Hearing day three, T125.24 to T126.4.

average term that the parties would have in mind when the cash flow is derived. [292]

A US treasury bond mechanically involves buying a bond, receiving interest periodically over the term of the bond and then receiving your capital at the end of it. But you receive no amounts of capital during the period of the bond. So during the 10 years, you only receive interest. In this case, we are dealing with cashflows that arise each year, year 1, 2, 3, through to year 10. Therefore, technically, to match the terms of the bond, we actually need to look at an average for the bond's period. The way you could look at it is to say: actually, each year's worth of cashflows that are being claimed, if each one of those was a separate claim and we had 10 years of claims, in year 1, we would not apply a 10-year rate to that. In year 2, we wouldn't apply a 10-year rate to that, we would apply a one-year, a two-year, a three-year, et cetera. So your average term is five years. So that's the position that I have put forward.

286. STC submits that this confuses the appropriate application of the discount rate (ie, to each year of income) with how the discount rate should be derived, which it submits is by reference to the remaining term of the CoA. [293]

287. The Tribunal does not accept STC's submissions on this matter, and prefers Mr Daniel's approach as more closely reflecting the way in which the parties would have contemplated the income stream at the time had the CoA been performed.

288. Regarding a rate to account for contingency risk, Ms Richards' view was that the rate applied in *The Kildare* should be increased, to 6.5%, because:

(a) that decision was concerned with a much shorter contract, of three years, as opposed to the 10 years left to run on the CoA; and

(b) the vessel in question, a dry bulk carrier, was inherently less risky than the Vessel, an oil tanker.

289. As to the first, Mr Daniel points out that any greater risk given the longer duration is necessarily accounted for by the discount method: [294]

[T]here is no technical reason why you should increase the risk premium purely because the period you are considering is longer or shorter.

ARBITRATOR: Doesn't it follow that the longer the period, the greater the risk?

MR DANIEL: Yes, but that's dealt with by the discounting. The claim element that arises in year 10 will be discounted by a significantly larger amount than the amount than arises in year 3, for example.

ARBITRATOR: Because it's 1.5 per cent per year.

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[292] Hearing day three, T120.25 to T121.18.

[293] STC's primary closing submissions, [354] to [357], STC's reply closing submissions, [85].

[294] Hearing day three, T124.3 to T124.18.

MR DANIEL: Yes.

ARBITRATOR: I see.

MR DANIEL: There is no intrinsic reason why, for 10 year, it suddenly should become 5 per cent and why we should be applying that 5 per cent to years 1 to 3 that was considered in The Kildare.

290. In its response to this evidence, STC elides Mr Daniel's explanation of how the method to be applied accounts for the greater risk, and so fails to come to grips with his evidence.[295] The Tribunal accepts Mr Daniel's explanation and approach on this issue.

291. Mr Daniel also rejects Ms Richards' view that the risks associated with a tanker are greater than those associated with a dry bulk carrier, on the basis that market data do not reflect a greater external measure of risk in this respect, in terms of either the relative cost of insurance or analysis of capital markets for shipping investments in the US.[296]

292. In response, STC submits that:[297]

(a) Mr Daniel has no experience in operational matters;

(b) the insurance data on which he relies to assert there is no material difference in the risk profiles of the two types of vessel does not support his contention; and

(c) the data on which he relies to assert that investors do not demand a premium for tanker vessels as opposed to dry bulk carriers is entirely out of context and does not support his position.

293. The task Mr Daniel undertook was to determine an appropriate discount rate for any award, and STC does not dispute Mr Daniel's expertise as a forensic accountant specialising in the shipping and offshore maritime industries.[298] The Tribunal does not therefore consider that Mr Daniel's lack of operational experience is a bar to his providing an opinion on this matter.

294. STC's contention that the insurance data does not support Mr Daniel's position is based on differences between the costs of insurance for the different types of vessels.[299] However, as Mr Daniel pointed out in his cross-examination, those differences were not great enough to disturb his overall conclusion that the costs were similar.[300] The Tribunal accepts this evidence.

295. STC submits that Mr Daniel's reliance on US capital markets not demanding a premium for investing in tanker operations is misplaced. This data is based on the relevant companies' WACC, which, on Mr Richards' evidence, is more likely to reflect those companies' corporate costs of

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[295] STC's primary closing submissions, [361], in which the first and last sentences of this quotation are extracted, but not the explanation that connects them.

[296] Hearing day three, T125.6 to T125.17.

[297] STC's primary closing submissions, [363].

[298] Moore Stephens Report, 11 May 2016, p 1.

[299] STC's primary closing submissions, [367], STC's reply closing submissions, [87].

[300] Hearing day three, T142.1 to T142.6.

borrowing.[301]

296. Even accepting, for the sake of argument, that this is so, Mr Daniel points out that "any differences in operational risk are reflected in higher levels of operating costs. Such operating costs are already dealt with in [Betamax's] cash flows."[302] The Tribunal therefore accepts Mr Daniel's approach to the method adopted in *The Kildare.*

297. Finally, STC submits that the more appropriate method is to assess Betamax's WACC, and use that as the discount rate. STC does not, however, offer any reasons as to why this approach should be preferred. Ms Richards, in her primary report, describes it as "more realistic",[303] however provides no explanation of why this is so. STC, in its closing submissions, does not expand on the point. Rather, it suggests that the method is similar to that used in *The Kildare,* and that the rate derived from both methods should not be too different. As, on Mr Daniel's evidence, Betamax's WACC is likely to be higher than 7%, this is a reason to prefer Ms Richards' approach.

298. In response, Mr Daniel points out that WACC was not used in *The Kildare* because:[304]

(a) the risk to be captured in the discount rate is the risk of the particular project, not the overall risk profile of the company; and

(b) only catastrophic risks were to be captured, rather than the full range of commercial risks reflected in the WACC.

299. STC responds that, as Betamax was effectively a vehicle for the project, the distinction does not apply here. Even if this is so, it addresses only the first of Mr Daniel's points. Further, absent a positive reason to prefer the WACC assessment, which STC has not offered, the Tribunal is not minded to depart from the approach adopted in *The Kildare.*

300. For these reasons, the Tribunal accepts that the appropriate discount rate for contingent risk is 1.5%, and risk-free is the average of 5 year US Treasury bills for the relevant period, to be applied to the cash flow expected in each remaining year of the CoA.

301. At the Tribunal's request, Ms Richards and Mr Daniel applied this method to the sum to be discounted. That sum is the proportion of the sum to which the Tribunal has determined Betamax is entitled (USD 131,019,156) that would have been earned under the CoA after the date stipulated for the Award, 18 April 2017. Their application of the method gave a sum of USD 101,577,221 for Years 6 to 15 of the CoA. To that amount must be added the sums to which the Tribunal has determined Betamax is entitled for Year 4 (USD 3,730,944) and Year 5 (USD 9,959,034). The total sum the Tribunal finds Betamax is entitled as damages is therefore USD 115,267,199.

302. While preparing the report applying the discount rate with Mr Daniel, Ms Richards raised an issue concerning the market rate she had agreed with Mr Lawrie for the purposes of determining the Vessel's likely earnings on the spot market (to be deducted from the sum to which Betamax is

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[301] STC's primary closing submissions, [369], quoting from hearing day three, T128.16 to T129.4.

[302] Peter Daniel's Supplementary Report, 14 July 2016, [3.16].

[303] Richards' Primary Report, [9.4].

[304] Hearing day three, T142.11 to T142.22.

entitled as payments under the CoA). Ms Richards and Mr Lawrie provided the Tribunal with supplementary reports on this issue. Ms Richards asserted that the rate should be adjusted because, through an oversight, the rate agreed was net of commissions. In order to reflect the actual position on the spot market, those commissions should be added back to give the gross figure. This would have the effect of reducing the amount to which Betamax is entitled as damages, as the sum to be deducted from the damages payable as future entitlements under the CoA would increase.

303. Mr Lawrie opined that this would be inappropriate, for the following reasons. Due to the sources available to the experts, the figure agreed at the hearing was something of a hybrid of historical net and gross amounts. Further, the commissions Ms Richards asserts should be added to the figure agreed are effectively a cost to the owner. If the commissions were added to the average figure, the same sum should therefore be deducted from the overall amount, resulting in no net change. Finally, as the parties cannot be assumed to have contemplated that the Vessel would be operating on the spot market at the time of entering in to the CoA, neither the CoA nor the management agreement between Betamax and ESM can provide any guidance on this issue.

304. The Tribunal accepts Mr Lawrie's view that it would be inappropriate to alter the rate he agreed with Mrs Richards at the hearing, for the reasons he gives. The total sum the Tribunal finds Betamax is entitled as damages therefore remains USD 115,267,199.

XIII. Issue Eight - Interest

305. Betamax seeks simple interest on any award in its favour at the rate of 3% from 7 April 2015 and simple interest at the same rate on any costs awarded in its favour from the date of the award. It points out that section 33(1)(d) of the IAA and Rule 28.7 of the SIAC Arbitration Rules give the Tribunal broad discretion to award interest at the rate and for the duration it considers appropriate.

306. STC contends that if the award has a component for future payments to which Betamax would have been entitled had the CoA remained on foot, it is effectively receiving the benefit of an advance payment. This benefit more than compensates Betamax for the loss of the use of any monies it would otherwise have received under the CoA. Payment of interest before the date of the award is therefore not justified.

307. The Tribunal accepts STC's submissions. Interest will be calculated on the award sum and on the amount awarded for costs from the date of the award until payment at 3% simple interest.

XIV. Issue Nine - Legal costs and the costs of the arbitration

308. The IAA, under section 33(2)(a), and the SIAC Rules, under Rules 31 and 33, give the Tribunal broad discretion when apportioning the costs of the arbitration and ordering that a party pay the other party's legal and other costs. A number of approaches have been adopted by Tribunals when exercising this discretion. The Tribunal accepts STC's submissions that, as a general rule, reasonable costs should follow the event, and that the Tribunal may nevertheless apportion costs

where a party has been successful overall, but has failed on some issues. [305]

309. Here, it is relevant that this is a commercial case, concerned with the enforcement of contractual obligations. STC is liable to pay damages to Betamax in the sum of USD 115,267,199. This represents the majority (nearly 70%) of the amount Betamax originally claimed, of USD 170,663,838. The Tribunal therefore finds that STC is liable to pay Betamax's costs, to the extent they were reasonably incurred, and all of the costs of the arbitration. The Tribunal also finds that, due to the high proportion of its original claim that was awarded in Betamax's favour, apportionment is not appropriate in this case.

310. STC incurred the following costs:

(a) USD 431,201.96
(b) SGD 1,609,123.11 (including the fees of the Tribunal Secretary)
(c) MUR 1,002,520
(d) GBP 155,846.76
(e) EUR 15,820

311. Betamax incurred the following costs:

(a) USD 3,529,434
(b) SGD 39,466 (including the fees of the Tribunal Secretary)
(c) GBP 1,100,370

312. Betamax's costs were therefore significantly higher than STC's. To a degree, this is to be expected, given that Betamax had the burden of proof as the Claimant. However, the Tribunal considers it appropriate to reduce the two largest sums claimed by Betamax by 20%. The Tribunal therefore awards the following costs in Betamax's favour:

(a) USD 2,823,547.20
(b) SGD 39,466 (including the fees of the Tribunal Secretary)
(c) GBP 880,296

313. The costs of the arbitration have been fixed by the Registrar of the Court of Arbitration of SIAC, in the amount of SGD 465,223.58, composed of the following amounts.

Tribunal's Fees & Expenses	**SGD**
Dr Michael Pryles (Sole Arbitrator)	
Dr Pryles' Arbitrator's Fees	382,292.42
Dr Pryles' Expenses	15,651.78

[305] STC's submissions on costs, 26 October 2016.

Sub-total	397,944.20
TOTAL ARBITRATOR'S FEES & EXPENSES	397,944.20
BANK CHARGES INCURRED	39.38
SIAC Administration Fees & Expenses	
SIAC Administration Fees	66,500
SIAC Expenses	740
TOTAL SIAC ADMINISTRATION FEES & EXPENSES	67,240
TOTAL COSTS OF ARBITRATION	465,223.58

XV. Operative part

314. For the foregoing reasons the Tribunal finds and awards as follows:

(a) the Tribunal has jurisdiction to hear and decide the claims in this arbitration;
(b) STC is to pay Betamax damages in the amount of USD 115,267,199 for its default under the CoA;
(c) STC is to pay Betamax's costs in the amounts of USD 2,823,547.20, SGD 39,466 and GBP 880,296;
(d) STC is to bear the costs of the arbitration, fixed in the amount of SGD 465,223.58; and
(e) STC is to pay simple interest at the rate of 3% per annum of the amounts in paragraphs 314(b), 314(c) and 314(d) from the date of this award to the date of full payment.

315. All other claims and requests made by the parties in this arbitration have been rejected.