EXHIBIT A

NOTARIAL CERTIFICATE

TO ALL TO WHOM THESE PRESENTS SHALL COME

I, CHEAH SAING CHONG, NOTARY PUBLIC, duly authorized and appointed, practising in the Republic of Singapore **DO HEREBY CERTIFY AND ATTEST** that I was present on the **5th day of December 2018**, at Singapore aforesaid and did then and there see **Delphine Ho, Registrar** of the **Singapore International Arbitration Centre** signed before me, the document titled **SIAC ARBITRATION NO.003 OF 2014 (ARB003/14/ALO)** and the executed original document signed by **Delphine Ho** is attached hereunder.

WHEREOF I have hereunto subscribed my name and affixed my Seal of Office at Singapore this **5th day of December Two Thousand and Eighteen (2018).**

REPUBLIC OF SINGAPORE
NOTARY PUBLIC

Cheah Saing Chong

NOTARY PUBLIC
Republic of Singapore

NOTARY PUBLIC
Cheah Saing Chong
N2018/0071
1 Apr 2018 – 31 Mar 2019
SINGAPORE

SIAC ARBITRATION NO. 003 OF 2014 (ARB003/14/ALO)

SIAC ARBITRATION NO. 003 OF 2014 (ARB003/14/ALO) IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION RULES OF THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE ("SIAC") (5TH EDITION, 1 APRIL 2013) BETWEEN NEXBIS PTY LTD ("CLAIMANT") AND THE GOVERNMENT OF THE REPUBLIC OF MALDIVES ("RESPONDENT")

Pursuant to the appointment of the Registrar of the Singapore International Arbitration Centre by the Minister of Law of the Republic of Singapore under Section 19C of the International Arbitration Act (Cap. 143A) and the International Arbitration (Appointed Persons under Section 19C) Order 2009 as a person who may authenticate arbitral awards, I, Delphine Ho, the Registrar of the Singapore International Arbitration Centre, hereby certify that the attached *Final Award* dated 24 November 2016 ("***Final Award***") is an authentic award published in Singapore by the arbitral tribunal comprised of Chan Sek Keong in arbitration proceedings conducted under the auspices of the Singapore International Arbitration Centre. The attached *Final Award* has been registered in the Singapore International Arbitration Centre Registry as Award No. 132 of 2016 on 24 November 2016.

Under Section 19B(3) of the International Arbitration Act (Cap. 143A), an arbitral award is made when it has been signed and delivered in accordance with Article 31 of the UNCITRAL Model Law on International Commercial Arbitration (1985). The attached *Final Award* was delivered to the Claimant through its counsel, Providence Law Asia LLC at 24 Raffles Place, #24-02A Clifford Centre, Singapore 048621 and to the Respondent through its counsel, Aldgate Chambers at 63 Market Street, #11-02 Bank of Singapore Centre, Singapore 048942. Consequently, the attached *Final Award* is now final and binding on the parties.

Signed at Singapore)
By the abovenamed)
Delphine Ho)
This 5th day of December 2018)

Before me,

Cheah Saing Chong

NOTARY PUBLIC
Notary Public
Cheah Saing Chong
N2018/0079
1 Apr 2018 - 31 Mar 2019
SINGAPORE

05 DEC 2018

AT THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE

IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION RULES OF THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE SIAC RULES (5TH EDITION, 1 APRIL 2013) ("SIAC RULES 2013")

ARB No. 003 of 2014

Between

NEXBIS PTY LTD
(FORMERLY KNOWN AS NEXBIS LIMITED)
(Claimant)

And

THE GOVERNMENT OF THE REPUBLIC OF MALDIVES
(REPRESENTED BY THE DEPARTMENT OF IMMIGRATION AND EMIGRATION)
(Respondent)

FINAL AWARD

Dated this 24th day of November 2016

Registered in SIAC Registry of Awards as:
Award No. 132 of 2016
on 24 November 2016

IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION RULES OF THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE (5TH EDITION, 1 APRIL 2013)

SIAC ARBITRATION NO. 003 OF 2014 (ARB003/14/ALO)

Between

NEXBIS PTY LTD
(FORMERLY KNOWN AS NEXBIS LIMITED)

Claimant

and

THE GOVERNMENT OF THE REPUBLIC OF MALDIVES (REPRESENTED BY THE DEPARTMENT OF IMMIGRATION AND EMIGRATION)

Respondent

FINAL AWARD

THE TRIBUNAL	**Chan Sek Keong SJ**
Counsel for Claimant	**ProvidenceLaw Asia LLC** (Abraham Vergis, Kimberly Leng and Asiyah Arif)
Counsel for Respondent	**Aldgate Chambers** (Kenneth Pereira, Jeremy Bay, Eugenia Chan and Rebecca Cheah)

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FINAL AWARD

I. PARTIES TO THE ARBITRATION

1. The Claimant in this Arbitration is **Nexbis Pty Ltd** (formerly known as Nexbis Limited), a company incorporated in the Commonwealth of Australia, and having an office address at Suite 16-01, Level 16, Nexbis Tower, UOA Damansara II, No. 6 Changkat Semantan, Damansara Heights, 50490 Kuala Lumpur, Malaysia.

   [1.1 The Claimant is represented in these proceedings by ProvidenceLaw Asia LLC (Abraham Vergis, Kimberly Leng and Asiyah Arif)

2. The Respondent is, and was at all material times, the Government of the Republic of Maldives. It is represented in this arbitration by the **Department of Immigration and Emigration ("DOIE")** with its office at H. Velaanaage 1st Floor, Malé, Ameer Ahmed Magu, Republic of Maldives.

   [2.1 The Respondent is represented in these proceedings by Aldgate Chambers (Kenneth Pereira, Jeremy Bay, Eugenia Chan and Rebecca Cheah)

3. The Claimant and the Respondent may each be referred to as a "Party" and are collectively referred to hereinafter as the "Parties".

II. NOTICE OF ARBITRATION

4. By a Notice of Arbitration dated 9 January 2014, served on the Registrar of the Singapore International Arbitration Centre ("**SIAC**"), the Claimant made a claim against the Respondent in the amount of (a) US$269,000,000 (equivalent

to, S$341,000,000) as compensation or damages and (b) US$3,771,308.10 being the total outstanding invoiced amounts, for breach of an agreement made between the parties signed and dated 17 October 2010 called the **Concession Agreement for the Maldives Immigration Border Control System ("CA").**

5. In its Response to the Notice of Arbitration dated 23 January 2014, the Respondent asserted that the notice was prematurely issued as the Claimant had not complied with clause 19.1 of the CA in failing to notify the Respondent of a dispute so as to engage in discussions to resolve the dispute. Hence, the Tribunal was not vested with jurisdiction in the matter.

III. CONSTITUTION OF TRIBUNAL

6. Pursuant to Rule 6.3 of the Arbitration Rules of the Singapore Arbitration Centre (5^{th} Edition, 1 April 2013) ("**SIAC Rules**"), the President of the Court of Arbitration of SIAC appointed Chan Sek Keong of 29 Victoria Park Road, Singapore 266509, Email: chansekkeong@singnet.com.sg as the sole arbitrator ("**Tribunal**") on 21 February 2014 on the joint nomination of the Parties.

IV. APPLICABLE LAW AND JURISDICTION

7. Clause 22.0 of the CA provides as follows:

> *22.0 LAW AND JURISDICTION*
> *This Agreement shall be governed by and construed in accordance with the laws of the Republic of Singapore and the parties hereto hereby submit to the exclusive jurisdiction of the Singapore Courts.*

V. DISPUTE RESOLUTION VENUE

8. Clause 19 of the CA provides:

> *19.0 DISPUTE RESOLUTION*
> *Any disputes or differences between the [Claimant] and the [Respondent] in relation to this Agreement shall be dealt with in accordance with this Clause 19.*
>
> *19.1 Dispute Escalation Process*

(a) If any matter, dispute or claim between the Parties arise out of or relating to this Agreement, of if an event occurs which may reasonably lead to a potential default or breach of a term of this Agreement, any one of the Parties may notify the other in writing.

(b) Upon receipt of such notice, the Parties shall promptly enter into a mutual consultation process with each other in good faith, in an effort to achieve an acceptable and amicable resolution for the dispute. Where such consultation process does not resolve such dispute within thirty (30) days of the date of the notice (or such period as may be mutually extended), the dispute shall be referred by any one of the Parties to arbitration pursuant to Clause 19.3

xxx

19.3 Arbitration

19.3.1 If any matter, dispute or claim arising out of or relating to this Agreement or the breach or termination hereof is not resolved pursuant to the provisions of Clause 19 above, that matter, dispute or claim shall be referred to an arbitrator to be agreed between the Parties hereto or, failing agreement, the case will be referred to Singapore International Arbitration Centre for arbitration purpose. The decision of an arbitrator shall be final and binding on each of the Parties hereto.

19.3.3[sic] The reference of any matter, dispute or claim to arbitration pursuant hereto and/or the continuance of any arbitration proceedings consequent thereto shall in no way operate as a waiver of the obligations of the Parties to perform their respective obligations under this Agreement.

VI. PROCEDURAL HISTORY

9. On 22 February 2014, the Tribunal sent to the Parties a draft Procedural Protocol for discussion and agreement on the procedural timelines. On the same day, the Respondent's solicitor replied that it would confer with the Claimant's solicitor.

10. On 7 March 2014, the Claimant informed the Tribunal that the Parties were still discussing the draft Procedural Protocol.

11. On 15 April 2014, the Claimant informed the Tribunal that the Parties had agreed on a partial Procedural Protocol on the timelines only up to the discovery stage. On the same day, the Tribunal, with the consent of the Parties, issued a

partial Procedural Protocol which set out the timelines for the service of the Statement of Claim ("**S/C**") by the Claimant, the service of the Statement of Defence and the production of documents.

12. On 7 May 2014, the Claimant applied for an extension of time to file the Statement of Claim on the ground that it was waiting for the formal Certificate to be issued by the independent auditors pursuant to clause 16.3 of the Concession Agreement (as defined in the Claimant's Notice of Arbitration) for the purposes of quantification of the Claimant's claim. On the same day, the Respondent's solicitors informed the Tribunal that they were taking instructions on the Claimant's request.

13. On 8 May 2014, the Respondent consented to the request for extension of time, whereupon the Tribunal, with the consent of the Parties, issued an Amended Procedural Protocol to extend the procedural timelines.

14. On 14 May 2014, the Claimant filed its S/C.

15. On 24 June 2014, the Respondent requested an extension of time of three weeks from 25 June 2014 to file its Defence and Counterclaim ("**D/C**"). On 26 June 2014, the Respondent informed the Tribunal that the Claimant was not agreeable to any extension of time. In response, the Respondent filed an application for an extension of time to serve its D/C by 16 July 2014 on the following grounds: (a) the S/C set out a number of substantive issues going back to 2010 which the Respondent needed to address: (b) a number of these issues involved Maldivian law; (c) the S/C also enclosed an auditor's report which the Respondent needed to review and respond to; (d) many of the documents are in the Dhivehi language which have yet to be officially translated, and the Respondent was doing its best to get them translated...

16. On 27 June 2014, the Claimant served a lengthy response to the Respondent's application in which it sets out the reasons for its objections. On the same day, the Respondent responded to the Claimant's objections, point by point.

17. On 28 June 2014, the Tribunal granted the Respondent's application for an extension of time to file its D/C by 16 July 2014.

18. On 16 July 2014, the Respondent filed its D/C.

19. On 13 August 2014, the Claimant filed its Reply and Defence to Counterclaim dated 13 August 2014 (**"CR to D/C"**).

20. On 10 September 2014, the Respondent filed its Reply to CR to D/C.

21. On 20 October 2014, the Respondent -

    a. applied to the Tribunal for an order that the Respondent need only file one Redfern Schedule after both rounds of voluntary disclosure were completed, and not as provided in the APP; and

    b. informed the Tribunal that, following the Tribunal's e-mail dated 28 August 2014, the Parties had agreed to amend the timelines for voluntary disclosure under clause 3.1 of the APP, to (i) 7 October 2014 for the first tranche, and (ii) 27 October 2014 for the second and final tranche.

22. On 23 October 2014, the Claimant informed the Tribunal by letter that it had no objection to the Respondent's application regarding the filing of one Redfern Schedule. The Claimant also proposed other timelines for further requests for production of documents, and the final timeline for the submission of the Redfern Schedule by 5 January 2015.

23. On 23 October 2014, the Respondent responded by agreeing to the Claimant's proposals, whereupon the Tribunal issued the directions as per the agreement of the Parties set out at [21]-[22] above.

24. On 13 November 2014, the Respondent applied to the Tribunal for an order under section 12(1)(a) of the International Arbitration Act (the "**IAA**").and Rule 24 (k) of the SIAC Rules that the Claimant provide security for costs in the amount of S$150,000 by way of a banker's guarantee on the grounds that: (a) the Claimant had been in voluntary administration in Australia around 27 June 2014; (b) it had ceased trading since September 2012; (c) it had entered into a deed of company arrangement with its creditors under which a third party would fund A$376,000 to settle the Administrator's fee and a priority creditor's claim; and (d) a third party was funding the Claimant in relation to this Arbitration.

25. On 20 November 2014, the Claimant objected to the Respondent's application for security for costs and stated that if the Tribunal were minded to grant the application, the amount sought was excessive in that the costs should not be higher than S$50,000 at that stage of the proceedings, and that the Parties should be given time to agree on the matter among themselves.

26. On 20 November 2014, the Tribunal ordered the Claimant to furnish security for costs in the sum of S$150,000 by way of a bankers' guarantee within two weeks from its order, and that the Tribunal would settle the terms if the Parties could not agree on them. The Tribunal also ordered that the costs of the application to be reserved, with liberty to the Respondent to apply for further security for costs.

27. On 27 November 2014, the Respondent requested the Claimant to produce 18 categories of documents set out in a Redfern Schedule. On 11 December 2014, the Claimant objected to the production of 12 categories in the Request.

28. On 17 December 2014, the Respondent made an application to the Tribunal to settle the terms of the banker's guarantee as security for the costs, and also for an extension of time to produce the banker's guarantee. The application set out

the grounds of disagreement between the Parties and exhibited two Annexes, "A" and "B", being the disputed drafts of the banker's guarantee.

29. On 17 December 2014, the Tribunal prepared a new draft of the banker's guarantee based on the said Annexes and forwarded it to the Parties as the banker's guarantee approved by the Tribunal. The Tribunal also directed the Claimant to procure the guarantee to be issued within two weeks from 17 December 2014.

30. On 5 January 2015, the Respondent filed a 35-page submission (to which was annexed exhibits totaling 329 pages), together with a bundle of five authorities (totaling 55 pages) setting out the arguments that it was entitled to the production of 12 of the categories of documents which the Claimant had objected to on the ground of irrelevancy to "the case in hand".

31. On 5 January 2015, the Tribunal commented in its email to the Respondent that some of the documents it sought discovery were in the public domain. On 6 January 2015, the Respondent informed the Tribunal that it could not find many of the public documents in the relevant public registries, and acknowledged that there were other documents it had sought which were also in the public domain and that it would look for them in the relevant registries.

32. On 6 January 2015, the Claimant, in reply to the Respondent's email dated 6 January 2015 that the Claimant had failed to procure the banker's guarantee, informed the Tribunal that it had submitted an application to a Malaysian bank to issue the guarantee but that the bank was not agreeable to issuing a guarantee which did not provide for an expiry date, and that it would need to apply for clearance from higher management..

33. On 7 January 2015, the Tribunal issued its order directing the Claimant to produce certain documents requested by the Respondent in its Request for

Production of Documents. On the same day, the Claimant sought the Tribunal's leave to address the Respondent's submission relating to the production of documents (see [31] above) on the ground that it had not been given the opportunity to do so. On the same day, the Respondent objected to the Claimant's application on the ground that the Claimant had failed to make its submissions after having received the completed Redfern on 22 December 2014. On 8 January 2015, the Claimant responded to the Respondent's objections. On the same day, the Tribunal ruled that its order was final.

34. On 13 January 2015, the Respondent applied to the Tribunal to suspend the proceedings on the ground that the Claimant had failed to furnish the banker's guarantee. On 15 January 2015, the Claimant informed the Tribunal that it was trying its best to procure the banker's guarantee and would abide by any order of the Tribunal.

35. On 22 January 2015, the Respondent sought the Tribunal's further directions on the Claimant's non-compliance with the Tribunal's directions of 17 December 2015.

36. On 22 January 2015, the Claimant filed its Redfern Schedule, its written submissions in respect of the Claimant's Request to Produce Documents dated 22 January 2015, including Appendices B to F to the written submissions, and stated that Appendix A (Parts I and II) would be sent separately due to size constraints.

37. On 27 January 2015, Providence Law Asia LLC ("**PLA**") informed the Tribunal that it had been appointed by the Claimant to act in place of Rodyk & Davidson LLP ("**R&D**").

38. On 3 March 2015, the Claimant applied to the Tribunal that it be allowed to provide security for costs of S$150,000 by way of a solicitor's undertaking to be

given by PLA. On 4 March 2015, the Respondent responded that it had proposed that the Claimant pay the security in cash to an escrow account, which the Claimant had rejected, and that the Respondent would prefer a banker's guarantee to a solicitor's undertaking, but left it to the Tribunal to decide.

39. On 4 March 2015, the Tribunal granted the Claimant's application that a solicitor's undertaking be provided in place of a banker's guarantee.

40. On 9 March 2015, PLA provided its undertaking on security for costs.

41. On 20 April 2015, the Claimant produced the Third List of Documents (with an Index) relating to the documents it was ordered to produce earlier (see [33] above), but reserving the right to object to the use of the documents at the hearing.

42. On 28 April 2015, the Tribunal requested the Parties to agree on the next set of timelines for the remaining procedural steps to be taken and on the hearing dates.

43. On 6 May 2015, the Respondent informed the Tribunal that the Parties had agreed to the Tribunal fixing the hearing dates at 5-9 October 2015 and 12-16 October 2015. On 7 May 2015, the Tribunal issued the order fixing the said hearing dates as agreed by the Parties.

44. On 3 June 2015, the Respondent filed an application (8 pages of text and Annexes "A" and "B" totaling 116 pages) to amend its D/C, setting out the reasons for the application, as follows: (a) they did not fall outside the arbitration agreement; (b) they could be largely dealt with by written submissions; and (c) they would not cause prejudice to the Claimant.

45. On 11 June 2015, the Claimant filed a submission (5 pages of text and Annexes "A" to "G" "totaling 274 pages) that: (a) the proposed substantive amendments

to the D/C at [36A], [36B] and [77.4] should be disallowed; and (b) the Tribunal should convene an oral hearing of the Respondent's application in order to be fully apprised of the Claimant's objections, supported by relevant documents and legal authorities.

46. On 11 June 2015, the Respondent replied to the Claimant's submissions and argued that its proposed amendments were necessitated by the Claimant producing a letter from KordaMentha to the Claimant dated 5 June 2015 and relying on it to assert that the Claimant "*had ceased operations since 2012*" (and was accordingly insolvent) and which, on its face, was an erroneous interpretation of those words. The Respondent alleged that KordaMentha's comment was "made based ot [its] understanding at that time and that the [Claimant] was delisted in September 2012". KordaMentha's comment was not factually correct.

47. On 11 June 2015, the Tribunal, after considering the arguments of the Parties, allowed the Respondent to amend its D/C as marked in the draft ("**D/C Am1**"), and directed the Respondent to file the same by the next day, with leave to the Claimant to file its amended CR to D/C by 16 June 2015.

48. On 12 June 2015, the Respondent filed its D/C Am1.

49. On 16 June 2015, the Parties informed the Tribunal that they had mutually agreed on the timelines on the next procedural steps leading to the hearing fixed for 5 – 9 October 2015 and 12 – 16 October 2015. A draft Procedural Protocol No 2 was enclosed for the Tribunal's endorsement. A corrected draft was forwarded to the Tribunal on the same day. The Tribunal issued the corrected Procedural Protocol No 2 later on 16 June 2015.

50. On 16 June 2015, the Parties mutually agreed to extend the date for filing the Claimant's Amended Reply to D/C A1 by 17 June 2015, which the Tribunal

noted. On 17 June 2015, the Claimant filed its Reply (Amendment No 1) dated 17 June 2015").

51. On 22 June 2015, the Respondent applied (11 pages of text and Annexes "A" to "D" totalling 115 pages) ("**Application for Further Disclosure**") for an order for further production of documents by the Claimant, *viz.* (1) in relation to Request 18 of the Respondent's Request to Produce Documents , *inter alia*, the board minutes discussing, but not limited to, the Claimant's assets, the delisting of the Claimant's shares on the ASX and its cessation of operations in 2012; and (2) the Claimant's audited accounts or management accounts for Y/2012-Y/2014.

52. On 26 June 2015, the Claimant responded to the Respondent's application for further discovery (7 pages of text and Annexes "A" to "totaling 215 pages) and contended, for the reasons stated therein, that the Respondent was not entitled to the requested disclosures. The Claimant requested the Tribunal to hold an oral hearing on the matter to enable its Counsel to fully argue its case before the Tribunal.

53. On 26 June 2015, the Tribunal, having regard to the extensive objections of the Claimant to the Respondent's application for further disclosure of documents by the Claimant, the voluminous exhibits, and the change of legal representation of the Claimant, informed the Parties by email that it had decided to hear the Parties orally on the Application for Further Disclosure. The Tribunal directed the Parties to agree on a date for the oral hearing.

54. On 29 June 2015, the Claimant applied (58 pages of text, including Annexes "A" to "D") for a ruling from the Tribunal that, notwithstanding the Respondent's intention to call an expert witness on Maldivian law in relation to the issues in this Arbitration, it was not necessary for expert evidence of

Maldivian law to be given as a question of fact as the Parties could submit on Maldivian law.

55. On 1 July 2015, the Tribunal was notified by Aldgate Chambers LLC that it had been appointed as solicitors for the Respondent in place of Advocatus Law LLP.

56. On 1 July 2015, with the consent of the Claimant, the Respondent's new solicitors, Aldgate Chambers LLC, filed the Respondent's Reply (Amendment No 1).

57. On 8 July 2015, the Respondent responded (42 pages of text, including Annexes "A" and "B") to the Claimant's request to the Tribunal for a ruling on the need to call expert evidence on Maldivian law, and contended that, *inter alia*, such expert evidence was beneficial to the Tribunal in view of the complexity of Maldivian law and that the Respondent should not in any event be precluded from calling such evidence.

58. On 9 July 2015, the Tribunal ruled that it had no reason to prevent the Respondent from calling expert evidence on Maldivian law, and that it was a matter for the Claimant to decide on its own course of action. If expert evidence were called, the Tribunal would hear the witness in the normal way, like any other expert witness.

59. On 9 July 2015, the Tribunal, in view of the Parties' inability to agree on a date for the oral hearing of the Application for Further Disclosure for further discovery, issued the following directions: (a) the application to be heard on 27 July 2015 at 10 am; (b) the Parties are to exchange written submissions on 17 July 2015 (this date was later changed to 20 July 2015); and (c) if the Claimant's counsel could not attend the hearing on 27 July 2015, the Tribunal would give its decision based on the written submissions.

60. On 20 July 2015, the Claimant filed its written submissions in the Respondent's application dated 22 June 2015 regarding the Claimant's Production of Documents (20 pages), together with a bundle of authorities (467 pages). On the same day, the Respondent filed its submissions (29 pages), together with a bundle of authorities (83 pages), on the same subject matter. On the same day, the Claimant confirmed that the Parties would be available for the oral hearing on 27 July 2015.

61. On 20 July 2015, the Claimant sought the Tribunal's directions as to whether it required the Claimant to prove Maldivian law as a question of fact at the hearing or if the Tribunal is prepared to accept submissions on Maldivian law from the Claimant's Maldivian co-counsel. On the same day, the Tribunal responded that it had not taken any position that Maldivian law, being a foreign law, has to be proved as a fact or that it has to be disproved as a fact. Hence, the Claimant must make up its own mind on how it wishes to proceed with respect to the expert evidence on the basis of international arbitration practice.

62. On 26 July 2015, the Tribunal issued directions on the procedure to be followed at the 27 July 2015 hearing, and that with reference to the redacted documents, the Parties should consider whether the un-redacted versions should be produced to the Tribunal for relevancy/materiality, and that the Tribunal would rule immediately or as soon as possible.

63. On 27 July 2015, the Tribunal heard submissions from the Parties on the Application for Further Disclosure and issued its orders for the production of documents as requested by the Respondent.

64. On 31 July 2015, the Claimant made an application to the Tribunal to order the Respondent to answer the Interrogatories set out at Annex "A" to the Application (15 pages) ("**Application for Interrogatories**"). On 1 August

2015, the Claimant clarified, at the request of the Tribunal, that the application was made under section 12(1)(b) of the IAA.

65. On 3 August 2015, the Respondent filed its response (9 pages), together with a PDF of annexures (378 pages) objecting to the Application for Interrogatories on the grounds that: (a) the Claimant was effectively serving on the Respondent interrogatories to amplify and elucidate a document that has been disclosed; (b) the answers sought by the Claimant are irrelevant; and/or (c) interrogatories in international arbitration were rare, particularly where these issues could be dealt with by way of cross-examination of the factual witnesses, and that there were no good reasons offered by the Claimant to depart from this.

66. On 7 August 2015, the Tribunal, after considering the submissions of the Parties on the Application for Interrogatories, issued its order directing the Claimant to answer the interrogatories itemised as 4.1 and 4.2 under [10] and [11] therein. Consequent upon the order, [10] of the Procedural Protocol No 2 was amended to require the Parties to exchange witness statements on 24 August 2015, and [11] to remain unchanged, subject to any application for extension of time.

67. On 12 August 2015, the Respondent served on the Claimant and the Tribunal the Witness Statement of Ibrahim Naseer ("**Naseer**") (19 pages), the Chief Principal Immigration Officer DOIE of the Republic of Maldives. Later, on the same day, the Respondent also served the Witness Statement of Hussain Siraj ("**Siraj**"), a Maldivian law practitioner, as its expert on Maldivian law (571 pages).

68. On 20 August 2015, the the Claimant, with the consent of the Respondent, served its Statement of Claim (Amendment No 1) dated 20 August 2015 ("**S/C Am1**").

69. On 20 August 2015, the Respondent made an application (6 pages) with annexures (266 pages) to the Tribunal for an order that the Claimant provide additional security for costs in the sum of S$350,000 or such other sum as the Tribunal deemed fit for the period up to the end of the hearing of this Arbitration.

70. On 24 August 2015, the Claimant filed its response to the Respondent's application for further security of costs (323 pages).

71. On 25 August 2015, the Respondent served the Second Witness Statement of Naseer (26 pages), together with Exhibits (1,145 pages).

72. On 25 August 2015, the Claimant served the Witness Statements of Husnu Al Suood ("**Suood**") dated 23 August 2015 (10 pages of text and 120 pages of exhibits) and of Chua Yu Ye ("**Chua**") dated 24 August 2015, a director of the Claimant (Volumes 1-4, 88 Exhibits totaling 2302 pages), Vol 5, 6 Exhibits totaling from pages 11532-11576, out of more than 10,000 pages produced in the enclosed CD-Rom).

73. On 28 August 2015, the Tribunal, after considering the arguments of the Parties in relation to the Respondent's application for further security to be paid by the Claimant (26 pages), rendered a written decision dismissing the application for the reasons stated therein (9 pages).

74. On 4 September 2015, the Claimant served the Witness Statement of Dr Mohamed Munavvar ("**Munavvar**") (32 pages of text, 19 Annexures in Dhivehi and English totaling 766 pages), a Maldivian private practitioner, as its Maldivian law expert.

75. On 7 September 2015, the Respondent served the Third Witness Statement of Naseer (19 pages) and the Witness Statement of Leow Quek Siong ("**Leow**") (56 pages), its financial expert, both dated 7 September.

76. On 9 September 2015, the Claimant served the Second Witness Statement dated 4 September 2015 of Chua (20 pages with Annexures totaling 258 pages), and the Witness Statement of Tam Chee Hong ("**Tam**") (57 pages), its financial expert.

77. On 23 September 2015, the Tribunal issued a set of eight directions for the hearing of the evidence of the financial experts and legal experts on 5 October 2015.

78. On 30 September 2015, the Respondent, with the consent of the Claimant, filed its Defence and Counterclaim (Amendment No 2) ("**D/C Am2**").

79. On 3 October 2015, the Claimant served on the Respondent and the Tribunal the Third Witness Statement of Chua (24 pages of text and 66 pages of Exhibits) of the same date, in advance of its intended application to the Tribunal for leave to admit the said statement at the hearing on 5 October 2015 "in order to address fresh factual points raised for the first time by the Respondent through its financial expert and in the reply witness statement of their sole factual witness."

80. On 3 October 2015, the Tribunal directed the Parties to settle the order in which they will be calling their witnesses. Later, on the same day, the Claimant informed the Tribunal of the Parties' agreement, and provided a list of the order of witnesses to be called.

81. On 3 October 2015, the Respondent served its Opening Statement and Bundle of Authorities (283 pages).

82. On 4 October 2015, the Claimant served a "slightly revised version of Chua Yu Ye's Third Witness Statement dated 3 October 2015" to effect minor changes to the said statement.

83. On 4 October 2015, the Claimant served its Opening Statement, and a draft of the "Agreed Facts and List of Issues for Determination" which was awaiting the Respondent's approval.

84. On 5 October 2015, the Claimant filed its 5th List of Documents and also re-filed the Witness Statement of Suood dated 23 August 2015 (10 pages of text and 120 pages of exhibits).

85. On 5 October 2015, the oral hearing commenced on 5 October 2015 and continued until 8 October 2015 when it was adjourned, and resumed from 12 October to 15 October 2015.

86. On 9 October 2015, the Parties filed their agreed independent joint financial experts' statement (3 pages). On receipt of the said statement, and having regard to its contents, the Tribunal ruled that it would leave it to the Parties to tender the statement in evidence on the Monday following (12 October 2015) without the need for the experts to testify on its contents.

87. On 10 October 2015, the Respondent informed the Tribunal that on Monday, its expert, Leow, would be offered for cross-examination on sections 9 to 11 of his Witness Statement dated 7 September 2015 (on the insolvency issue) and his further report in response to Chua's Third Witness statement (which would be forwarded soon).

88. On 10 October 2015, the Respondent served on the Tribunal the Second Witness Statement of its financial expert, Leow, dated 10 October 2015.

89. On 12 October 2015, the hearing resumed and continued until 15 October 2015 when it concluded. At the conclusion of the hearing, the Tribunal allowed the Parties to confer and agree on the dates for the filing of Closing Submissions and also of the Reply Submissions, and that if the Parties could not reach an agreement, the Tribunal would fix the dates for these submissions.

90. On 27 October 2015, the Claimant informed the Tribunal that the Parties had agreed that the Closing Submissions would be served on 18 December 2015, and the Reply Submissions on 15 January 2016 with the hearing date to be proposed thereafter. The Tribunal agreed to these proposals.

91. On 17 December 2015, the Claimant informed the Tribunal that the Parties had mutually agreed that the Closing Submissions be served on 23 December 2015 and the Reply Submissions on 22 January 2016, and sought the Tribunal's confirmation of these extensions of time. On the same day, the Tribunal confirmed its agreement.

92. On 23 December 2015, the Claimant served its Closing Submissions (110 pages) and a Bundle of Authorities (10 items, 292 pages).

93. On 24 December 2015, the Respondent served its Closing Submissions (200 pages), Closing Submissions on the Authenticity of Certain Documents, particularly the Respondent's **Anti-Corruption Commission's Investigation Report dated 27 November 2011** (**"ACC Report"**) (92 pages of text in English and 100 pages in Dhivehi, and 2,590 pages of Exhibits in Dhivehi and English).

94. On 30 December 2015, the Parties informed the Tribunal that they had not agreed on the Statement of Facts or the List of Issues.

95. On 8 January 2016, the Parties sought the Tribunal's consent to serve their Reply Submissions on 29 January 2016. On the same day, the Tribunal consented.

96. On 26 January 2016, the Parties agreed to serve their Reply Submissions by 4 February 2016 and sought the Tribunal's consent. On the same day, the Tribunal responded to confirm its consent.

97. On 4 February 2016, the Respondent served its: (a) Reply Submissions dated 4 February 2016 (9,138 pages); (b) 3rd Bundle of Authorities (Respondent's Reply Submissions) dated 4 February 2016 (220 pages); and (c) Costs Submissions and its Schedule dated 4 February 2016 (31 pages).

98. On 4 February 2016, the Claimant served its: (a) Reply Submissions (107 pages); and (b) Bundle of Authorities (Reply Submissions) (328 pages).

99. On 13 February 2016, the Claimant proposed to the Tribunal to hold an oral hearing with respect to the Closing Submissions and the Reply Submissionson the suggested dates. The Tribunal replied later that day that it would hear counsel on 30 March 2016 and gave directions on the structure of the oral hearing.

100. On 4 March 2016, the Claimant applied to the Tribunal to vacate the oral hearing fixed for 30 March 2016 on the ground that the issues in dispute have been fully ventilated in the written submissions, and that an oral hearing would not be necessary.

101. On 8 March 2016, the Respondent responded that it was agreeable to the vacation of the oral hearing, subject to the Parties being entitled to file a rejoinder limited to 30 pages, if they so wish (setting out the reasons for the request).

102. On 9 March 2016, the Claimant responded that it could not agree with the Respondent's proposal to be allowed to file a rejoinder, and gave detailed reasons for its objection.

103. On 10 March 2016, the Tribunal informed the Parties that it was not prepared to cancel the oral hearing at the request of one Party since it was fixed with the agreement of both Parties, and that the hearing would proceed as scheduled.

104. In view of the Parties' inability to agree on the format of the oral hearing, the Tribunal directed that the Claimant would begin first, and that if it were satisfied with its Closing Submissions, it could treat them as oral submissions and rest its case. The Respondent would then make its submissions, and then the Claimant could respond. Thereafter, the Tribunal would decide on any applications by the Parties for further submissions.

105. On 24 March 2016, the Claimant served its Costs Submissions (17 pages).

106. On 26 March 2016, the Respondent informed the Tribunal that at the oral hearing on 30 March 2016, it would address the following issues:

1. ACC Report
2. Evidence from the Bar
3. Issue of corruption – the applicable laws which ought to govern this area
4. Frustration
5. Ability of Respondent to rely on clause 11.1.1 Claimant's "invoices"
6. $2 vs $4

107. On 28 March 2016, the Claimant informed the Tribunal that it would submit on the issues the Respondent had highlighted, and on the following matters:

1. The Respondent's withdrawal of defences
2. The quality of the Respondent's evidence
3. The Respondent's repeated affirmation of the CA
4. Implementation of the CA
5. National Security
6. Costs

108. On 30 March 2016, the oral hearing took place before the Tribunal. On 31 March 2016, the Respondent filed its Skeletal Submissions and the soft copy of its Consolidated Bundle of Documents.

109. On 24 April 2016, the Claimant filed its Response/Comments on the Respondent's Costs Submissions (see [97] above).

110. On 27 April 2016, the Respondent informed the Tribunal that, without admission to the Claimant's allegations with respect to the Respondent's assertions in the paragraphs set out below, the Respondent would no longer pursue the following issues in light of the evidence put forth in the arbitral hearing of this matter:

2.1. Paragraphs 2 to 6 of the Respondent's Statement of Defence and Counterclaim (Amendment No. 2) ("**DCC**");
2.2. Paragraphs 8.2 and 25 of the DCC;
2.3. Paragraphs 8.3 and 26 to 28 of the DCC;
2.4. Paragraph 7 of the Respondent's Reply (Amendment No. 2); and
2.5. Insofar as the backup system of the MIBCS was stated to be stored in Kuala Lumpur, the Respondent is no longer pursuing this.

On 28 April 2017, the Respondent filed its Response dated 27 April 2016 to the Claimant's Costs Submissions.

111. On 7 June 2016, the Tribunal emailed the Claimant to confirm as soon as possible whether or not it was pursuing its claim for damages against the Respondent for preventing it from implementing the CA as at pleaded at [42(a)] of the S/C Am1.

112. On 13 June 2016, the Tribunal emailed the Parties to recall its email of 7 June 2016.

113. On 13 June 2016, the Claimant responded to confirm that it would not be pursuing its claim as pleaded at [42(c)] of the S/C Am1 for delays in the implementation of the CA. The Claimant also filed a reply to the Respondent's Cost Submissions dated 4 February 2016.

114. On 13 June 2016, the Tribunal emailed the Parties that it required: (a) from the Claimant, a statement showing the breakdown of its costs claims prior to and after the change of solicitors in January 2016; and (b) from the Respondent, a

copy of its costs claims for S$535,000.00 as professional fees and arbitration fees.

115. On 13 June 2016, the Claimant provided the breakdown of its costs.

116. On 14 June 2016, the Respondent provided another copy of its costs claims.

117. On 25 July 2016, the Tribunal declared the proceedings closed under Rule 28. 1 of the SIAC Rules.

VII. CHRONOLOGY OF EVENTS AND *DRAMATIS PERSONAE*

118. Both Parties have helpfully provided a chronology of events relevant to the disputes in this arbitration. The Claimant's list refers to 101 events. The Respondent's list refers to 118 events. In this Award, the Tribunal has reproduced below the Respondent's list of events, edited in the interest of brevity. The Table of *Dramatis Personae* is reproduced from that provided by the Claimant, also edited in the interest of brevity.

Chronology of Events

S/No	Date	Event
1.	3 Dec 2009	The proposal for the Border Control System (“**BCS**”) is created.
2.	7 Dec 2009	The National Planning Council (“**NPC**”) approves the BCS, which is called the Maldives Immigration Border Control System (“**MIBCS**”), at its 31st Meeting.
3.	13 Jan 2010	The Ministry of Finance and Treasury of the Republic of Maldives (“**MOFT**”) issues an Invitation for Expressions of Interest (“**EOI**”).
4.	10 Feb 2010	The EOI submissions open. The Claimant submits its EOI, which is stated to be prepared for the Director General, Tender Evaluation Section.
5.	18 Feb 2010	A team from the DOIE consisting of the Controller/Ibrahim Ashraf/Ahmed Naseem, visits Malaysia.
6.	19 April 2010	A pre-qualification summary sheet is issued setting out scores of four parties that passed the EOI evaluation.
7.	28 April 2010	At its 12th Meeting, the Technical Evaluation Board (“**TEB**”) prequalifies the four parties (out of seven), including the Claimant, for the MIBCS Project.
8.	May 2010	The MOFT issues the Request for Proposal (“**RFP**”) to selected bidders who submitted EOIs. The Claimant was one of them.
9.	30 May 2010	Bid opening held and the Claimant submits its technical and financial bid in response to the RFP.
10.	2 June 2010	1st technical evaluation (“**TE**”) is carried out by a team from DOIE (which included the Controller) and checked by Saamee Ageel (“**Ageel**”).
11.	2 June 2010	16th TEB meeting, where the 1st TE is discussed.
12.	3 June 2010	17th TEB meeting, where the 1st TE is discussed.
13.	1 Sept 2010	2nd TE completed.
14.	1 Sept 2010	23rd TEB meeting where the 2nd TE is discussed.

15.	22 Sept 2010, 10am	24th TEB meeting where it was decided to evaluate price proposals by giving equal 10% weightage to each of the criteria of passenger fee, work permit fee, visa card fee and royalty.
16.	22 Sept 2010, 1pm	The price proposals of the four bidders are opened.
17.	-	Financial evaluation of price proposals carried out.
18.	29 Sept 2010	25th TEB meeting where it was decided that the MIBCS would be awarded to Nexbis, Malaysia.
19.	29 Sept 2010	Letter from MOFT to the Controller (Ref No. 13-K/94/2010/14) requesting to proceed with the preparation of the contract and attaching the Claimant's technical and price proposal.
20.	29 Sept 2010	The MOFT issues letter of award to the Claimant awarding the MIBCS project to it (Ref No. 13-K/PRV/2010/21).
21.	13 Oct 2010	Meeting between the Claimant and the DOIE, MOFT and Attorney General's Office ("**AGO**") on the Concession Agreement.
22.	17 Oct 2010	Letter from the Anti-Corruption Commission ("**ACC**") to the DOIE stating that it was not to award the MIBCS project to any party until it instructs otherwise (Ref No. 132-B/94/2010/08).
23.	17 Oct 2010	The CA is executed between the Claimant and the Respondent.
24.	17 Oct 2010	The DOIE issues a public announcement on the MIBCS project.
25.	21 Oct 2010	Directive 2010/62 from the President's Office ("**PO**") that government authorities are to obey ACC's orders, including stop work orders.
26.	1 Nov 2010	Letter from the DOIE to the ACC stating, *inter alia*, that the DOIE had responded to the ACC's order to stop the project (Ref No. 94-T/123/2010/1007).
27.	5 Nov 2010	The DOIE issues a 2nd press release to say that it is working with the Claimant on the MIBCS.
28.	29 Nov 2010	Kick-off meeting takes place between the Claimant and the Respondent.

29.	24 Jan 2011	Letter from the ACC to the DOIE regarding the MIBCS project instructing the DOIE to re-tender for the MIBCS project (Ref No. 123-B/94/2011/02).
30.	26 Jan 2011	Letter from the PO to the DOIE, ordering the DOIE to stop work on the MIBCS project (Ref No. 1CBO(A)/2011/212).
31.	22 Feb 2011	Abdullah Shahid takes over as DOIE Controller from Mr Ilyas Hussain Ibrahim (“**Ilyas**”).
32.	20 Mar 2011	Letter from the DOIE to the Claimant stating that the ACC has directed the DOIE to stop work on the MIBCS project (Ref No. 94/PRIV/2011/56).
33.	30 Mar 2011	Letter (Ref No. Nexbis/ROM/MIBCS/2011/004) from the Claimant to the DOIE referring to a discussion with the DOIE on the MIBCS on 21 March 2011 – that the Claimant was prepared to enter into a supplemental contract with the Respondent to provide modules that were not provided in the CA, and which formed a basis of complaint by the Respondent.
34.	18 April 2011	AGO advised the Ministry of Home Affairs of the Republic of Maldives (“**MHA**”) on the ways to terminate the C, and to prepare a Cabinet paper and submit it to Cabinet via MHA to seek instructions from Cabinet. .
35.	25 April 2011	AG sent his opinion to MHA on 25 April 2011. On the same day DOIE sends letter to the MHA enclosing the AGO's legal opinion and a cabinet paper for submission to the Cabinet of the Maldives (“**Cabinet**”) (Ref No. 94-A/10/2011/46). [RBD 2262]
36.	18 May 2011	Letter from the MOFT to the DOIE informing the DOIE to proceed with the MIBCS project (Ref No. 13-K/94/2011/17).
37.	22 May 2011	The PO's letter to the MHA instructing MHA to proceed with the CAas advised by the Cabinet (Ref No. 1-CBO(S)/10/2011/89).
38.	24 May 2011	Letter from the DOIE to the MHA asking how the DOIE should proceed with the matter (Ref No. 94-A/10/2011/58).
39.	26 May 2011	Letter from the MHA to the DOIE (Ref No. 10-H/94/2011/75) to comply with the instructions given by PO and attaching PO's Letter No. 1-CBO(S)/10/2011/89, dated 22 May 2011.
40.	30 May 2011	DOIE's letter informing the Claimant of MHA's instructions to commence negotiations on agreed date (Ref No. 94-A/PRIV/2011/98).

41.	30 May 2011	Letter from the Claimant to the DOIE requesting a meeting to discuss the MIBCS project (Ref No. Nexbis/ROM/MIBCS/2011/007).
42.	6 June 2011	Government gazette is published setting out the Cabinet's decision on 17 May 2011 to review the agreement and to proceed with works.
43.	29 June 2011 but fax report on 30 June 2011	Claimant's letter to the Ministry of Transport and Communications requesting a meeting to move the MIBCS project along.
44.	30 June 2011	The PO's letter was sent to the Claimant stating that Mohamed Shaafiee has been appointed as Senior Project Director for the MIBCS Project and seeking a meeting with the Claimant.
45.	30 June 2011	Letter from the Claimant to the PO asking for a meeting to start the dialogue (Ref No. Nexbis/ROM/PO/2011001).
46.	21 July 2011	Letter from the Claimant to the PO requesting a meeting to discuss the MIBCS project (Ref No. Nexbis/ROM/PO/2011002).
47.	19 Aug 2011	Letter from Claimant to DOIE requesting a response (Ref No. Nexbis/ROM/MIBCS/2011/011).
48.	29 Aug 2011	Letter from the Claimant to the PO requesting help to expedite implementation of the MIBCS project (Ref No. Nexbis/ROM/PO/2011/0002).
49.	27 Sept 2011	Claimant's letter (by solicitor) to the DOIE giving notice pursuant to clause 19.1(a) and 19.1(b) of the CA.
50.	10 Oct 2011	DOIE's letter to the Claimant that the ACC had instructed the Respondent not to proceed with CA until further notice (Ref No. 94-A/PRIV/2011/197).
51.	31 Oct 2011	Cabinet decision dated 18 October 2011 to proceed with the MIBCS is published in Government Gazette.
52.	1 Nov 2011	DOIE's letter to the Claimant requesting that the meeting with the Claimant to discuss the implementation of the MIBCS be scheduled only after 13 November 2011 (Ref No. 94-A/PRIV/2011/226).
53.	2 Nov 2011	The ACC files Civil Case No. 2158/Cv-C/2011 ("**CC 2158/2011**") and obtains an interim injunction suspending work under the CA.

54.	3 Nov 2011	The interim order is issued.
55.	9 Nov 2011	The Claimant informs the DOIE by letter, *inter alia*, of its interest to join as a party in CC 2158/2011 (Ref No. Nexbis/ROM/MIBCS/2011/013).
56.	27 Nov 2011	The ACC issues its investigation report on the MIBCS (Report No: TR-2011/94) (Case No: 1244).
57.	15 Jan 2012	CC 2158/2011 dismissed on, *inter alia*, the basis that the ACC had no power to require compliance with the ACC's 24 January 2011 letter.
58.	20 Jan 2012	Letter from the Claimant's solicitors, R&D, to the Respondent requesting a meeting.
59.	30 Jan 2012	ACC files Civil Case No. 153/Cv-C/2012 ("**CC 153/2012**") against the DOIE seeking an order that the CA be annulled.
60.	5 Feb 2012	CC 153/2012 dismissed as the issues to be decided were determined in CC 2158/2011.
61.	8 Feb 2012	Ilyas is reinstated as Controller of the DOIE.
62.	14 Feb 2012	Letter from R&D to the DOIE requesting a meeting to avoid commencing arbitration, *inter alia*, to implement the MIBCS.
63.	19 Febr2012	Letter from the DOIE to R&D (Ref No. 94-A/PRIV/2012/25) agreeing to the meeting and seeking proposed dates.
64.	27 Feb 2012	The ACC appeals the decision in CC 153/2012 to the High Court of Maldives, Case No. 2012/HC-A/50 ("**HC 50/2012**").
65.	8 Mar 2012	1st PSC Meeting
66.	8 April 2012	ACC appeals the decision in CC 2158/2011 to the High Court of Maldives, Case No. 2012/HC-A/105 ("**HC 105/2012**").
67.	9 April 2012	2nd PSC Meeting
68.	9 April 2012	The Claimant issues Data Centre Set Up Proposal.
69.	10 April 2012	The DOIE signs off on the Claimant's Data Centre Set Up Proposal.
70.	9 May 2012	The Claimant sends to the Australian Stock Exchange regarding Scheme Implementation Agreement with Agathis Three Pte Ltd.

71.	10 May 2012	The High Court of Maldives issues an injunction in HC 105/2012 suspending performance of the CA until a conclusive decision was reached in HC 105/2012.
72.	24 May 2012	Dr Mohamed Ali takes over from Ilyas as DOIE Controller.
73.	25 June 2012	Supreme Court of Maldives issues mandamus voiding the injunction issued in HC 105/2012 on 10 May 2012, on the ground that the High Court bench was unlawfully constituted, and ordering the original High Court bench be re-constituted.
74.	27 June 2012	The Claimant's letter to the DOIE that the Claimant would send personnel to complete installation of the MIBCS as the 10 May 2011 injunction has been lifted.
75.	4 July 2012	Certificate of User Acceptance in respect of the border control module is issued by the Claimant and signed off by the DOIE.
76.	10 July 2012	3rd PSC meeting
77.	11 July 2012	The Claimant is de-listed from the Australian Stock Exchange.
78.	16 July 2012	The High Court of Maldives re-issues interim injunction suspending performance of the CA in HC 105/2012.
79.	27 Aug 2012	The Claimant appeals against the High Court of Maldives' interim injunction in HC 105/ 2012 in Supreme Court Case 2012/SC-A/21.
80.	2 Sept 2012	The Supreme Court of Maldives sets aside an interim injunction in HC 105/2012 as ACC had no authority to issue an order in its letter of 24 January 2011.
81.	17 Sept 2012	High Court of Maldives in HC 105/2012 holds that the Respondent had a legal duty to comply with the ACC's 24 January 2011 Letter.
82.	17 Sept 2012	MIBCS Site Implementation checklist is issued.
83.	19 Sept 2012	4th PSC Meeting
84.	12 Sept 2012	The Claimant commenced the disposal of all of its shares in its subsidiaries, including NSA Solutions Sdn Bhd and S5 Systems Sdn Bhd ("S5 Systems").

85.	20 Sept 2012	Certificate of Acceptance in respect of the Border Control Module is issued by the Claimant and signed off by the DOIE.
86.	26 Sept 2012	The Claimant appeals against the decision in HC 105/2012 to the Supreme Court of Maldives in Supreme Court Case No. 2012/SC-A/26.
87.	24 Oct 2012	5th PSC Meeting
88.	19 Dec 2012	6th PSC Meeting
89.	19 Dec 2012	Claimant sent to the DOIE Invoices Nos. 11049 (US$70,347.50), 11050 (US$229,761.30) and 11051 (US$257,104.20).
90.	20 Dec 2012	The Finance Committee of the People's Majlis ("**Parliament**")'s report decided that the CA should be terminated and to instruct the Parliament to include this in its budget proposals for the next year (Report No. MLK/2012/R-9).
91.	23 Dec 2012	Budget Review Committee of Parliament includes the recommendation to terminate the CA in its recommendations to the proposed National Budget of 2013.
92.	25 Dec 2012	Parliament passed a motion accepting the Finance Committee's report on the CA.
93.	27 Dec 2012	Parliament passes National Budget for 2013.
94.	10 Jan 2013	Invoice No. 11054 for 1 to 31 December 2012 (US$331,787.50) is issued.
95.	4 Feb 2013	Invoice No. 11057 for 1 to 31 January 2013 (US$369,916.70) is issued.
96.	19 Feb 2013	7th PSC Meeting
97.	26 Feb 2013	Ageel charged under section 12(a) and (b) of the Prohibition of Corruption Act ("**PPCA**").
98.	27 Feb 2013	Ilyas charged under section 12(a) and (b) of the PPCA.
99.	4 Mar 2013	Invoice No. 11060 for 1 to 28 February 2013 (US$415,450.20) is issued.
100.	4 April 2013	Invoice No. 11063 for 1 to 31 March 2013 (US$405,731.70) is issued.
101.	18 April 2013	The decision in HC 50/2012 that CC 153/2012 be remitted to Civil Court is made.

102.	23 April 2013	8th PSC Meeting
103.	6 May 2013	Invoice No. 11065 for 1 to 30 April 2013 (US$383,532.70) is issued.
104.	6 June 2013	Invoice No. 11069 for 1 to 31 May 2013 (US$353,740.10) is issued.
105.	3 July 2013	Invoice No. 11072 for 1 to 30 June 2013 (US$324,451.60) is issued.
106.	5 July 2013	The Claimant completed the disposal of all its shares in its subsidiaries, including NSA Solutions Sdn Bhd and S5 Systems.
107.	31 July 2013	S5 Systems' email to the DOIE that license for MIBCS software will be renewed as the border control system important to national security.
108.	2 Aug 2013	Invoice No.11074 for 1 to 31 July 2013 (US$361,841.70) is issued.
109.	3 Aug 2013	Invoice No. 11082 (US$268,642.90) is issued.
110.	5 Aug 2013	Repudiatory Letter from the Ministry of Defence and National Security is sent to the Claimant.
111.	19/20 Aug 2013	MIBCS is disconnected.
112.	5 Sept 2013	R&D sends a letter to the Respondent purporting to serve cl 12.1 notice on the Respondent.
113.	16 September 2013	The decision in SC 26/2012 that the ACC did not have the power to issue orders to terminate the CA.
114.	20 Dec 2013	R&D sends a letter to Advocatus Law LLP purporting to serve cl 12.2 termination notice, or acceptance of Respondent's repudiatory breach.
115.	9 January 2014	The Claimant commences this Arbitration.
116.	18 April 2014	The Claimant's parent company transfers its shares in Aseana One Corp held in the name of Agathis Three Pte Ltd to NSA Technology Holding Limited, an entity allegedly controlled by Dato Johann Young.
117.	27 June 2014	The Claimant entered into Voluntary Administration.
118.	23 Oct 2014	A deed of company arrangement is entered into and the Claimant's debt is transferred to a Creditors' Trust.

Dramatis Personae involved in the MIBCS Project/CA

S/No.	Name	Description / Involvement in the MIBCS Project	Reference in Respondents Bundle of Documents
1.	Abdullah Muiz	Solicitor General of the Republic of Maldives when the CA was entered into on 17 October 2012. He took part in discussions and advised on it. Attorney General of the Republic of Maldives from 21 March 2011 to 7 February 2012.	3 RBD 2567
2.	Abdullah Shahid	Controller of the DOIE from 22 February 2011 to 7 February 2012. As Controller, he was involved in its implementation. Subsequently, he was charged with corruption for acts committed during his tenure as Head of the Disaster Management Centre.	3 RBD 2555
3.	Abdullah Waheed	Deputy Controller of the DOIE. Member of the team who evaluated the EOIs on 6 April 2010. Member of the 1st TE team that conducted its evaluation on 2 June 2010. Witnessed the Controller's signature on the CA. Involved in the testing of MIBCS and signed the Certificate of User Acceptance on 4 July 2012. Member of the 1st to 5th PSC meetings from 8 March to 24 October 2012.	3 RBD 2536
4.	Ahmed Jinah Ibrahim	Worked in the Tender Evaluation Section of the MOFT. Assigned as an MIBCS Project Officer. Member of the 1st TE team.	3 RBD 2510

5.	Ahmed Mausoom	Chief of Staff from the PO, Republic of Maldives. Member of the TEB. Member of the 23rd TEB which accepted the 2nd TE on 1 September 2010. Member of the 24th TEB meeting which decided on 22 September 2010 that the price proposal would be assessed by giving equal 10% weightage to the components of passenger fee, visa fee and work permit fee.	3 RBD 2607
6.	Ahmed Naseem	Chief Immigration Officer from DOIE. Presented information to the NPC on 7 December 2009 on the MIBCS project. Member of the TE team that evaluated the EOIs on 6 April 2010. Member of the 1st TE team that conducted its evaluation on 2 June 2010. After the MIBCS project was awarded to the Claimant, he organized discussions held during the agreement drafting period.	3 RBD 2530
7.	Ahmed Nazim	Member of Parliament of the Republic of Maldives, Chair of the Finance Committee of the Parliament which recommended on 20 December 2012 that the CA be terminated. Subsequently charged and convicted of offences defrauding the state, and sentenced to 25 years' imprisonment.	-
8.	Ahmed Shareef	Chief Judge of High Court of the Republic of Maldives who, the Respondent alleged, had met with the Claimant's officers in Bangkok while an action against the Claimant in the High Court was pending. Member of the High Court in HC 105/2012 which issued the interim injunction suspending the performance of the CA.	-
9.	Aishath Azima Shakoor	Attorney General of the Republic of Maldives from 12 Feb 2012 to 10 April 2013 and 1 July 2013 to 29 October 2013. She stated that she would lead the international arbitration in the Nexbis and GMR cases.	

10.	Al'Usthaadh Ahmed Usham	Officer in the AGO of the Republic of Maldives and member of the TEB. He was part of the 23rd TEB meeting on 1 September 2010 which accepted the 2nd TE. Attended the 24th TEB meeting on 22 September 2010 which decided that the price proposal would be assessed by giving equal 10% weightage to the components of passenger fee, visa fee and work permit fee. Attended the 25th TEB meeting on 29 September 2010 which awarded the MIBCS project to the Claimant.	3 RBD 2589
11.	Ali Arif	Officer of MOFT and a member of the TEB. Attended the 16th and 17th TEB meetings on 2 and 3 June 2010 where the 1st TE was discussed. Attended the 24th TEB meeting on 22 September 2010 which decided that the price proposal would be assessed by giving equal 10% weightage to the components of passenger fee, visa fee and work permit fee. Observed opening of the price proposals on 22 September 2010. Attended the 25th TEB meeting on 29 September 2010 which awarded the MIBCS project to the Claimant. On 29 September 2010, he wrote on behalf of the MOFT to the DOIE Controller to inform him that the TEB had awarded the MIBCS Project to the Claimant and requested him to proceed with the preparation of the contract documents.	3 RBD 2602
12.	Ali Hashim	Minister of Finance and Treasury at the time the MIBCS project was proposed and then awarded to the Claimant. The DOIE Controller sent him a draft RFP on 7 March 2010 for the MOFT's review.	-
13.	Ali Saeed	Senior Immigration Officer in DOIE. Signed-off on the Completion of MIBCS Site Implementation attaching the Site Implementation Checklist on 18 Sept 2012. Member of the PSC and attended all eight PSC meetings between 8 March 2012 and 23 April 2013. DOIE's contact person for the MIBCS project.	-

14.	Ali Sawad	Attorney General of the Republic of Maldives when the CA was signed. On 6 September 2010, the Controller of DOIE sent him a draft of the CA for his opinion.	
15.	Ali Shujau	Deputy Solicitor General at the AGO of the Republic of Maldives when the CA was signed. Wrote to the DOIE Controller on 17 October 2010 stating that the AGO of the Republic of Maldives had no objections to the signing of the CA after amendments.	3 RBD 2564
16.	Aminath Juweriya	Project Officer from Tender Evaluation Section of MOFT. Member of the 2nd TE team that conducted the evaluation on 1 September 2010.	3 RBD 2519
17.	Anwar Ali	Department of National Planning officer and a member of the TEB. Attended the 16th and 17th TEB meetings on 2 and 3 June 2010 where the 1st TE was discussed. Attended the 24th TEB meeting on 22 September 2010 which decided that the price proposal would be assessed by giving equal 10% weightage to the components of passenger fee, visa fee and work permit fee. Attended the 25th TEB meeting on 29 September 2010 which awarded the MIBCS project to the Claimant. On 29 September 2010, wrote on behalf of the MOFT to the DOIE Controller to inform him that the TEB had awarded the MIBCS Project to the Claimant and requested him to proceed with the preparation of the contract documents.	3 RBD 2586
18.	Faaig Umar	Member of the 2nd TE team that conducted the evaluation on 1 September 2010.	3 RBD 2507
19.	Haneefa Jaufar	DOIE officer who attended the 1st and 2nd PSC meetings.	-
20.	Hasaan Afeef	Minister of Home Affairs of the Republic of Maldives at the time the cabinet paper was submitted to the Cabinet to seek its decision on whether the CA should be terminated.	-

21.	Ibrahim Afeef	Deputy Director General of the Legal Affairs Department of the DOIE from February 2008 to November 2010. His main responsibility was to give legal advice to the Controller of the DOIE, and oversea (cross-border) agreements. He was involved in the negotiation of the CA.	3 RBD 2592
22.	Ibrahim Ashraf	Assistant Controller of the DOIE, and a member of the team which evaluated the EOIs on 6 April 2010. Member of the 1st TE team that conducted the evaluation on 2 June 2010. Member of the PSC and attended all eight PSC meetings between 8 March 2012 and 23 April 2013.	3 RBD 2525
23.	Ibrahim Mufeed	DOIE officer who attended the 8th PSC meeting on 23 April 2013.	
24.	Ilyas Hussain Ibrahim	The Controller of the DOIE from 13 November 2008 to 21 February 2011; and 8 February 2012 to 23 May 2012. Member of the team that evaluated the EOIs on 6 April 2010. Member of the 1st TE team that conducted the evaluation on 2 June 2010. Signed the CA on 17 October 2010 on behalf of DOIE. Member of the PSC and chaired the 1st and 2nd PSC meetings.	3 RBD 2548
25.	Ismail Asif	From the Maldives National Chamber of Commerce and Industry, and a member of the TEB. Attended the 16th and 17th TEB meetings on 2 and 3 June 2010 where the 1st TE was discussed. Attended the 23rd TEB meeting on 1 September 2010 which accepted the 2nd TE. Attended the 24th TEB meeting on 22 September 2010 which decided that the price proposal would be assessed by giving equal 10% weightage to the components of passenger fee, visa fee and work permit fee. Attended the 25th TEB meeting on 29 September 2010 which awarded the MIBCS project to the Claimant.	3 RBD 2522 and 3 RBD 2605

26.	Ismail Shafeeq	From MOFT. Part of the TEB. Attended the 16th and 17th TEB meetings on 2 and 3 June 2010 where the 1st TE was discussed.	
27.	Dr Mohamed Ali	The Controller of the DOIE from 24 May 2012 to 21 November 2013. Signed the Certificate of User Acceptance on behalf of the DOIE on 4 July 2012. He acknowledged and accepted the Certificate of Acceptance provided by the Claimant on 20 September 2012. As Controller, he was part of the PSC and chaired the 3rd to 8th PSC meetings between 10 July 2012 and 23 April 2013.	-
28.	Mohamed Amir	MOFT officer and a member of the TEB. Attended the 23rd TEB meeting on 1 September 2010 which accepted the 2nd TE. Attended the 24th TEB meeting on 22 September 2010 which decided that the price proposal would be assessed by giving equal 10% weightage to the components of passenger fee, visa fee and work permit fee. Attended the 25th TEB meeting on 29 September 2010 which awarded the MIBCS project to the Claimant.	-
29.	Mohamed Faisal	From MOFT. Member of the 2nd TE team that conducted its evaluation on 1 September 2010.	3 RBD 2541
30.	Mohamed Nasheed	President of the Republic of Maldives from 11 Nov 2008 to 7 Feb 2012. Member of the National Planning Council that approved the carrying out of the immigration component on a Build, Operate, and Transfer ("**BOT**") basis on 7 Dec 2009.	
31.	Mohamed Naiz	MOFT officer and a member of the 2nd TE team that conducted its evaluation on 1 September 2010.	3 RBD 2545

32.	Mohamed Nazim	Minister of Defence and National Security of the Republic of Maldives from 8 February 2012 to 17 November 2013. Signed the Termination Letter dated 5 August 2013. Subsequently convicted for unlawful smuggling and possession of firearms and is serving an 11-year imprisonment sentence.	-
33.	Mohamed Shifau	Senior Immigration Officer in DOIE. Signed-off on the Site Implementation Checklists on 17 September 2012, 1 November 2012, and 10 November 2012.	-
34.	Mohamed Waheed Hassan	President of the Republic of Maldives from 7 February 2012 to 17 November 2013. The CA was terminated during his term as President.	
35.	Saeed Mohamed	Chief Immigration Officer in DOIE Member of the PSC, and attended the 1st, 2nd, 4th, 5th, 6th and 7th PSC meetings.	
36.	Samee Ageel	Director General in MOFT at the time the CA was signed.	3 RBD 2514 and 3 RDB 2597
37.	Uthman Shakir	Ministry of Economic Development officer and a member of TEB. Attended the 16th and 17th TEB meetings on 2 and 3 June 2010 where the 1st TE was discussed.	
38.	Zeeniya Ahmed	Ministry of Housing, Transport and Environment officer and a member of TEB. Attended the 23rd TEB meeting on 1 September 2010 which accepted the 2nd TE. Attended the 24th TEB meeting on 22 September 2010 which decided that the price proposal would be assessed by giving equal 10% weightage to the components of passenger fee, visa fee and work permit fee. Attended the 25th TEB meeting on 29 September 2010 which awarded the MIBCS project to the Claimant.	3 RBD 2583

VIII. LIST OF DEFINED TERMS

1	
171010 Draft	The second version of the draft CA
2	
290710 Draft	The first version of the draft CA
22 June 2015 Application	Respondent's application for an order for further production of documents by the Claimant
A	
ACC	Anti-Corruption Commission
ACC Report	Anti-Corruption Commission's Investigation Report dated 27 November 2011
Act 25/79	Maldives Act of 1979
Ageel	Saamee Ageel
AGO	Attorney General's Office
Alleged Insolvency Issue	Whether the Claimant had allegedly ceased operations in September 2012 and had subsequently become insolvent/unable to pay its debts as they fell due. If so, whether the Respondent was entitled to rely on Clause 11.1.1(ii) of the CA to terminate the CA on 5 August 2013
APP	Amended Procedural Protocol
Application for Interrogatories	Claimant's application for interrogatories dated 31 July 2015
B	
BCS	Border Control System
BOT	Build, Operate, and Transfer
Breach and/or Repudiation Issue	Whether the Respondent breached and / or repudiated the CA
C	
CA	Concession Agreement for the Maldives Immigration Border Control System dated 17 October 2010
Cabinet	Cabinet of the Maldives
CC 153/2012	Civil Case No. 153/Cv-C/2012
CC 2158/2011	Civil Case No. 2158/Cv-C/2011
Chua	Chua Yu Ye (Director of the Claimant)
Constitution	Constitution of the Republic of Maldives
Corruption Issue	Whether the CA is "tainted with corruption" so as to render it void / unenforceable
CR to DC	Claimant's Reply and Defence to Counterclaim dated 13 August 2014
CR to D/C Am1	Claimant's Reply (Amendment No 1) dated 17 June 2015
D	
Damages Issue	Whether and to what extent the Claimant is entitled to claim

	damages for the Respondent's premature termination of the CA
DNP	Department of National Planning
DOIE	Department of Immigration and Emigration
D/C	Defence and Counterclaim
D/C Am1	Amended Defence and Counterclaim
D/C Am2	Defence and Counterclaim dated 30 September 2015
E	
EOI	Expression of Interest
F	
Frustration Issue	Whether the CA was frustrated by reason of the motion passed by the Maldivian Parliament on 25 December 2012 instructing the Maldivian Government to terminate the CA
H	
HC 50/2012	ACC appeals decision in CC 153/2012 to High Court Case No. 2012/HC-A/50
HC 105/2012	ACC appeals decision in CC 2158/2011 to High Court Case No. 2012/HC-A/105
I	
IAA	Singapore's International Arbitration Act (Cap. 143A)
Ilyas	Ilyas Hussain Ibrahim, DOIE Controller
K	
Kon Yin Tong	Kon Yin Tong and another v Leow Boon Cher and others [2011] SGHC 228
L	
Leow	Leow Quek Siong
M	
MHA	Ministry of Home Affairs
MIBCS	Maldives Immigration Border Control System
MOFT	Ministry of Finance and Treasury
Munavvar	Dr Mohamad Munavvar (Maldivian law expert, Claimant's witness)
N	
Naseer	Ibrahim Naseer (Chief Principal Immigration Officer of DOIE, Respondent's witness)
NPC	National Planning Council

P	
Page	Commissioners of Crown Lands v Page [1960] 2 Q.B. 274
Parliament	People's Majlis
Party/Parties	Claimant and/or Respondent
PGO	Prosecutor General's Office
PLA	Providence Law Asia LLC
PO	President's Office
PP	Partial Procedural Protocol
PPCA	Prohibition of Corruption Act
Prevention Issue	Whether the Respondent breached its obligations under the Concession Agreement by preventing the Claimant's implementation of the MIBCS
Public Law Issue	Whether the CA is void under public law due to matters of national security and public interest
R	
R&D	Rodyk & Davidson LLP
RFP	Request for Proposal
Rolimpex	C. Czarnikow Ltd. v. Centrala Handlu Zagranicznego Rolimpex [1978] 1 QB 176
RRPD	Respondent's Request to Produce Documents
S	
S&A	Ms Suood & Anwar
S5 Systems	S5 Systems Sdn Bhd
SC 21/2012	Claimant appeals against High Court's interim injunction in HC 105/ 2012 in Supreme Court Case 2012/SC-A/21
SC 26/2013	Claimant appeals against decision in HC 105/2012 to the Supreme Court in Supreme Court Case No. 2012/SC-A/26
SIAC	Singapore International Arbitration Centre
SIAC Rules	Arbitration Rules of the Singapore Arbitration Centre (5th Edition, 1 April 2013)
Siraj	Hussain Siraj (Maldivian law expert, Respondent's witness)
Suood	Husnu Suood (Director of the Claimant)
S/C	Statement of Claim
S/C/ Am1	Statement of Claim (Amendment No 1) dated 20 August 2015
T	
Tam	Tam Chee Chong (Claimant's financial expert)
TE	Technical Evaluation
TEB	Technical Evaluation Board
TES	Tender Evaluation Section
Tribunal	Chan Sek Keong SJ / Sole Arbitrator
W	
Want of Authority Issue	whether the CA is void because the Controller of the DOIE allegedly acted ultra vires in entering into the CA which provides for the imposition of the Charges, which was in

	excess of what was allowed under the Maldives Immigration Act 2007
William Cory	William Cory & Sons Ltd v City of London Corporation [1951] 2 K.B. 476

IX. SUMMARY OF MATERIAL EVENTS

A. THE MATERIAL EVENTS PRIOR TO THE ISSUE OF THE NOTICE OF ARBITRATION

119. The material facts giving rise to this Arbitration are as follows:

a. The Claimant was one of four short-listed parties who submitted bids (consisting of a technical bid and a price bid) for the MIBCS Project to be implemented on a BOT basis for a concessionary period of 20 years.

b. The four technical bids were opened on 30 May 2010. The Claimant's bid was evaluated by the TEB as the best bid, but it was cancelled for an irregularity in the evaluation. A second TE was done by an independent panel of experts who also gave the highest marks to the Claimant. The price bids were opened on 22 September 2010, and the Claimant's bid was also evaluated as the best bid. On 29 September 2010, the Respondent informed the Claimant that it was the successful bidder for the MIBCS Project.

c. On 17 October 2010, the ACC directed the DOIE not to award the MIBCS Project to any party until instructed otherwise. The Respondent (represented by the DOIE) ignored the ACC's instruction as the AGO had cleared the legality of the award. The Parties executed the CA on 17 October 2012. It is not clear from the documentary evidence whether the CA was executed before or after the DOIE received the ACC's directive not to execute the CA.

d. Between 21 October 2010 and April 2011, the implementation works on the project were interrupted by various decisions of the agencies of the

Respondent. However, on 22 May 2011, the PO directed that the works on the project be proceeded with.

e. Between May 2011 and October 2011, the works were again interrupted by the Respondent. On 31 October 2011, the Cabinet decided to proceed with the project.

f. Between 2 November 2011 and September 2013, the ACC instituted a number of court proceedings against the DOIE in the Maldivian courts in order to stop the implementation of the project on the basis that the DOIE was under a legal obligation to comply with the ACC's directives. The Claimant was given leave by the court to intervene in the proceedings. Eventually, when the case reached the Supreme Court of Maldives on appeal, the Court decided that the ACC had only investigative powers under the ACC Act, and that it had no power to direct the DOIE not to sign the CA or to implement it (see Chronology of Events at [118] above).

g. The Claimant completed the installation of the border control system in accordance with the terms of the CA. The system became operational on 20 September 2012 when the Claimant issued the Certificate of Acceptance in respect of the Border Control Module which was signed off by the DOIE.

h. The Certificate of Acceptance was endorsed by the Respondent on 20 September 2012. Consequently, the 20-year concession period under the CA commenced on 20 September 2012. Thereafter, the Claimant was entitled to payment of the arrival/departure fee of non-Maldivians of either US$2 or US$4 per passenger, depending on the interpretation of clause 5 of the CA.

i. Between 19 December 2012 and August 2013, the Claimant sent to the Respondent a series of invoices based on US$4 per passenger for payment of the monthly fee due under the CA. These were not paid.

j. On 20 December 2012, the Finance Committee examined the terms of the CA and recommended that the CA be terminated and that its recommendation be included in the annual budget to be passed by the Parliament in the manner provided in the Constitution of the Republic of Maldives ("**Constitution**") (Report No. MLK/2012/R-9).

k. On 23 December 2012, the Budget Review Committee also recommended that the CA be terminated and that its recommendation be included as part of the 2013 national budget to be passed by Parliament as required by the Constitution.

l. On 25 December 2012, Parliament unanimously passed the Finance Committee's report on the CA.

m. On 27 December 2012, Parliament passed the National Budget for 2013.

n. On 5 August 2013, the Respondent notified the Claimant by letter that, for the reasons given therein, it was not bound by the CA and giving 14 days' notice that it would take over the management of the border control of the Maldives for the reasons stated therein.

o. From 19 to 20 August 2013, the Respondent disconnected the MIBCS installed by the Claimant and took over border control of the Maldives.

p. On 5 November 2013, the Claimant (through its solicitors) notified the Respondent by letter that its actions amounted to breaches of the terms of the CA and/or a repudiatory breach of the CA, and accordingly, gave notice under clause 12.1 of the CA, and that if the Respondent persisted in breaching the CA, the Claimant was entitled to elect to terminate the CA under clause 12.2 of the CA, and further or alternatively under the general law, it would claim damages and losses totaling US$268.8 million.

q. On 20 December 2013, the Claimant gave the Respondent notice of termination under clause 12.2 of the CA and, in the alternative, the Claimant's acceptance of the Respondent's repudiatory breach of the CA,

r. On 9 January 2014, the Claimant served its Notice of Arbitration on the Respondent.

B. THE CONCESSION AGREEMENT

120. The material terms of the CA are reproduced below:

1. DEFINITIONS AND INTERPRETATION

Effective Date — *the date of commencement of the Concession Period, being the date of endorsement by the Government of the Certificate of Acceptance issued for the MIBCS;*

xxx

2.0 CONCESSION

2.1 Grant of Concession

The [Respondent] hereby grants <u>exclusively</u> to the [Claimant], subject to the terms and conditions of this Agreement, the right and authority to:

2.1.1 design, supply, install and implement the MIBCS, an information technology system and other equipment and database, to enable the [DOIE] to track border crossings of travellers at the entry and exit points of the Republic of Maldives, validate and authenticate travel documents, capture traveller biometric information and carry out enforcement duties, as described in Appendix A: Part 1;

2.1.2 subject to all prevailing and relevant laws in respect thereof, manage, maintain and provide the Maintenance Services for the MIBCS (at its own cost and expense) during the Concession Period, and to retain the Revenue received or receivable and derived therefrom; and

2.1.3 provide initial and periodic training to the [DOIE] officers on the usage of the MIBCS, in accordance with Appendix A: Part 3.

Subject to and in accordance with the terms and conditions of this Agreement, the [Claimant] hereby accepts the Concession at its own risk and expense and in consideration for which the [Claimant] is hereby allowed to charge, demand, collect and retain the Charges: -

(a) from each passenger using non-Maldivian passport arriving into and departing from the Republic of Maldives;

(b) from every work visa issued / renewed / extended annually

for the provision of the MIBCS in accordance with Appendix B, and to bear all costs arising and retain the Revenue thereunder. (Emphasis added)

2.2 ***Concession Period***

This [Concession] Agreement shall be for a period of TWENTY (20) years commencing from the Effective Date and ending on the twentieth (20th) anniversary of the Effective Date ("Concession Period").

xxx

3.2 ***Acceptance of MIBCS***

The [Claimant] is responsible for demonstrating and certifying to the [Respondent] that the Deliverable Items meet all of the requirements and specification according to the Acceptance Criteria set out in Appendix A: Part 1. Prior to asking the [Respondent] to accept any phase or part of the Works, [Claimant] shall certify, in writing, in the form set forth in Appendix C, that the Works have been performed in accordance with all applicable requirements. The [Respondent] shall, no later than 14 days from the [Claimant's] issuance of each Certificate of Acceptance, accept and endorse upon each Certificate of Acceptance the completion of such phase or part (as applicable) of the Works. The [Respondent] would be deemed to have accepted and approved of the Certificate of Acceptance if no formal response/dispute in writing has been raised to the [Claimant] within 10 Working Days of the issuance of the Certificate of Acceptance.

xxx

3.4 Revenue

The [Claimant] shall be entitled to retain the Revenue, including all and any income received or receivable or derived from the supply, management and maintenance of the MIBCS.

xxx

3.6 Right to Sub-Contract

The [Claimant] may appoint such vendors, sub-contractors or suppliers and/or enter into such licensing, sub-contracting or other contractual arrangements as the [Claimant] shall deem fit and appropriate, for the supply, management and maintenance of all or any part of the Works.

xxx

5.1 Provision of Statement by the Government

5.1.1 The [Respondent] shall, on or before the seventh (7th) day of every month, provide a statement/report to the [Claimant] specifying the total number of passenger arriving into and departing the Republic of Maldives.

5.1.2 The [Respondent] shall, on or before the seventh (7th) day of every month, provide a statement / report to the [Claimant] specifying the total number of visa cards issued / renewed / extended during the preceding month.

xxx

5.2 Charging Mechanism

5.2.1 The [Claimant] is authorised by the [Respondent] to impose upon and collect levy or fee from:

i. Each and every passenger using non-Maldivian passport arriving into and departing from the Republic of Maldives, a fee of USD2.00 (UNITED STATES DOLLAR TWO ONLY) per passenger via a levy or fee imposed or to be imposed by the [Respondent] to be charged on such passenger.

ii. Each and every work visa card that is issued / renewed / extended annually or for every foreign worker, whichever the case may be, in *the Republic of Maldives, a fee of USD15.00 (UNITED STATES DOLLAR FIFTEEN ONLY).*

iii. In the event that the [Respondent] decides to abolish the issuance of the visa card for whatever reason, then the same levy or fee shall be imposed annually on each foreign worker present in the Republic of Maldives for the remainder of the Concession Period.

5.2.2 *The levy or fee as noted in Clause 5.2.1 of this Agreement will commence to be imposed or charged from the earlier of thirty (30) calendar days from the date of Acceptance of the MIBCS according to Appendix A of this Agreement by the [Respondent] and the actual date on which the MIBCS is being used by the [Respondent]. Such levy and fee will be imposed and charged from such date onwards throughout the Concession Period.*

xxx

5.2.4 *The [Respondent] shall take all and any such actions and/or steps that may be required in order to authorise imposition and collection of the Charges for the [Claimant], including implementing or issuing any additional security levy, policies, permits and/or licences which may be required for the purpose of enabling the same.*

xxx

5.3.1 *The [Claimant] shall submit to the [Respondent] on or before the fourteenth (14th) day of each month, an invoice in respect of the aggregate Fees and Costs payable as specified in Appendix B by the [Respondent] to the [Claimant] for the preceding month.*

5.3.2 *The [Respondent] shall pay all invoices properly rendered by the [Claimant] within 30 working days of their receipt.*

xxx

6.2 *Steering Committee of [Respondent] & [Claimant]*

The Government shall establish a Steering Committee comprised of [6] numbers of appointed representatives with 3 each from the [DOIE] and the [Claimant] respectively, for the purpose of implementing this Agreement. The role and functions of the Steering Committee shall include:

(i) The provision of overall guidance on the implementation of the MIBCS;

(ii) The regularly review of the project status to ensure the project development is on track;

(iii) To be the final point for resolving any issues or disputes arising from the implementation of MIBSC before being referred to Arbitration according to Clause 19.3

xxx

6.6 Approvals and Assistance

(c) obtaining all necessary approvals and authorizations from [Respondent's] Agencies and Departments for the purpose of implementing the MIBCS including for the imposition of the Charges, in order that the same may in all cases be obtained within as short a period as reasonably practicable after the submission of relevant applications thereof;

xxx

8.3 Royalty

The [Claimant] agree to pay the [Respondent] a royalty fee amounting to 5% on project gross revenue declared by the [Claimant] annually for the duration of the Concession Period.

xxx

11.1 Default Events by [Claimant]

11.1.1 *<u>Events of Default</u>*

If at any time:

xxx

(ii) the [Claimant] goes into liquidation or a receiver is appointed over the assets of the [Claimant] or the [Claimant] makes an assignment for the benefit of or enters into an arrangement or composition with its creditors or stops payment or is unable to pay its debt;

xxx

then the [Respondent] shall, have the right to terminate this [CA] forthwith by giving notice to that effect.

PROVIDED THAT notwithstanding the [Respondent's] right to issue the termination notice as aforesaid, the [Claimant] may request in writing for a further extension of time to rectify its default or remedy such breach, AND the [Respondent] shall grant a reasonable extension of time to the [Claimant] upon being satisfied that the [Claimant] has taken reasonable steps and/or has implemented such efforts in good faith to remedy the default in question.

12.0 *TERMINATION BY COMPANY*

12.1 ***Default Events by [Respondent]***

If the [Respondent] without reasonable cause fails to perform or fulfil any of its obligations herein, the [Claimant] may give notice to the [Respondent] of its intention to terminate the Concession by giving ninety (90) days' notice or such other period as may be agreed by the parties hereto to that effect to the [Respondent] with compensation.

PROVIDED ALWAYS notwithstanding the [Claimant's] right to give such notice, the [Respondent] may request for an extension of time to rectify its default or remedy such breach thereof, in which case the [Claimant] shall grant such reasonable extension for a period to be mutually agreed by the Parties hereto.

12.2 ***Termination***

If the [Respondent] fails to remedy the relevant event of default referred to in Clause 12.1 within the period of three (3) months or within such other period as may be agreed by the parties hereto the [Claimant] may, for so long as the relevant default or event is continuing, terminate the Concession at any time thereafter by giving notice to that effect to the [Respondent].

12.3 ***Consequences of Termination***

In the event of termination of this Agreement by the [Claimant] pursuant to Clause 12.2 above, the [Respondent] shall, within 45 days of termination, make payment to the [Claimant] an amount equivalent to the Value of Completed Works as defined and calculated in accordance with Clause 14. In addition to the Value of Works, the [Respondent] agrees to pay the [Claimant] a compensation sum equivalent to the total Charges multiplied by the projected number of passengers entering into or departing from Maldives using non-Maldivian passports and foreign worker or visa cards that would have *been issued / renewed / extended by the [Respondent] for the remainder of the Concession Period in accordance with Clause 16.*

12.4 ***Consequences of Non-Termination***

If the [Claimant] does not terminate this Agreement under Clause 12.2 the [Claimant] shall notify the [Respondent] in writing of the same whereupon the Concession Period shall be extended for such period and/or the fee charges shall be increased as may be necessary to compensate the [Claimant] for all losses, damage, costs or expenses suffered or incurred by the [Claimant] as a consequence of such matter of event giving rise to the right to terminate the Concession or such other form of relief as mutually agreed by both parties.

xxx

14.0 ***VALUE OF COMPLETED WORKS***

For the purpose of this Agreement, "Value of Completed Works" shall mean the amount jointly certified by the Joint Authorities to be the aggregate as the Termination Date of –

(a) the value of the Works (less operation and maintenance costs) completed up to and at the Termination Date as certified by the Joint Auditors appointed pursuant to Clause 19.2;
(b) all amounts incurred by the [Claimant] in designing, installing, providing and maintaining the MIBCS from the Effective Date;
(c) all management, consulting costs and fees for professional services incurred by the [Claimant], and all development and R&D costs arising, in relation to the Concession;
(d) all capitalised interest and other financing costs and expenses reasonably and properly incurred by the [Claimant] in connection with the financing of the Concession during the Concession Period;

xxx

16.0 ***COMPENSATION***

16.1 *If the [Respondent] terminates the appointment of the [Claimant] pursuant to Clause 10.3 or a termination of the appointment of the [Claimant] is invoked pursuant to Clause 12.1 or should the [Respondent], directly or indirectly, withdraw and/or terminate and/or revoke and/or repudiate and/or breach the appointment of the [Claimant] before the expiry of the Concession Period for any reason whatsoever, the [Respondent] shall reimburse the [Claimant] for all losses (actual or contingent), financial debts due to Debt Financing of* *all the MIBCS, claims, costs, damages or expenses incurred or reimbursed by the [Claimant], including but not limited to the investments to supply and install MIBCS and the total sum of the projected loss of revenue and/or loss of profit for each and every year of the Concession Period.*

16.2 *If the [Claimant] does not terminate the appointment of the [Claimant] pursuant to Clause 12.4 then, the [Claimant] shall inform the [Respondent] in writing to that effect, whereupon the Concession Period shall be automatically extended for such period and/or the fee charges shall be increased as shall be necessary to compensate the [Claimant] for the consequences of such matter or event giving rise to the right to terminate the appointment of the [Claimant]* ***Provided That*** *if the [Claimant] is able to demonstrate that, for financial reasons it is necessary for the [Claimant] to be reimbursed, the [Respondent] shall reimburse the [Claimant] for all losses (whether actual or contingent), financial debts due to Debt Financing of the MIBCS, claims, costs, damages or expenses incurred or reimbursed by the [Claimant], including but not limited to the investments to supply and install the MIBCS and the projected loss of revenue and/or loss of profit for the remainder of the Concession Period, arising directly out of or resulting directly from the relevant default or event.* (Emphasis added)

16.3 *Any claim by the [Claimant] to be compensated by the [Respondent] pursuant to the proviso of Clause 16.1 & 16.2 shall be accompanied by a certificate from an independent firm of auditors appointed by the [Claimant] setting out the amount payable pursuant to that clause and including detailed calculations of the same. The amount so certified shall be paid to the [Claimant] by the Government within fourteen (14) Working Days after the date of receipt of the certificate from such independent firm of auditors.*

xxx

18.2 ***Continuing Obligations***
The obligations of the [Respondent] and the [Claimant] under this Clause shall continue even after the expiration or earlier termination of this Agreement in respect of any act, deed, matter or other thing happening before the expiration or earlier termination of this Agreement.

xxx

27.0 ***TIME OF THE ESSENCE***

Time whenever mentioned shall be of the essence of this Agreement.

28.0 ***GOODWILL AND CONSULTATION***

Each of the Parties hereto covenants to maintain the cordial relationship of good faith and mutual trust that exists between them and shall exercise earnest efforts and use its best endeavours to resolve any misunderstanding, disagreement or dispute in an amicable manner so as to eliminate any discord and avoid any conflict.

xxx

29.0 ***FURTHER ASSURANCE***

The parties shall at all times and from time to time do all such further acts and execute all such further deeds, documents and instruments as may be necessary or desirable in order to give full effect to and carry out the terms of this Agreement.

30.0 ***AMENDMENT***

No modification, amendment or variation of any of the provisions of this Agreement shall be effective unless made by mutual consent and made in writing by way of a supplementary agreement specifically referring to this Agreement and duly signed by the parties. The provisions in respect of such amendment, variation or modification thereof shall be supplemental to and be read as an integral part of this Agreement which shall remain in full force and effect as between the parties hereto

xxx

32.0 ***ENTIRE AGREEMENT***

This Agreement constitutes the entire agreement between the Parties hereto with respect to the matters dealt with herein and supersedes any previous agreement or understanding between the Parties hereto in relation to such matters. Each of the Parties hereby acknowledge that in entering into the Agreement, it has not relied on any representation or warranty save as expressly set out herein or in any document expressly referred to herein.

X. THE PARTIES' PLEADINGS AND SUBMISSIONS

A. THE CLAIMANT'S CLAIMS ON 20 AUGUST 2015

121. The Claimant pleaded at [15] of its S/C Am1 dated 20 August 2015 that the Respondent committed breaches of the CA as follows:

(a) Clause 2.1 by, inter alia:

i. Failing, refusing and/or allowing the Claimant to have exclusivity to design, supply, install and implement their information technology system and other equipment and database, to enable the DOIE to, among other things, track border crossings of travelers [sic] at the entry and exit points of the Republic of Maldives; and

ii Failing, refusing and/or neglecting to continue and/or allow the Claimant to continue with the operation of the MIBCS under the Concession Agreement;

(b) Delaying the implementation of the MIBCS; and/or

(c) Failing, refusing and/or neglecting to make payment of all outstanding invoices rendered by the Claimant from September 2012 through to August 2013 for the charges collected from passengers using non-Maldivian passports arriving into and departing from the Maldives (the "**Charges**") during the Claimant's operation of the MIBCS that the Claimant is rightfully entitled to be paid pursuant to, inter alia, clauses 5.2 and 5.3 of the Concession Agreement.

122. At [16]- [41] of S/C Am1, the Claimant pleaded the factual and legal bases of the said claims, and at [42] claimed as follows:

By reason of the above, the Claimant claims:

a. Damages for delays in implementation of the Concession Agreement to be assessed (pursuant to paragraph 27 above);
b. The sum of US$3,771,308.10 being the total outstanding invoiced amounts, as per paragraph 31(f) above;
c. Damages in the form of actual costs and expenses and loss of investment incurred by the Claimant to be assessed (pursuant to paragraph 40(a) above);
d. Damages in the form of loss of revenue and/or loss of profit for termination of the Concession Agreement to be assessed pursuant to paragraph 40(b) above and/or for the sum of US$258,234,764.00 pursuant to paragraph 40(c) above;
e. Costs; and

f. Such further and other relief as the Tribunal may see fit to award.

B. The Respondent's defence and counterclaim on 30 September 2015

123. The Respondent's pleaded defence and counterclaim are set out at [2]-[77] of its D/C Am2 and may be summarized as follows:

[2]-[6] (a) The Tribunal lacks jurisdiction as the Claimant's Notice of Arbitration was issued in breach of clause 19.1 of the CA (which requires service of notice of a dispute followed by a mutual discussion to resolve the dispute). Subsequently, in its Opening Statement dated 3 October 2015, the Respondent abandoned its jurisdictional objection.

[8] (b) The CA was void/voidable on the following grounds:

8.1 The [CA] is tainted with corruption;

8.2 The [CA] is illegal under the laws of the Republic of Maldives and / or pursuant to the Constitution of the Republic of Maldives;

8.3 The Controller had acted *ultra vires* by entering into a [CA] which exceeded his scope of authority; and / or

8.4 The [CA] was deemed contrary to national security and public interest.

[9]-[36] (c) These paragraphs elaborate on the allegations of fact and propositions of law in support of the grounds set out at [8].

[36A]-[36B] (d) The Respondent is entitled to terminate the CA on <u>5 August 2013</u> under clause 11.1.1(ii) of the CA on the ground that the Claimant had ceased operations in September 2012, and was insolvent on 5 August 2013, as it had stopped payment and/or was unable to pay its debts by that date.

[37]-[38] (e) Without prejudice to its defence that the CA is void and/or had been frustrated, the Claimant is not entitled to the amount of damages sought, and that since clause 12.3 and clause 16 of the CA effectively allow the Claimant to recover the total revenue of the MIBCS project, they are not a genuine pre-estimate of the Claimant's loss and are in the nature of a penalty, and are therefore void and/or unenforceable.

[39]-[40] (f) If clause 12.3 and clause 16 of the CA are valid, the Claimant is not entitled to the sum claimed as the Respondent disputes the invoices produced by the Claimant and, further and/or in the alternative, the certificate purportedly issued by the "independent firm of auditors appointed out by the Company" should be set aside for the reasons that: (a) the auditors were not independent; (b) the relevant certificate is erroneous and/or based on incorrect and/or unjustifiable assumptions; and (c) the sum claimed is limited to the period before the Claimant entered into Administration or such period before the Claimant became unable to pay its debt.

[41]-[75] (g) Detailed responses to the Claimant's averments in the S/C Am1, admitting some, denying some, and admitting and avoiding some.

[76]-[77] (h) By reason of the above, the Respondent counterclaims:

> 77.1. A declaration that the [CA] is void as the Controller had acted *ultra vires* by entering into a [CA] which exceeded his scope of authority;
> 77.2. Further and / or in the alternative, the Respondent seeks a declaration that the [CA] has been frustrated and had come to an end on 25 December 2012, or such other date as the Tribunal deems fit;
> 77.3. Further and / or in the alternative, the Respondent seeks a declaration that under public law, due to matters of national security and public interest, the [CA] has been rendered void;
> 77.4. Further and / or in the alternative, the Respondent seeks a declaration that the Respondent had validly terminated the [CA].

XI. THE ORAL HEARING

124. The oral hearing was held at Maxwell Chambers, Maxwell Road, Singapore on 5-8 and 12-15 October 2015 when it was adjourned. The hearing resumed on 30 March 2016 when counsel for the Parties made their final submissions.

A. STATEMENTS AND TESTIMONIES OF WITNESSES

125. The Claimant adduced the statements and testimonies of the following witnesses:

(a) Chua as a factual witness,
(b) Suood as a factual witness,
(c) Munavvar as its Maldivian law expert, and
(d) Tam, as its financial expert.

Neither factual witness was able to testify as to the actual events that led to the signing of the CA as neither was involved in the preparation of the bids, the evaluation of the bids or the discussions on the terms of the CA or the signing of the CA.

126. The Respondent adduced the statements and testimonies of the following witnesses:

(a) Naseer as a factual witness,
(b) Siraj as its Maldivian law expert, and
(c) Leow as its financial expert.

The Respondent's factual witness was also unable to speak to the facts relating to the actual events that led to the signing of the CA as he was not involved in the preparation of the bids, the evaluation of the bids or the discussions on the terms of the CA or the signing of the CA.

127. In the course of the hearing on 9 October 2015, the Parties admitted in evidence the agreed joint statement dated 4 October 2015 of their respective financial

experts, Tam and Leow, on the computation of the compensation or damages based on US$2 or US$4 per passenger, as the case may be.

128. In the course of the hearing, Munavvar and Siraj, the Parties' Maldivian law experts, also filed an agreed joint statement dated 4 October 2015 on Maldivian law.

B. LIST OF ISSUES FOR DETERMINATION PROPOSED BY THE PARTIES

129. At [25] of its Opening Statement dated 4 October 2015, the Claimant referred to a draft list of issues for determination by the Tribunal:

> (a) Whether the Respondent breached its obligations under the Concession Agreement by preventing the Claimant's implementation of the MIBCS (the "**Prevention Issue**");
>
> (b) Whether the Respondent breached and/or repudiated the [CA] (the "**Breach and/or Repudiation Issue**");
>
> (c) Whether and to what extent the Claimant is entitled to claim damages for the Respondent's premature termination of the [CA] (the "**Damages Issue**");
>
> (d) Whether the [CA] is "*tainted with corruption*" so as to render it void / unenforceable (the "**Corruption Issue**");
>
> (e) whether the [CA] is void because the Controller of the DOIE [Ilyas] allegedly acted ultra vires in entering into the [CA] which provides for the imposition of the Charges, which was in excess of what was allowed under the Maldives Immigration Act 2007 (the "**Want of Authority Issue**");
>
> (f) Whether the [CA] is void under public law due to matters of national security and public interest (the "**Public Law Issue**");
>
> (g) Whether the [CA] was frustrated by reason of the motion passed by the Maldivian Parliament on 25 December 2012 instructing the Maldivian Government to terminate the [CA] (the "**Frustration Issue**"); and
>
> (h) Whether the Claimant had allegedly ceased operations in September 2012 and had subsequently become insolvent/unable to pay its debts as they fell due. If so, whether the Respondent was entitled to rely on Clause 11.1.1(ii) of the [CA] to terminate the [CA] on 5 August 2013 (the "**Insolvency Issue**").

130. At [26] of its Opening Statement dated 4 October 2015, the Claimant states that it appears from the draft list of issues that the Respondent was no longer contending that:

> (a) This Tribunal lacks jurisdiction over this matter [the Public Law Issue]; and
>
> (b) The [CA] is void for illegality as imposition of the Charges amount to a tax in contravention of Articles 97 and 247(b) of the Maldivian Constitution [the Want of Authority Issue].

131. In its Opening Statement dated 3 October 2015, the Respondent confirmed at [1] and [78], respectively, that it was no longer pursuing these two issues set out at [129] above.

132. At [17] of its Opening Statement, the Respondent proposed the following as the material issues for determination by the Tribunal, *viz*:

> 17.1 Was the [CA] void and/or validly terminated on 5 August 2013;
> 17.2 Could [the Respondent] have validly terminated the [CA] under clause 11.1.1(ii) of the [CA] in any case;
> 17.3 Would [the Respondent] be liable for the sums already invoiced by [the Claimant] and if not, what would the appropriate amount be;
> 17.4 If [the Respondent] was found to be in breach, what is the appropriate sum of damages payable to [the Claimant] (if any)?

133. At [4] of its Reply Submissions dated 4 February 2016, the Claimant submitted that the Respondent, in its Closing Submissions dated 23 December 2015, had jettisoned the following defences:

> *a.* The Respondent is no longer contending that [Ilyas] entered into the CA without authority, as it was ultra vires his powers under the MIA 2007 [the Want of Authority Issue];
>
> *b.* When addressing its defence that the CA was voidable for being "tainted with corruption", the Respondent also makes no reference to its pleaded allegation that the Claimant had engaged in corrupt conduct by providing 75 laptops to the Respondent, or by meeting a High Court judge when one of the Maldivian court cases was ongoing.

c. The Respondent is no longer pursuing that the CA could be terminated on the basis that the Claimant had stored sensitive information in Malaysia, out of reach of the Maldives, and that this amounted to a national security threat [the Public Law Issue].

134. At [5] of its Reply Submissions, the Claimant stated that the only defences which the Respondent was pursuing (after filing its Closing Submissions) were as follows:

a. The CA is voidable for being tainted with corruption. These corrupt acts involve only Samee and Ilyas.

b. The CA was frustrated by a parliamentary motion passed on 25 or 27 December 2012 that the [Respondent] should terminate the CA;

c. The Respondent was entitled to terminate the CA on national security grounds as a result of the "pop-ups" which appeared on the Respondent's computer screens; and

d. The Respondent was entitled to terminate the CA pursuant to Clause 11.1.1(ii) of the CA.

135. To clear any uncertainty as to the issues that the Respondent had agreed to withdraw from the arbitration, the Tribunal requested the Respondent, at the conclusion of the oral hearing on 30 March 2016, to confirm in writing what the issues or defences were.

136. On 27 April 2016, the Respondent, without admission to the Claimant's allegations, confirmed that it would no longer pursue the following issues:

2.1. Paragraphs 2 to 6 of the Respondent's Statement of Defence and Counterclaim (Amendment No. 2) ("**DCC**"); [ie, that this Tribunal has no jurisdiction to hear the dispute]

2.2. Paragraphs 8.2 and 25 of the DCC; [ie, that the CA is illegal under the laws of the Republic of Maldives and/or pursuant to the Constitution of the Republic of Maldives];

2.3. Paragraphs 8.3 and 26 to 28 of the DCC; [ie, that the Controller had acted *ultra vires* by entering into the CA which exceeded his scope of authority.]

2.4. Paragraph 7 of the Respondent's Reply (Amendment No. 2) [ie, there was corruption in that the Claimant had met the former High Court Chief Justice of the Maldives in Bangkok while the case concerning the MIBCS was pending in the Maldivian courts (resulting in his demotion), and that the Claimant had issued seventy five (75) laptop computers to the DOIE officers during the time the Maldivian court had ordered a temporary halt to the MIBCS project]; and

2.5. Insofar as the backup system of the MIBCS was stated to be stored in Kuala Lumpur, the Respondent is no longer pursuing this.

XII. THE ISSUES FOR THE TRIBUNAL'S DETERMINATION

137. Having regard to the Respondent's confirmation above, the Tribunal was left with the following issues to determine:

1) the Prevention Issue,
2) the Frustration Issue, and
3) the Breach and/or Repudiation Issue.

138. Subsumed under issue (3) are the Corruption Issue, the Insolvency Issue, and the Compensation/Damages Issue.

139. With respect to the Prevention Issue, the Claimant did not make any substantive arguments on it in its Opening Statement, its Closing Submissions and Reply Submissions. For this reason, the Tribunal requested the Claimant by email on 7 June 2016 to confirm whether or not it would be pursuing its claim for damages against the Respondent for preventing it from implementing the CA, as pleaded at [42(a)] of the S/C/ Am1.

140. On 13 June 2016, the Tribunal recalled its email of 7 June 2016 (as it had already determined the issue provisionally). However, subsequent to the recall, the Claimant responded to confirm that it would not be pursuing the Prevention Issue.

141. The Tribunal will examine the Frustration Issue first. With respect to the issues subsumed under the Breach and/or Repudiation Issue, the Tribunal will examine the Insolvency Issue, followed by the Compensation/Damages Issue and finally the Corruption Issue (which is the crux of the Respondent's defence).

A. THE FRUSTRATION ISSUE

1. The Respondent's pleaded case and submissions

142. At [34]-[36] of its D/C Am2, the Respondent pleads:

> 34 The Respondent avers that the [CA] had been frustrated by a motion passed by the Maldivian Parliament, on or about 25 December 2012, which instructed the Respondent to terminate the [CA].
>
> 35 This instruction was then included in the budget recommendations for the 2013 budget passed by the Parliament.
>
> 36 Pursuant to section 34(c) of the Public Finance Act (Act No. 3/2006) of the Republic of Maldives, read with the 1st Amendment Bill to the Public Finance Act, it is mandatory for the Respondent to act on such recommendation and to terminate the [CA].

143. At [62]-[67] of its Opening Statement dated 3 October 2015, the Respondent contends:

> 62. Further and/or in the alternative, it is GOM/DOIE's case that the [CA] has been frustrated by a motion passed by the Maldivian Parliament on or around 25 December 2012, directing GOM/DOIE to terminate the [CA].
>
> 63. Under the doctrine of separation of powers in the Maldivian Constitution, the [Maldivian Parliament] is considered as separate arm from the Executive.
>
> 64. Generally, a motion passed by the Maldivian Parliament is treated as a recommendation and a mere recommendation would not have the force of law. However, this is different when it comes to recommendations of the budget review committee passed by the Parliament in relation to the implementation of the budget.

> 65. The 1st Amendment Act to the Public Finance Act amends Section 34(c) of the Public Finance Act to state as follows:
>
> > "In implementing the budget, the Government shall comply with the recommendations of the budget review committee, as passed by Parliament."
>
> 66. In our present case, the motion to terminate the [CA] was included in the budget recommendations for the 2013 budget passed by the Parliament.
>
> 67. Therefore, it was necessary for GOM/DOIE to terminate the [CA], in compliance with the Public Finance Act and any future performance of the [CA] Agreement, after the budget recommendations for the 2013 budget, would not have been possible.

144. At [240]-[290] of its Closing Submissions, the Respondent reiterated the arguments as set out in its Opening Statement and elaborated on some of them. At [274]-[288] of its Reply Submissions, the Respondent, in responding to the Claimant's submissions, reiterated its position as set out in its Opening Statement and Closing Submissions.

2. The Claimant's pleaded case and submissions

145. The Claimant pleads at [17] of its Reply (Amendment No 2):

> 17 Paragraph 20 of the RDC is denied. The Respondent avers that there is a separation of powers between the Executive (Cabinet) and the Legislative (the Maldivian Parliament) arms of the government.

146. At [60]-[61] of its Opening Statement, the Claimant contends:

> 60 The Respondent claims that the [CA] was frustrated by a motion passed by the Parliament instructing the Respondent to terminate the [CA].
>
> 61 The Claimant will show that the Maldivian Parliament's recommendation that the Respondent should terminate the [CA] does not have the force of law and therefore cannot frustrate the [CA].

147. At [337]-[341] of its Closing Submissions, the Claimant submits that (a) the budget recommendation passed by Parliament is not legislation and does not

have the force of law; and (b) even if the Respondent was obliged to terminate the CA, it was not absolved from liability to compensate the Claimant.

148. At [145]-[214] of its Reply Submissions, the Claimant responds to the Respondent's arguments in its Closing Submissions more fully. At [145], the Claimant restates the Respondent's arguments as follows:

> 145 At [21] to [30], and [242] to [326], RCS, the Respondent asserted that:-
>
> a. The CA was frustrated either on 25 December 2012 or 27 December 2012 as a result of the motion passed by Parliament that the CA should be terminated; ([242], RCS)
>
> b. In this regard, the Claimant's position that the Respondent is only required to adhere to the recommendations that were made in connection with or relate to the implementation of the budget is not borne out by a plain reading of section 34(c), Public Finance Act; ([254] to [258], RCS)
>
> c. The Parliamentary motion amounted to a "supervening illegality" which frustrated the performance of the CA; ([283] to [288], RCS)
>
> d. In this regard, the Respondent submitted that the Parliamentary motion to terminate the CA was a law;
>
> e. The CA was an administrative contract with a State, and a state can do generally whatever it pleases on its own territory. The Respondent was therefore permitted to terminate the CA; ([11], [21] to [30]; [278] to [280], RCS)
>
> f. As a result of the doctrine of separation of powers, the Government of Maldives cannot be said to have any part to play in the decision made by the Maldivian Parliament to terminate the CA; ([244] to [247], RCS); and
>
> g. As the contract has been frustrated, the Frustrated Contracts Act applies, under which damages are only compensatory; ([291] RCS).

149. The specific responses of the Claimants to these arguments, in the same order, are set out at [146]-[152] as follows:

> 146. First, this Tribunal can dismiss outright the assertion that the CA was frustrated on 25 December 2012. On 25 December 2012, the Parliament passed

a recommendation of the Finance Committee that the CA should be terminated. As conceded by Mr Siraj in cross-examination a recommendation of the Finance Committee which is passed by Parliament is not binding on the government: Transcripts, Day 7, p.62. There is no legislation which says that is the case as well.

147. The Maldivian Civil Court also decided in Civil Court Case no. 2240/Cv-C/2012 that the decision of the Finance Committee of Parliament is only a recommendation put to Parliament, and that there was no obligation on the Parliament to comply with these recommendations: CCS, Annex 3; Suood's Witness Statement, p. 118.

148. Second, as we show below, when section 34(c), Public Finance Act is read in its context, it is plain that the GOM was only obliged to follow a recommendation made by the budget review committee that related to the state budget for the following year prepared by the MOFT. As we also show, the recommendation was completely divorced from the state budget and had nothing to do with it. In the circumstances, the GoM was not obliged to follow it under section 34(c), Public Finance Act.

149. Third, recommendation of the budget review committee passed by Parliament did not amount to law, and therefore cannot constitute a "supervening illegality" which frustrated the CA.

150. Fourth, there is no merit to the Respondent's argument that it could "do whatever it pleases on its territory" because the CA was an administrative contract.

151. Fifth, the Respondent "self-frustrated" the CA by the passing of the Parliamentary motion to terminate the CA. In this regard, it will be shown that the Respondent cannot rely on the doctrine of "separation of powers" to deny its contractual responsibility to the Claimant.

152. Sixth, as the CA was not frustrated, the Frustrated Contracts Act does not apply.

3. Discussion and finding of the Tribunal

150. It may be noted, first of all, that with respect to this argument, the Respondent makes a distinction between the roles of the Parliament and the "GOM", which is the Executive, as two arms of "government" (in its largest sense) under the separation of powers doctrine under the Constitution. The argument is that

Parliament is authorised to pass the annual budget under the Public Finance Act which, when passed, binds the Executive to act in accordance with it.

151. The separation of powers doctrine requires each constitutional organ, *viz*, the legislative, the executive and the judicial arms of the state, to act within its constitutional spheres of power as granted to them by the constitution. The legislature may pass laws, but may not execute them. The executive may execute laws but may not pass them unless lawfully delegated to it by the legislature. The judiciary may not pass laws or execute them except to the extent lawfully delegated to it either by the legislature or the executive.

152. These principles have been declared by the Supreme Court of the Maldives in Supreme Court Order No 2012/SC-SJ/05 dated 28 November 2012. The declaration was made in the following circumstances: on 26 November 2012, the then opposition political alliance released a statement that it intended to commence a campaign of public rallies in respect of the border control issue. At that time, the opposition was also involved in an active campaign against the presence of GMR, an Indian company operating the Ibrahim Nasir International Airport (Haveeru Daily, November 26, 2012).

153. In response to these announcements, the Supreme Court on its own volition on 28 November 2012 issued an order which *inter alia,* declared that: (a) the three organs of the state, namely, the Executive, the Legislature and the Judiciary established by Articles 5, 6 &7 of the Constitution are within a constitutional system where powers are separate; (b) all organs are to be free from the influence or encroachment from the other; and (c) none of these organs may act *ultra vires* the constitution or beyond the powers necessarily prescribed therein. The law of the Constitution determines the powers of the three arms of "government", and each must act in accordance with any law passed by the Parliament in accordance with the Constitution, including Parliament itself.

(a) The Annual Budget

154. Article 96 of the Constitution provides for the annual budget of the Government as follows:

> Annual budget
>
> 96. (a) Prior to the commencement of each financial year, the Minister of Finance shall submit for approval to the People's Majlis a budget containing the projected revenue and expenditures for the year, and a statement of actual revenue and expenditures for the preceding year.
>
> (b) The People's Majlis may approve or amend the budget submitted by the Minister of Finance as in its discretion it deems fit.
>
> (c) No supplementary expenditures shall be added to an approved budget without further approval by the People's Majlis. Expenditures included in the budget shall be applied solely for the specified purpose. Taxation and expenditures
>
> 97. The Executive shall not:
> (a) spend any public money or property;
> (b) levy any taxation;
> (c) obtain or receive any money or property by loan or otherwise;
> (d) provide any sovereign guarantees;
> except pursuant to a law enacted by the People's Majlis.

155. The provisions of Articles 96 and 97 are self-explanatory. Prior to the commencement of each financial year, the Minister of Finance shall submit for approval to Parliament a budget containing the projected revenue and expenditures for the year, and a statement of actual revenue and expenditures for the preceding year. Parliament may approve or amend the budget submitted by the Minister of Finance as in its discretion it deems fit. The Executive shall not spend any public money or property except pursuant to a law enacted by Parliament.

156. There is nothing in Articles 96 or 97 that empowers the Minister of Finance to submit for approval by Parliament a budget other than one that contains the

projected revenue and expenditures for the year. How the revenue is to be spent is subject to any law passed by Parliament. In the present case, the relevant law is the Public Finance Act, section 34(c) of which (as amended) states as follows:

> "In implementing the budget, the Government shall comply with the recommendations of the budget review committee, as passed by Parliament."

157. The Respondent has not referred the Tribunal to any provision in the Public Finance Act that confers authority on the Finance Committee or the Budget Review Committee to recommend that the Government may break its contractual obligations to third parties when making its recommendations on how and to what extent public money is to be spent by the Government. Yet, this was precisely what the Finance Committee and the Budget Review Committee did in the present case.

158. Furthermore, the Respondent has not referred to any provision in the Constitution or any statute to support its contention that the Legislature (Parliament) has the power under the Constitution to direct the Executive (Government) to terminate unilaterally any valid agreement between the Government and a third party. On the basis of the doctrine of separation of powers (which forms part of the structure of the Maldivian Constitution), Parliament's power is confined to passing laws within its legislative powers under the Constitution and also to approving the annual budget of the Government. In the Tribunal's view, Parliament will be acting outside its constitutional powers in making it unlawful for the Government to perform its contractual obligations to a third party by including it as an item of revenue or expenditure in passing the annual budget of the Government. When passed, the budget binds the Government to spend public money within the budget.

(b) The Finance Committee's recommendation

159. The Tribunal also finds that section 34(c) of the Public Finance Act (as amended) refers specifically to the recommendations of the Budget Review Committee. Accordingly, the recommendation of the Finance Committee is irrelevant. The Government's statutory duty under section 34(c) is to comply with the recommendations of the Budget Review Committee when passed by Parliament, and not those of the Finance Committee.

(c) The Budget Review Committee's recommendations

160. The function of the Budget Review Committee, which is an *ad hoc* committee, is to review the budgetary proposals of the various ministries and agencies of the Government, and make recommendations to Parliament on its proposals. Its function is not to review the reasonableness or legality of any contract entered into by the Government, even though such contract may impact on the revenues of the Government. How the Government is to augment or increase its revenues to meet its budgetary requirements is a matter of policy for the Government to decide. It is not for the Budget Review Committee to advise the Government that it has entered into an improvident agreement with a third party and that it should terminate the contract as part of its budgetary recommendations to Parliament.

(d) Power of Parliament to approve the Budget

161. Parliament is vested with a constitutional power under Article 96 of the Constitution to approve the budget (see [154] above). When Parliament approves the recommendations of the Budget Review Committee, it is not exercising any legislative power to enact a law. The passing of a budget is not and does not constitute a legislative act. Parliament is only exercising a constitutional power to approve the budget under Article 96(b) of the Constitution. The Constitution has vested Parliament with a power to control

public spending by the Government. The budget is now a law. Until and unless it has been approved by Parliament, the Government will not have any money to spend. If Parliament refuses to pass the budget, the Government will have no money to run the country. Such an event usually creates a constitutional crisis.

162. Of course, Parliament, being a sovereign legislature, may exercise its legislative power to pass a law to annul or void a contract to which the Government is a party if it is not a breach of fundamental rights entrenched in the Constitution. In the present case, Parliament did not pass such a law. What it passed was the recommendations of the Budget Review Committee, a very different kind of act. Whether, if Parliament had passed legislation to annul the CA, the Respondent could plead frustration under Maldivian or Singapore law, is not an issue before the Tribunal. Therefore, it need not be addressed.

163. The Claimant cites *C. Czarnikow Ltd. v. Centrala Handlu Zagranicznego Rolimpex* [1978] 1 QB 176, ("***Rolimpex***") where Lord Denning held that where the government is a party to a contract, and it intervenes to escape its own obligations under the contract, it could not rely on a self-induced "intervention" any more than it could rely on a self-induced frustration, citing *Maritime National Fish Ltd. v. Ocean Trawlers Ltd* [1935] A.C. 524, or a self-induced incapacity to perform or a self-induced prevention of performance: see *Roberts v. Bury Improvement Commissioners* (1870) L.R. 5 C.P. 310. *Rolimpex* was affirmed by the House of Lords in [1979] 1 AC 351.

164. In response, the Respondent in its Skeletal Submissions dated 30 March 2016 contends at [71] that *Rolimpex* referred to the judgment of Devlin J in *Commissioners of Crown Lands v Page* [1960] 2 Q.B. 274 ("***Page***") as follows:

> "Devlin J. there divided government acts into two categories: (i) those which a government does for the public good in the interests of the country as a whole; and (ii) those which it does so as to avoid its own liabilities under a particular contract or contracts. So far as the first category is concerned, a government

> cannot fetter its duty to act for the public good. It cannot bind itself-by an implication in the contract-not to perform its public duties. This first category is illustrated by *Commissioners of Crown Lands v. Page* [1960] 2 Q.B. 274."

165. The Respondent also contends that *Page* considered the case of *William Cory & Sons Ltd v City of London Corporation* [1951] 2 K.B. 476 ("***William Cory***") where the city corporation had contracted with the plaintiff to remove refuse. However, the city corporation passed a by-law which resulted in the performance of the contract being rendered impossible. Harman J held that there was no frustration and that it was irrelevant that the supervening event was brought about by the defendant corporation itself in another capacity.

166. It is the Tribunal's view that neither *Page* nor *William Cory* is relevant to the Frustration Issue. *William Cory* was decided on the basis that the City of London Corporation had a statutory duty to make by-laws for the collection of refuse. In the present case, the Maldivian Parliament had no constitutional or statutory obligation to enact any law to nullify a contract entered into by the Government.

167. The Respondent also relies on the statement (italicised) of Lord Wilberforce in the House of Lords in *Rolimpex*, where his Lordship said:

> "Before the courts and this House the buyer took a different line. It appealed to a group of English cases dealing with actions taken by or on behalf of the Crown in which a distinction has been made, broadly, between the acts which are performed by a government for the public good or for a general executive purpose and acts which a government does so as to avoid liability under a contract or contracts...Lord Denning M.R. was disposed to hold that this distinction might be applied to the present case if, but only if Rolimpex was to be regarded as a department of government : he then proceeded to hold that it was not. I have very great doubt whether the doctrine developed by these cases, which is very much one of English constitutional law, can viably be transplanted into the constitutional climate of foreign States-particularly such states as Poland which we are entitled to know have an entirely different constitutional structure from ours. Such a transplantation, if possible at all, would involve English courts in difficult and delicate questions as to the motivation of a foreign State, and as to the concept of public good, which

> would be unlikely to correspond with ours. I am not saying that there may not be cases when it is so clear that a foreign government is taking action purely in order to extricate a state enterprise from contractual liability, that it may be possible to deny to such action the character of government intervention, within the meaning of a particular contract, but that result cannot, in my opinion, be achieved by means of the doctrine mentioned above: it would require clear evidence and definite findings. It is certain that no such evidence or findings exist in the present case."

168. In the Tribunal's view, the constitutional structures of the Republic of Maldives and the United Kingdom are similar in so far as they give effect to the separation of powers. However, the constitutionality of any Act of the English Parliament may not be challenged in the English courts since the English Parliament is sovereign. However, the Maldivian Parliament is not sovereign in the same sense since its powers are subject to and limited by the Constitution. If the Maldivian Parliament were to pass a law declaring the CA null and void, different constitutional issues would arise, such as, whether it had the constitutional power to pass such a law.

169. The Claimant has also submitted that according to well-established international law rules, the conduct of any organ of a State must be regarded as an act of the State. As stated by the Tribunal in *The Claims of Rosa Gelbtrunk* and the "*Salvador Commercial Company et al*" (1902) 15 RIAA 455:

> "[T]he State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity."

This principle has also been codified in Article 6 of the Draft Articles on State Responsibility which provides:

> "[T]he conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or subordinated position in the organization of the State."

170. The Claimant has contended that, in the present case:

a. The CA is a contract between the Claimant and the Government of the Republic of Maldives as the Executive branch of the Republic of Maldives. Any act of the Parliament in passing a motion to terminate the CA is also an act of the Republic of Maldives. In the circumstances, the Respondent is effectively seeking to "self-frustrate" the CA, which is not permitted by law.

b. Self-frustration is also not permitted under the terms of the CA. Clause 10.1 of the CA provides that an "Event of Force Majeure" means an "event, not within the control of the party affected, which that party is unable to prevent, avoid or remove…". The Republic of Maldives cannot claim that the parliamentary motion was not within its control.

171. This argument, interesting as it is, need not trouble the Tribunal. The Tribunal is of the view that the Budget Review Committee has no power to recommend to Parliament to terminate the CA as a budgetary recommendation, and Parliament's approval of the recommendation has no legislative effect on the CA.

172. For the reasons given above, the Tribunal finds that the CA was not frustrated by the Parliamentary approvals given to the recommendations of the Finance Committee and the Budget Review Committee to terminate the CA. The approvals did not absolve the Respondent from having to, or make it illegal for the Respondent, to perform its contractual obligations under the CA.

B. THE INSOLVENCY ISSUE

1. The Respondent's pleaded case on clause 11.1.1 of the CA

173. Clause 11.1.1 of the CA provides that if at any time the Claimant, *inter alia*, stops payment or is unable to pay its debts, the Respondent has the right to terminate the CA forthwith by giving notice to that effect, provided that the Claimant may ask for time to rectify its default or remedy such breach, and the

Respondent has to give a reasonable extension of time to the Claimant if satisfied that the Claimant has taken reasonable steps and/or has implemented such efforts in good faith to remedy the default in question.

174. At [36A] of its D/C Am1, the Respondent contends that it was entitled to terminate, and could have terminated, the CA on 5 August 2013 under clause 11.1.1(ii) as the Claimant had ceased operations, stopped payment or was unable to pay its debts. At [36B], the Respondent contends it discovered these facts only after 5 August 2013, after discovery of documents. Hence, the Respondent was not able to invoke clause 11.1.1 to give notice of termination of the CA on or before 5 Augusts 2013.

175. The Respondent contends that it is entitled to invoke clause 11.1.1 of the CA by way of defence on the basis of the legal principle as set out in *The Law of Contract in Singapore* (Academy Publishing 2012) at [17.199] that:

> "Following *Alliance Concrete Singapore Pte Ltd v Comfort Resources Ltd* ([2009] 4 SLR(R) 602) ("*Alliance Concrete*") the rule in Singapore appears to be settled in that it is generally open to a party to discharge a contract in reliance on any ground which might have been available at the time it elected to discharge that contract, even one which, at the time, was unknown to the party seeking to discharge that contract. This is, however, subject to (at least, perhaps) two qualifications. First, it must not be unfair or unjust for the party to make such an election between alternate grounds and second, if it were possible for the party in breach to have been notified of the breach so as to prevent the breach from occurring, no election would be possible if the party seeking to discharge the contract had failed to inform the party in breach of such possibility."

176. The Respondent also contends at [359]-[362] of D/C Am1 that neither exception to the general rule applies to it, i.e., it is not unfair or unjust for the Respondent to plead insolvency and the Claimant would not have been in a position to rectify the breach if notice of termination had been given.

2. The Claimant's pleaded case on clause 11.1.1 of the CA

177. In response, the Claimant pleads as follows at [20A] of its Reply and Defence to Counterclaim (Amendment No 2) ("CR to D/C Am2") dated 6 October 2015:

> 20A. Paragraphs 36A and 36B are not admitted and the Respondent is put to strict proof thereof. The Claimant avers that:
>
> (i) the Claimant had not ceased operations in September 2012 and had not "subsequently become insolvent";
>
> (ii) on 5 August 2013, the Claimant had not "stopped payments"';
>
> (iii) on 5 August 2013, the Claimant was not unable to pay its debts;
>
> (iv) as of 11 July 2012, the Claimant was delisted (i.e. its shares ceased to be traded on the Australian Stock Exchange). It continued to operate after 11 July 2012 as a private limited company (as opposed to a publically listed company);
>
> (v) between September 2012 and until the [CA] was terminated by the Respondent on 5 August 2013, the Claimant was operating the MIBCS;
>
> (vi) between 11 October 2012 to 3 September 2013, the Claimant issued 12 invoices to the Respondent covering the period between 1 September 2012 to 19 August 2013;
>
> (vii) at the 6th MIBCS Project Steering Committee on 19 December 2012 attended by representatives from the Respondent and the Claimant, it was noted that the MIBCS was fully implemented and operational since July 2012, the Claimant had submitted invoices for the months of September 2012 to December 2012 for the Respondent's further action and the Respondent acknowledged receipts of these invoices; and
>
> (viii) at the 7th MIBCS Project Steering Committee on 19 February 2013 attended by representatives from the Respondent and the Claimant, it was noted that the MIBCS was fully implemented and operational since July 2012, the Claimant had submitted invoices for the months of December 2012 to January 2013 for the Respondent's further action and the Respondent acknowledged receipts of these invoices

178. The Claimant does not dispute the principle as set out at [175] above, and its applicability in this case (if in fact the Claimant were insolvent at the date of termination of the CA), but contends:

a. that the Claimant was not insolvent at all material times;

b. that in any event, the principle does not apply to the facts of the case because if the Claimant were unable to pay its debts, it was caused or contributed to by the Respondent's actions in delaying the completion of the MIBCS Project, and hence, the Respondent was relying on its own wrong as a reason for alleging that the Claimant was insolvent; and

c. that, if the Respondent had given notice of termination on the ground that the Claimant was unable to pay its debts, the Claimant would have been able to rectify the breach.

3. The test of insolvency

179. At [350] of its Closing Submissions, the Respondent cites the following passages in the judgment of the High Court of Singapore in *Kon Yin Tong and another v Leow Boon Cher and others* [2011] SGHC 228 *("**Kon Yin Tong**")* as a useful summary of the principles applicable to determine whether a company is insolvent:

> "[33] Despite the fact that no one single test is conclusive as a measure of solvency, it is commonly accepted that the two primary indicia of a company's inability to pay debts are the cash flow test and the balance sheet test. **For most purposes, it is the present inability to pay debts that is the crucial factor.**
>
> [34] It is important to bear in mind, however, that the determination of whether a company is insolvent is essentially a question of fact...
>
> [35] Generally, the burden of proof is borne by the party making the allegation of insolvency...
>
> [36] The cash flow test deems a company insolvent when it cannot meet its obligations as and when they fall due. The balance-sheet test, on the other hand, would deem a company insolvent when the current liabilities of the company exceed its assets.

[37] With respect to the cash flow test, the court will look at the company's financial position taken as a whole. The relevant factors which can be taken into consideration include:

(a) all of the company's debts as at that time in order to determine when those debts were due and payable;

(b) all of the assets of the company as at that time in order to determine the extent to which those assets were liquid or were realisable within a timeframe that would allow each of the debts to be paid as and when it became payable;

(c) the company's business as at that time in order to determine its expected net cash flow from the business by deducting from projected future sales the cash expenses which would be necessary to generate those sales; and

(d) arrangements between the company and prospective lenders, such as its bankers and shareholders, in order to determine whether any shortfall in liquid and realisable assets and cash flow could be made up by borrowings which would be repayable at a time later than the debts.

[38] It should also be noted that the court adopts a commercial rather than a technical view of insolvency. Thus, while the phrase "is unable" might be thought to refer to the inability at the relevant time to pay debts which have then fallen due, its conjunction with the phrase "as they fall due" indicates a continuous succession of debts rather than a calculation of debts existing on any particular day. The essential question is whether the company's financial position is such that it can continue in business and still pay its way. The court therefore has to consider whether any liquidity problem the company may have is purely temporary and can be cured in the reasonably near future. Further, the court may also have regard to claims falling due in the near future and to the likely availability of funds to meet such future claims and the company's existing debts.

[39] **On the other hand, the balance sheet test deems a company insolvent if its assets are insufficient to meet its liabilities, including contingent and prospective liabilities. It is thus a wider test than the "cash flow" test which only takes into account debts.**

[40] A "contingent liability" would refer to a liability or other loss which arises out of an existing legal obligation or state of affairs, but which is dependent on the happening of an event that may or may not occur. **"Prospective liability" however, has been judicially defined as "a debt which will certainly become due in the future, either on some date which has already been determined or on some date determinable by reference to future events"**. It thus embraces both future debts, in the sense of liquidated sums due, and non-liquidated claims."

[Emphasis added]

180. The Claimant does not dispute the principles stated in *Kon Yin Tong*. However, at [242] of its Reply Submissions, the Claimant refers to the English case of *BNY Corporate Trustee Services Ltd* where the court discussed the balance sheet test under section 123(2) of the English Insolvency Act as follows:

> [40] In practical terms, it would extraordinary if section 123(2) was satisfied every time a company's liabilities exceeded the value of its assets. Many companies which are solvent and successful, and many companies early on in their lives, would be deemed unable to pay their debts if this was the meaning of section 123(2)": BNY Corporate Trustee Services Ltd, at [40].
>
> [41] A company should not be at risk of being wound up simply because the aggregate value (however calculated) of its liabilities exceeds that of its assets. Many companies in that position are successful and creditworthy, and cannot in any way be characterised as "unable to pay their debts". Section 123(2) does not give such a mechanistic and artificial reason for permitting a creditor to present a petition to wind up a company.
>
> [42] Section 123(2) requires the court to make a judgment whether it has been established that, looking at the company's assets and making proper allowance for its prospective and contingent liabilities, it cannot reasonably be expected to meet those liabilities. If so, it will be deemed insolvent although it is currently able to pay its debts as they fall due. The more distant the liabilities, the harder this will be for the creditor to establish that the company is unable to meet them.
>
> [43] Where the company's liabilities can be deferred for over many years and where the company is (without any permanent increase in borrowings) paying its debts as they fall due, the court should proceed with the greatest caution in deciding that the company is in a state of balance-sheet insolvency under section 123(2).

4. The Respondent's evidence/arguments on the Claimant's insolvency

181. The Respondent relies on the following matters as evidence of the Claimant's insolvency:

a. The Claimant's sole director (and factual witness) tampered with the Claimant's 2013 Management Accounts. One version was marked '8 July 2015', and another version was marked '3 August 2015'. There were differences between them as to the debts due from related companies. The witness also reversed some debts which have been written-off in the accounts. The witness tampered with the July accounts because they could not be reconciled with the August accounts which had been sent to and used by KordaMentha (see [367]-[378] of the Respondent's Closing Submissions).

b. Due to the lack of information on the Claimant's cash flow and debts, the Respondent's Financial Expert could only perform the balance sheet test to determine the Claimant's solvency: see [382]-[398] of the Respondent's Closing Submissions, reproduced in the endnote.[i] In summary, the evidence is as follows:

   i. The Claimant had neither intangible asset, property, plant & equipment, trade receivable nor trade payable. Instead, the main assets of the Claimant comprised a sum of A$2.9m due from ASN and a sum of A$59m due from NSA only.

   ii. The Claimant was dormant. There was no revenue generated (at [9.64(a)], and the Claimant was not trading as there were no trade receivables or payables (at [9.64(c)].

   iii. The Claimant had no assets. There was no investments or intangible assets recorded on its balance sheet (at [9.64(b) & (d)]).

   iv. The Claimant was making a loss. Operating expenses of A$0.9m were incurred despite the Claimant being dormant, with directors' fees of A$0.5m and business entertainment of A$0.1m being the major operating expenses (at [9.64(e)].

   v. The Respondent's Financial Expert was of the view that the Claimant was insolvent by A$1.58m as at 30 June 2013 if certain debts owing to or by the Claimant had been set-off (as they should have been), and that "[b]ased on the above adjusted [the Claimant's] balance sheet, there is a sum of A$1m "due to ASN" after the "set-off" of A$2.9m which [the Claimant] would not be able to settle. In 2014, the sum due to ASN increased to A$1.7m before the Claimant went into voluntary administration" (see [385]-[387] of the Respondent's Closing Submissions).

182. Although the Respondent's Financial Expert was not able to perform the cash flow test, there is substantial evidence that the Claimant was not able to pay its debts, such as the debt to Peter Dykes amounting to A$475,000 before the Deed of Company was entered into. Furthermore, for the purposes of clause 11.1.1(ii) of the CA, it is clear that the Claimant had "stopped payments" to Peter Dykes.

183. The Respondent also made the following assertions at [420]-[430] of the Respondent's Closing Submissions:

a. The Claimant caused its own insolvency;

b. The ACC's actions caused or contributed to the Claimant's insolvency; and

c. In its letter dated 19 December 2012, the Claimant stated "it agreed not to forward its monthly invoices during the implementation period" (See [4CHB 2726]), and therefore, it cannot blame any delay of payment.

d. Furthermore, the invoices were never rendered by the Claimant to the Respondent and therefore, it was not the Respondent's non-payment of invoices that rendered the Claimant insolvent. Even though the Malaysian Company was called ASN / S5 Systems, the invoices were craftily rendered with the Nexbis logo to deceive the Respondent.

e. The Claimant had ceased operations as stated by KordaMentha, notwithstanding it was later induced to correct the statement. Tam, the Claimant's financial expert, admitted that he was advised by the Claimant that ASN incurred all the costs to procure the hardware and software and also provided the necessary manpower and resources in relation to the CA on behalf of the Claimant.

f. The Claimant did not record any revenue or trade receivables and did not have any investments or intangible assets.

g. The Claimant did not send any invoices to the Respondent. They were sent by Nexbis Sdn Bhd.

h. From the above, it is clear that what had actually transpired was that the Claimant had essentially 'assigned' the contract to ASN/S5 Systems and had ceased operations.

i. The Claimant had to invest a sum of US$35m (undiscounted) over 20 years - a substantial amount of money. Tam had recognised (see RBD 2730) that in the first year, if the Claimant was performing the CA, it would be projected to make a loss of US$10.1m.

j. The fact that the project was projected to have positive cash flow does not mean that the Claimant could never become insolvent.

k. The Claimant's management had intended for the money payable under the CA to be diverted away to ASN/ 5 Malaysia. There was no evidence that any money paid to the Malaysian entity would be transferred to the Claimant. The Claimant certainly did not produce any agreements evidencing such arrangements.

184. The Respondent also asserted at [432]-[438] of the Respondent's Closing Submissions that the Claimant would not have been able to remedy its default, if the Respondent had served notice of termination prior to the termination of the CA on 5 August 2013 as it was or remained insolvent even until 27 June 2014, when its sole director decided to enter into voluntary administration. The Claimant's debts to its directors and ASN Solutions/S5 Systems caused it to go into administration.

5. The Claimant's evidence and arguments on its solvency

185. In its rebuttal of the Respondent's allegations that the Claimant was insolvent prior to the termination of the CA, the Claimant contends at [224] and [229]-[232] of its Reply Submissions dated 4 February 2016, as follows:

> [224] a. Had the implementation of the CA not been delayed, the Claimant would have started earning revenues much earlier;
>
> b. Had the Respondent paid the Claimant for operating the MIBCS system (which it did for a year without getting paid), the Claimant's cash flow position would have been much better; and

c. Once the MIBCS project was implemented, it would have been a profitable project that would have been self-sustaining by the second year of operations, provided the Respondent paid its dues.

[229] Under cross-examination, Mr Leow admitted that had the Respondent done what they were supposed to do under the CA, the Claimant's cash flow position would have been better, because:-

a. Had the kick-off meeting occurred immediately after the CA was signed, the revenues that would have been generated from the MIBCS project would have started flowing to the Claimant 1.5 years earlier: Transcripts, Day 5, p. 53-54.

b. In other words, the Claimant would have notionally begun receiving income 6 months after the CA was signed;

c. The Claimant also would not have suffered any holding costs for the 1.5 years when the project was still up in the air: Transcripts, Day 5, p. 78-80.

[230] [Mr Leow's] opinion that the Claimant was insolvent as at 5 August 2013 is fundamentally flawed and inherently lop-sided because [he] had failed to properly account for what would have been the Claimant's position as at 5 August 2013 *if the Respondent had performed its obligations under the CA fairly and timeously.* In other words, Mr Leow had failed to account for the Respondent's prolonged delay and obstruction in not allowing the Claimant to implement the Project immediately "as time is of the essence".

[231] Secondly, Mr Leow purported to include the costs of the MIBCS project into the Claimant's balance sheet, but not the healthy cash flow which the Claimant would have earned in the form of the charges that the Respondent was obliged to pay under the payment mechanism of the CA.

[232] The Respondent's assertion that the Claimant was insolvent as at 5 August 2013 turns on this unprincipled and unbalanced accounting treatment by Mr Leow (which he readily conceded under cross-examination, as elaborated below).

186. The Claimant argues that as at 5 August 2013, the Claimant was not insolvent on an "as is" basis, and *a fortiori,* if the Respondent had performed its fundamental obligations under the CA. The arguments are set out at [235]-[261].[ii] In summary, they are as follows:

(a) Whether or not a company is solvent is a question of fact. A company in debt does not prove it is unable to pay its debts. A temporary inability to pay its debts is not evidence of a company's insolvency.

(b) Under the balance sheet test, the Claimant was solvent between 30 June 2013 and 5 August 2013, as its management accounts as at 30 June 2013 shows it had a net current asset position of A$2.4m (5 CHB 3236).

(c) Under the cash flow test, the Claimant was solvent as it was able to meet its obligations as and when they fell due.

187. With respect to the balance sheet test, it is argued that the Respondent's argument has no merit because (as set out at [185above, and also at [248] in the endnote):

> 248 In order to advance their position that the Claimant was in a net liability position, the Respondent had to rely on several unsustainable premises:
>
> *a.* The Respondent takes the unreasonable position that the **costs** of the MIBCS project as at 30 June 2013 **should be included** [in] the Claimant's balance sheet, but that the **revenues** generated by MIBCS project up till 30 June 2013 **should be excluded** from the balance sheet;
>
> *b.* Based on this unreasonable position, the Respondent asserts that the sum of A$2,970,090.75 due to the Claimant from ASN Solutions Sdn Bhd (**"ASN"**) should be set-off against the A$3.9M that ASN had incurred for the MIBCS project by 30 June 2013 and which had later been invoiced to the Claimant. However the Claimant does not similarly add to the Claimant's balance sheet the revenues for the MIBCS project; and
>
> *c.* The Respondent also asserts that the sum of A$59,004,501.78 due to the Claimant from NSA Solutions Sdn Bhd should have been written-off as at 30 June 2013.

6. The Claimant's financial condition prior to 5 August 2013

188. Clause 11.1.1 of the CA provides that:

> If at any time the [Claimant] ...stops payment or is unable to pay its debts; then the [Respondent] shall, have the right to terminate this [CA] forthwith by giving notice to that effect.

> PROVIDED THAT notwithstanding the [Respondent']s right to issue the termination notice as aforesaid, the [Claimant] may request in writing for a further extension of time to rectify its default or remedy such breach, AND the [Respondent] shall grant a reasonable extension of time to the [Claimant] upon being satisfied that the [Claimant] has taken reasonable steps and/or has implemented such efforts in good faith to remedy the default in question.

7. Did the Claimant stop payment to its creditors prior to 5 August 2013?

189. The Tribunal is of the view that the words "stops payment" in the context of clause 11.1.1 mean "stops payment to its creditors". They refer to a corporate decision not to pay creditors because the company is unable to do so for lack of cash or credit facilities from banks, or inter-company loans. Those words are intended to refer to a situation where the company is in a state of insolvency and unable to carry on its business.

190. Applying this test, the Tribunal finds that the Respondent has not adduced any or sufficient evidence that the Claimant had stopped payment to its creditors prior to 5 August 2013. The fact that the Claimant had ceased operations in September 2012 (as noted by KordaMentha) does not mean that it had stopped payment to its creditors. The fact of the matter is that the Claimant had already secured the MIBCS Project by 17 October 2010 although its implementation was delayed or interrupted by the actions of the ACC and also of some officers of the DOIE (see Chronology of Events at [118] above). Whether the Claimant has stopped payment to its creditors is purely a question of fact, and it is not possible for the Tribunal, looking backwards from today, to conclude on the evidence that the Claimant had stopped payment simply on an analysis of the Claimant's accounts and inferences to be drawn from the state of the accounts.

191. It may be recalled that on 20 September 2012, the Claimant issued the Certificate of Acceptance in respect of the Border Control Module which was signed off by the DOIE, i.e., from that day onwards, the Claimant was entitled

to payment under the CA of either US$2 or US$4 per passenger from the Respondent arriving/leaving the Republic of Maldives, depending on what the Parties had agreed to.

192. It should also be noted that the Claimant is not a stand-alone company. It is part of or affiliated with a group of companies (although its cross-shareholding structure appears to be complex). However, unless there is credible evidence that the group of companies was insolvent, the probability of the Claimant being allowed to breach the CA, and thereby lose its rights thereunder, is commercially very low. The CA was a very profitable long-term contract for the Claimant.

193. Furthermore, it should also be noted that the Respondent has referred to the Claimant's letter dated 19 December 2012 to the Respondent (see [183(c)] above) agreeing not to send monthly invoices during the implementation period, beginning in September 2012. The first three invoices: Invoices No 11049 dated 11 October 2012 for US$70,347.50, No 11050 dated 14 November 2012 for US$229,761.30, and No 11051 dated 13 December 2012 for US$257,104.20 were sent on 19 December 2012.

8. Was the Claimant unable to pay its debts as at 5 August 2013?

194. Under the cash flow test, a company is deemed to be insolvent when it cannot meet its obligations as and when the debts fall due: *Kon Yin Tong* at [36]. Having considered the evidence and the arguments of the Parties, the Tribunal finds that the Respondent has not adduced any or sufficient evidence to show that as a matter of fact the Claimant was unable to pay its debts prior to 5 August 2013. It is not possible to infer from reading the management accounts of the Claimant that it was unable to pay its debts as and when they fell due. As mentioned earlier, it was highly improbable that the Claimant would be allowed to breach the CA and lose its valuable rights thereunder.

195. It is not disputed that from September 2012, the MIBCS Project was financially self-sustaining, and a very profitable contract for the Claimant, so profitable in the Respondent's view, that it suspected that the Claimant might have obtained the CA corruptly, especially when the CA appeared to state that the Claimant be paid US$4 per foreigner arriving and departing the Maldives when its price bid was only U$2 per passenger.

9. Would the Claimant have been able to remedy any breach if it had been notified of the breach by the Respondent under clause 11.1.1(ii) of the CA?

196. The Tribunal's answer to this question is "Yes" for the reasons given by the Claimant at [229] to [232] of its Reply Submissions (see [192] and [194] above). Further, the Tribunal accepts the Claimant's argument that, given the profitability of the MIBCS Project, the Claimant would have been able to obtain bank financing easily on the security of the receivables under the CA. In any event, it is not disputed that the Claimant completed the installation and implementation of the project with whatever financial resources it had or had obtained. It is the Tribunal's view that the commercial purpose of clause 11.1.1 of the CA was to ensure that the MIBCS would be completed in a timely manner, and insolvency on the part of the Claimant would affect the date of completion. This was not the case here. In fact, the completion of the MIBCS project was delayed for reasons for which the Claimant was not responsible.

10. Finding on whether the Claimant breached clause 11.1.1 of the CA

197. For the reasons given above, the Tribunal finds that the Respondent has failed to prove that the Claimant was in breach of its obligations under the CA before and after 5 August 2013 which would have entitled it to terminate the CA under clause 11.1.1(ii) thereof.

198. The Tribunal further finds that if the Respondent had been entitled to give notice of termination, and had given such notice under clause 11.1.1(iv) of the CA, the Claimant would have been able to remedy the breach within the time specified therein.

C. THE DAMAGES ISSUE

1. The pleaded cases of the Claimant and of the Respondent

199. The Claimant terminated the CA on the basis of the Respondent's alleged repudiatory breaches. Initially, at [42][iii] of its S/C Am1, the Claimant claimed liquidated damages under clause 12.3 and clause 16 of the CA:

> a. Damages for delays in implementation of the [CA] to be assessed;
>
> b. The sum of US$3,771,308.10 being the total outstanding invoiced amounts;
>
> c. Damages in the form of actual costs and expenses and loss of investment incurred by the Claimant to be assessed;
>
> *d.* Damages in the form of loss of revenue and/or loss of profit for termination of the [CA] to be assessed and/or for the sum of US$258,234,764.00.

Claims (a) and (c) were withdrawn in the course of these proceedings.

200. At [37]-[40] of its D/C Am1, the Respondent pleaded that, even if it were in breach of the CA:

(a) the Claimant was not entitled to the amount of the damages claimed;

(b) in any event, clause 12.3 and clause 16 of the CA were not a genuine pre-estimate of the Claimant's loss and were in the nature of a penalty. The claims were therefore void and/or unenforceable;

(c) even if clause 12.3 and clause 16 of the CA were valid, the amounts of the invoices were disputed, and that the certificate issued by the "independent firm of auditors appointed out by the Company" should be set aside as the certifier concerned was not independent; and

(d) even if the Claimant were entitled to damages (which was not admitted), such sum should be limited to the period before the Claimant entered into administration or such period before the Claimant became unable to pay its debts.

201. In its Opening Statement dated 4 October 2015[iv], the Claimant clarified at [33] that it was claiming contractual damages under clause 12.3 (Alternative A) or common law damages (Alternative B) in the event that the Alternative A claim is a penalty. Under Alternative A, the Claimant claims as follows:

(a) "Value of the Completed Works",

(b) Loss of gross revenue of US$4 for each foreign traveler projected for the remainder of the Concession Period and discounted for present value of between US$64,938,053 and US$74,074,855 (in substitution for the initial claim for US$258,234,764); and

(c) Loss of gross revenue of US$15 per work visa projected to be been issued / renewed / extended for the remainder of the Concession Period and discounted for present value.

202. Under Alternative B, the Claimant claims loss of net profit it would have earned through the gross revenues generated through the Foreign Traveler Charges and Foreign Worker Charges, the present value of which for the remainder of the 20-year Concession Period would be between US$29,571,944 and US$34,381,332 [see paragraphs 6.1 – 6.18 of Tam's valuation report].

203. On 9 October 2015, five (5) days into the hearing, the Parties admitted in evidence the Joint Statement of their financial experts, *viz*, Tam and Leow, that they had agreed on "the following areas of their respective reports as follows" in relation to the Claimant's claim for damages against the Respondent under Alternative B:

(Per passenger)	@ US$2	@US$4
(a) Value of Completed Works	US$2,063,458	US$2,063,458
(b) Amount payable from 20 September 2010 to August 2012	US$1,885,654	US$3,771,308
(c) Loss of revenue (Present Value)	US$37,740,652	US$58,790,178
(d) Loss of profits (Present Value)	US$15,200,000	US$37,000,000

2. The Claimant's Closing Submissions

204. In its Closing Submissions dated 23 December 2015, the Claimant reiterates its damages claim at [145]-[149].[v]

205. At [150]-[200] of its Closing Submissions[vi], the Claimant contends that it is entitled to claim for loss of revenue based on US$4 per passenger arriving and departing the Maldives for the following reasons:

(a) The contextual meaning of clause 5.2.1 is clear.

(b) The CA is an entire agreement and no evidence of previous negotiations may be admitted to contradict the meaning of clause 5.2.1.

(c) Even though the Claimant's price bid for the MBICS Project was based, *inter alia*, on US$2 per passenger on arrival (including Maldivians), and accepted by the TEB on that basis, the fee was increased to US$2 per passenger on arrival and US$2 on departure during the negotiations on the terms of the CA. Clause 5.2.1 of the final draft of the CA reflected this change.

(d) The ACC, AGO, MOFT, DOIE, the Budget Review Committee, the Finance Committee and the Parliament all understood clause 5.2.1 to have the same meaning and effect.

(e) The Claimant sent a series of invoices to the Respondent for payment based on US$4 per passenger which the Claimant had acknowledged without objection.

(f) While the Claimant's consistent position was that it was entitled to impose a fee of US$4 per foreign passenger, the Respondent only objected to the fee on 7 September 2015, almost four years after CA was signed, and just before the hearing of this arbitration..

3. The Respondent's Closing Submissions

206. At [439]-[461] of its Closing Submissions dated 23 December 2015, the Respondent contends:

(a) that the Claimant is not entitled to claim US$3,771,308.10 (the total value of the unpaid invoices) as they were not sent by the Claimant, and furthermore, the Respondent had not accepted them (at [439] and [441]);

(b) that the Claimant cannot base its claim on clause 12.3 and clause 16.1 of the CA, as it had abandoned its independent auditor's certificate (at [448]);

(c) that the Claimant's claim for damages of US$258,234,764.00, being a loss of revenue is not made pursuant to clause 12.3 of the CA (at [449]);

(d) that clause 12.3 would entitle the Claimant to double compensation, and is therefore in the nature of a penalty which is unenforceable (at [453]-[461]).[vii]

4. The Claimant's Reply Submissions on the passenger fee

207. In its Reply Submissions dated 4 February 2016, the Claimant submits at [328]-[335]:

(a) First, the Parties originally contemplated that the Claimant would charge every passenger (regardless of nationality), a US$2 fee, but after negotiations the Claimant would charge only non-Maldivian passengers US$2 upon arrival and US$2 upon departure (as seen from a previous draft of the CA reviewed by Abdullah Muiz, Solicitor General) (at [328]).

(b) Second, the CA contains an entire agreement clause. The Respondent cannot rely on the Claimant's original proposal if it is different from that set out in the CA (at [329]).

(c) Third, the common understanding of the AGO, MOFT, DOIE and ACC was that the Claimant was entitled to charge every non-Maldivian passenger US$2 upon arrival and US$2 upon departure. The Parties' subsequent conduct also evidenced this common understanding (at [330]).

(d) The Respondent's argument that post-contractual conduct may not be used to explain the meaning of a clause in the contract is incorrect. The Singapore Evidence Act does not apply in this arbitration. It is open to the Tribunal to adopt a robust approach to contractual interpretation, and consider the post-contractual conduct of the parties, as has been done in New Zealand, several civil law jurisdictions and in transnational conventions (at [331]).

(e) Fourth, the Respondent cannot rely on the statements of Ahmed Waheed and Ibrahim Waheed on the following grounds: (i) they did not testify at the hearing; (ii) there is no reason to prefer their statements to those of the Solicitor General and of Ageel; (iii) Ahmed Waheed was not present at the negotiations or the discussions of the CA; and (iv) Ibrahim Waheed's recollection that he did not recall the US$2 that was to be charged upon departure as well, does not prove anything (at [332]-[333]).

(f) Fifth, Naseer confirmed in his testimony that the Respondent's case that the Claimant was entitled to charge only US$2 originated from a suggestion by its expert witness, Leow (at [334]).

(g) Sixth, the Respondent also has not explained why it only took the position that the Claimant was only entitled to charge every foreign US$2 at the threshold of the hearing, on 7 September 2015 (at [335]).

5. The Respondent's Reply Submissions on the passenger fee

208. In its Reply Submissions dated 4 February 2016, the Respondent submits at [105] to [188][viii]:

(a) The Respondent's argument that the Claimant was entitled to charge only US$2 for every foreigner entering and leaving the Maldives did not originate from Leow. He was asked to calculate the Claimant's loss on the basis that "[t]he total fee per foreign passenger who arrives and departs Maldives is US $2..." (at [105]-[111]).

(b) The Respondent had raised the issue at [39.1]-[39.2] of its D/C (at [112]-[113]).

(c) The principles applicable to contractual interpretation are set out at *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd* [2015] 5 SLR 1195 ("*Y.E.S. F&B*"). Applying those principles to the evidence looked at objectively in this case, the Claimant is only entitled to charge US$2, and this interpretation is consistent with business common sense (at [114]-[188]).

(d) The key phrase in clause 5.2.1 is "arriving into and departing from". These words should be read conjunctively, i.e. every foreign passenger arriving into and departing from Maldives would pay a total of US $2. The addition of the phrase "departing from" would prevent the Claimant from claiming in the future that it was entitled to claim an additional $2 upon departure. This construction is consistent with the wording of clause 12.3 of the CA (the liquidated damages/penalty clause) which provides that the Respondent would pay the Claimant, upon termination, a compensation sum equivalent to the total Charges multiplied by the projected number of passengers entering into and departing from Maldives (at [115]-[119]).

(e) The requirements of the bid and the bidding process support the Respondent's interpretation. All bidders submitted bids based on a "per passenger" basis. The Respondent's intention was for incoming tourists to be charged as low a price as possible as "there were concerns that the increase in taxes would cause tourist arrivals to decline" (at [121]-[128]).

(f) On a comparison of the Claimant's unsigned financial bid which states "USD 2 per passenger (per arrival and per departure)" [3CHB 1233], its original bid submitted on 20 May 2010 [2.2 CHB 975] and clause 5.2.1 of the CA [1 CHB 22], if the Claimant had intended to charge per arrival and per departure in clause 5.2.1, it would have used the same phrase found in its "draft" financial bid – "per passenger per arrival and per departure". That phrase is very clear, instead of "every passenger arriving into and departing from" show that it was not the Parties' intention (at [129]-[133]).

(g) There was no evidence of any extensive negotiations that led to the Claimant being allowed to charge US$4 per passenger (at [134]-[147]).

(h) A comparison between the unsigned draft and the CA is unhelpful because:

(i) the status of the unsigned draft is uncertain and is unreliable;

(ii) no evidence has been led on the draft;

(iii) the Claimant's interpretation is subjective;

(iv) an objective interpretation should give effect to clause 12.3 which allows the Claimant to claim damages multiplied by passengers entering <u>or</u> departing from the Maldives; and

(v) the words "entering into and departing from" should be read conjunctively.

6. Discussion on Damages Issue

(a) Alternative A claim – liquidated damages under cl 12.3 of the CA

209. The Claimant's Alternative A claim was initially for liquidated damages (or compensation) comprising: (a) Value of Completed Works for US$2,063,458; and (b) US$258,234,764 (at US$4 per passenger), as certified by the Parties'

financial experts, for loss of revenue for the remainder of the Concession Period of 20 years. The Alternative A claim is made under clause 12.3, read with clause 14, of the CA (see [120] for the text).

210. The Respondent's submission is that the claim for US$258,234,764 is not a genuine pre-estimate of any loss that the Claimant could have suffered by reason of the termination of the CA by the Claimant under clause 12.2, and is therefore a penalty and accordingly not enforceable.

211. The Tribunal agrees with the Respondent's submission that (a) and (b) of the Alternative A claim are not a genuine pre-estimate of the Claimant's loss and is a penalty for the following reasons:

(a) The claim for loss of revenue of US$258,234,764 (based on US$4 per passenger) for the remainder of the Concession Period is completely out of proportion to any legitimate interest of the Claimant in the CA.

(b) If the Respondent had performed its obligations under the CA for 20 years, the Claimant would have incurred the cost of maintaining (i.e., servicing, repairing and renewing), the border control system for that period. The claim is based on gross revenue, even though the Claimant would have to maintain the MIBCS throughout the Concession Period, if the CA had not been terminated.

(c) Clause 12.3 requires the Respondent to pay damages upfront from the date of breach which means that the Claimant would be paid US$258,234,764 immediately, and interest would accrue on this sum for the next 15 years.

(d) Damages payable to the Claimant under the CA are calculated on the basis of the passenger fees. Without the completed works, no passenger fees would be collectible. Hence, the value of the completed works is subsumed in the damages. To claim such value separately would amount to a double claim.

212. Even though the Claimant lawfully terminated the CA pursuant to the Respondent's wrongful repudiation of the CA on 5 August 2013, the Claimant is not entitled to claim the value of the completed works because clause 12.3 is a penalty clause (see [213] below). Furthermore, under its Alternative B claim, the value of the completed works is subsumed in the claim for general damages, otherwise it would result in a double claim (see [219] below).

213. In the course of the proceedings, the Claimant has reduced its Alternative A claim with respect to (b) at discounted or present value, of either US$37,740,652 (at US$2 per passenger) or US$58,790,178 (at US$4 per passenger). Discounting the gross revenue does not erase its character as a penalty. It merely renders it a discounted penalty. Once a penalty, always a penalty.

214. Furthermore, the discounted claim is also contrary to the terms of clause 12.3, read with clause 16.3 of the CA in that clause 12.3 does not provide for compensation payable at a discounted value. The Claimant is not entitled to make a smaller claim under clause 12.3 in order to validate it as a genuine pre-estimate of its loss.

215. The same reasoning applies to the claim for compensation for the total charges for visas for foreign workers issued or renewed or extended by the Respondent under clause 12.3 for the remainder of the Concession Period under the same clause.

The certificate of an independent firm of auditors

216. The Respondent has also argued that the Claimant cannot rely on clause 12.3, read with clause 16.1 of the CA to claim compensation, as it had abandoned its reliance on its independent auditor's certificate under clause 16.3. As clause 12.3 is a penal provision, it is not necessary to deal with this argument. However, the Tribunal wishes to point out that there may be an inadvertent

omission in clause 16.3 in that it provides that the certificate is required only where the claim for compensation is made "pursuant to the **proviso** of Clause 16.1 & 16.2." (Emphasis added). There is no proviso in clause 16.1, although there is a proviso in clause 16.2. Since clause 16.1 does not contain a proviso, it may be that no certificate is necessary for a claim made pursuant to clause 12.3.

(b) Alternative B claim - common law damages

217. With respect to the Claimant's Alternative B claim for common law damages, the claim is for:

> (a) for loss of revenue for the remainder of the 20-year Concession Period at the present value (i.e., discounted to date) of US$37,740,652 (at US$2 per passenger) or US$58,790,178 (at US$4 per passenger); or
>
> (b) for loss of projected profit for the remainder of the Concession Period at the present value (i.e., discounted to date) of US$15,200,000 (at US$2 per passenger) or US$37,000,000 (at US$4 per passenger).

218. The Tribunal agrees with the submission of the Respondent in that at common law, the Claimant is only entitled to be put in the same position as if the CA had been performed. If the Claimant had performed its obligations under the CA, it would have to incur expenditure to maintain the MIBCS in order to earn the revenue under the CA. Therefore, the Claimant is only entitled to claim the net profit from operating the border control system. Hence, the Claimant may only claim damages arising from loss of profit, and not the loss of revenue. On this basis, the Claimant is entitled to claim US$15,200,000 (at US$2 per passenger) or US$37,000,000 (at US$4 per passenger), as the case may be, as agreed jointly by the Parties' financial experts.

219. For the reason given at [218] above, the Tribunal also finds that the Claimant may not claim the Value of the Completed Works as it is subsumed in the claim for profits.

220. Likewise, the claim with respect to the work permits of foreign workers is also not permissible as that too is subsumed in the claim for loss of profit.

(c) The claim as per the invoices

221. The Claimant claims as damages the total value of the invoices issued and sent to the Respondent between 20 September 2010 and August 2013 amounting to: (a) US$1,885,654 (at US$2 per passenger); or (b) US$3,771,308 (at US$4 per passenger).

222. The Respondent denies this claim on the ground that the said invoices were not rendered by the Claimant but by Nexbis Sdn Bhd. The evidence is not clear as to the precise relationship between the Claimant and Nexbis Sdn Bhd, but they appear to be affiliated or related under a group of companies alleged to be controlled by the same person. It is also not clear from the testimony of the Claimant's sole director as to the capacity in which Nexbis Sdn Bhd sent the invoices.

223. As the Respondent has not pleaded, or argued, that the Claimant is not entitled to claim damages against the Respondent for breach of the CA on the ground that it had assigned the benefit of the CA to Nexbis Sdn Bhd, the Tribunal can only proceed on the basis that the Claimant is still the contracting party entitled to all the rights under the CA, and therefore, even if the invoices had not been sent on behalf the Claimant, that circumstance would not disentitle the Claimant to claim for the same amounts as shown in the invoices. The Respondent has not disputed that the amounts invoiced are inaccurate based on a fee of US$4 per passenger.

224. In the circumstances, the Tribunal finds that the Claimant is entitled to claim either the sum of US$1,885,654 (at US$2 per passenger) or US$3,771,308 (at US$4 per passenger), as the case may be.

(d) Are damages payable up to voluntary administration?

225. The Respondent has argued that since the Claimant went into voluntary administration on 23 October 2014, any damages it is entitled to should stop at that point of time because the Claimant would have stopped payment to its creditors, with the consequence that the Respondent would have terminated the CA under clause 11.1.1 (at [513]-[517] of its Closing Submissions[ix]).

226. The Respondent refers to the decisions in *The Mihalis Angelos* [1970] 3 WLR 601 ("***The Mihalis Angelos***") and *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha* ("***The Golden Victory***") for the following principles:

(a) damages may be reduced if an event had occurred such that a contracting party would have had the option of terminating the contract;

(b) damages may be reduced if an event would inevitably occur; and

(c) damages may be reduced if an event may occur.

227. The Respondent argues (at [510]-[513]) that principle (a) is applicable here because the Respondent would have been entitled to terminate the CA forthwith under clause 11.1.1 by reason of the following circumstances:

(a) the Claimant had no assets or revenue to settle its liabilities;

(b) the Claimant had entered into a scheme of arrangement with its creditors (see the Deed of Company Arrangement dated 23 October 2014, [6CHB 3927]), as the parent company could not settle all debts but merely paid some and transferred the rest to a creditor's trust;

(c) the Claimant:

(i) had stopped paying its former Chief Financial Officer (Peter Dykes) who resigned when the Claimant was delisted on or around July 2012;

(ii) became insolvent and entered into voluntary administration on 30 June 2014; and

(iii) entered into an arrangement with its creditors on 23 October 2014.

228. The Tribunal is unable to accept this argument. Principle (a) at [226] has no application to the facts in the present case. On 5 August 2013, when the Respondent repudiated the CA, it was under a liability to pay the Claimant the sum of US$1,885,654 (being 50% of the total outstanding invoiced amounts based on US$4 per passenger). From August 2013 to 30 June 2014 and 23 October 2014, the Claimant would have been entitled to be paid US$2 per passenger multiplied by the number of non-Maldivian visitors entering the Maldives during this period. If the Respondent had paid these sums to the Claimant, the latter would not have found it necessary to enter into voluntary administration.

229. Further, as the Tribunal concluded earlier, the Claimant would have been in a position to remedy any breach of the CA if the Respondent had given notice of termination of the CA under clause 11.1 thereof.

230. The Tribunal finds that the Respondent's submission on this point is entirely speculative. It is not possible to know, even with hindsight, what would have happened had the Claimant been allowed to continue to perform the CA and/or the Respondent had paid to the Claimant the payments due to it in a timely manner.

231. Accordingly, the Tribunal finds that the Respondent's argument on this issue fails, and that the damages payable to the Claimant are not limited to the date when it entered into voluntary administration.

(e) Is the passenger fee US$4 or US$2?

232. This issue is highly contentious. The Parties cannot agree on whether clause 5.2.1 of the CA provides for a passenger fee of US$2 for arrival and departure, or US$2 each for arrival and for departure. The Claimant's case is that clause 5.2.1 clearly provides for US$2 each for arrival and for departure, i.e., US$4. The Respondent's case is that clause 5.2.1 is ambiguous and should be interpreted to provide for US$2 for arrival and departure, i.e., US$2, as initially offered by the Claimant in its price bid and on the basis of which, *inter alia*, the MIBCS Project was awarded to the Claimant.

233. Clause 5.2.1 provides as follows:

> "The Company is authorised by the Government to impose upon and collect levy or fee from:
>
> > Each and every passenger using non-Maldivian passport arriving into and departing from the Republic of Maldives, a fee of USD2.00 (UNITED STATES DOLLAR TWO ONLY) per passenger via a levy or fee imposed or to be imposed by the Government to be charged on such a passenger."

(i) <u>The Respondent's Submissions on the passenger fee</u>

234. At [465]-[490] of its Closing Submissions[x], the Respondent contends:

(a) that the Claimant was entitled to charge only US$2 per passenger arriving in and departing from the Maldives for the following reasons:

(i) the Claimant has admitted that it had submitted a financial bid for the MBICS project at US$2 per passenger;

(ii) the Respondent accepted the Claimant's bid as it was the best proposal (as stated to DOIE by the MOFT in a letter dated 29 September 2010);

(iii) Recitals A and B of the CA state that the Respondent had evaluated and accepted the Claimant's proposal as "the competitive solution with the highest scoring on technical and price bid....";

(iv) the Parties intended that the charge would be US$2 per passenger;

(v) for the above reasons, cl 5.2.1 should be read to mean that a foreign passenger arriving and departing Maldives would only be charged US$2.

(ii) <u>The Claimant's Reply Submissions on the passenger fee</u>

235. In its Reply Submissions dated 4 February 2016, the Claimant submits at [328]-[335]:

(a) First, the Parties originally contemplated that the Claimant would charge every passenger, regardless of nationality, a US$2 fee, but after negotiations, the Claimant would be entitled to charge only non-Maldivian passengers US$2 upon arrival and US$2 upon departure (as seen from a previous draft of the CA reviewed by Abdullah Muiz, then Solicitor General) (at [328], referring to CCS (Claimant's Closing Submissions)[159] at endnote vi).

(b) Second, the CA contains an entire agreement clause. The Respondent cannot rely on the Claimant's original proposal if it is different from that set out in the CA (at [329]).

(c) Third, the AGO, MOFT, DOIE and ACC all understood that the Claimant was entitled to charge every non-Maldivian passenger US$2 upon arrival and US$2 upon departure. The Parties' subsequent conduct also evidenced this common understanding (at [330]).

(d) The Respondent's argument that post-contractual conduct may not be used to explain the meaning of a clause in the contract is incorrect. The Singapore Evidence Act does not apply in this arbitration. It is open to the Tribunal to adopt a robust approach to contractual interpretation, and consider the post-contractual conduct of Parties, as has been done in New Zealand, several civil law jurisdictions and in transnational conventions (at [331]).

(e) Fourth, the Respondent cannot rely on the statements of Ahmed Waheed and Ibrahim Waheed on the following grounds: (i) they did not testify at the hearing; (ii) there is no reason to prefer their statements to those of the Solicitor General and of Ageel; (iii) Ahmed Waheed was not present at the negotiations or the discussions of the CA; and (iv) Ibrahim Waheed's recollection that he did not recall the US$2 that was to be charged upon departure as well, does not prove anything (at [332]-[333]).

(f) Fifth, Naseer confirmed in his testimony that the Respondent's case that the Claimant was entitled to charge only US$2 originated from a suggestion by its expert witness, Leow (at [334]).

(g) Sixth, the Respondent also has not explained why it only took the position that the Claimant was only entitled to charge every foreigner US$2 at the threshold of the hearing, on 7 September 2015 (at [335]).

(iii) The Respondent's Reply Submissions on the passenger fee

236. In its Reply Submissions dated 4 February 2016, the Respondent submits at [105]-[188][xi]:

(a) The Respondent's argument that the Claimant was entitled to charge only US$2 per passenger (arriving and departing Maldives) did not originate from Leow. He was asked to calculate the Claimant's loss on the basis that "[t]he total fee per foreign passenger who arrives and departs Maldives is US $2..." (at [105]-[111]).

(b) The Respondent raised the issue at [39.1]-[39.2] of its D/C (at [112]-[113]).

(c) The principles applicable to contractual interpretation are set out at *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd* [2015] 5 SLR 1195 ("*Y.E.S. F&B*"). Applying those principles, the objective evidence shows that the Claimant is only entitled to charge US$2, and this interpretation is consistent with business common sense (at [114]).

(d) The key phrase in clause 5.2.1 is "arriving into and departing from". These words should be read conjunctively, i.e. every foreign passenger arriving into and departing from Maldives would pay a total of US $2. The addition of the phrase "departing from" would prevent the Claimant from claiming in future that it was entitled to claim an additional $2 upon departure. This construction is consistent with the wording of clause 12.3 of the CA (the liquidated damages/penalty clause) which provides that the Respondent would pay the Claimant, upon termination, a compensation sum equivalent to the total Charges multiplied by the projected number of passengers entering into and departing from Maldives (at [115]-[119]).

(e) The requirements of the bid and the bidding process support the Respondent's interpretation. All bidders submitted bids based on a "per passenger" basis. The Respondent's intention was for incoming tourists to be charged as low a price as possible as "there were concerns that the increase in taxes would cause tourist arrivals to decline" (at [121]-[128]).

(f) On a comparison of the Claimant's unsigned financial bid which states "USD 2 per passenger (per arrival and per departure)" [3CHB 1233], its original bid submitted on 20 May 2010 [2.2 CHB 975] and clause 5.2.1 of the CA [1 CHB 22], if the Claimant had intended to charge per arrival and per departure in clause 5.2.1, it would have used the same phrase found in its "draft" financial bid – "per passenger per arrival and per departure". That phrase is very clear, instead of "every passenger arriving into and departing from" show that it was not the Parties' intention (at [129]-[133]).

(g) There was no evidence of any extensive negotiations that led to the Claimant being allowed to charge US$4 per passenger (at [134]-[147]).

(h) A comparison between the unsigned draft and the CA is unhelpful because:

(i) the status of the unsigned draft is uncertain and is unreliable;

(ii) no evidence has been led on the draft;

(iii) the Claimant's interpretation is subjective;

(iv) an objective interpretation should give effect to clause 12.3 which allows the Claimant to claim damages multiplied by passengers entering or departing from the Maldives; and

(v) the words "entering into and departing from" should be read conjunctively.

(f) Discussion on the passenger fee

237. The Parties agree that an entire agreement clause (clause 32) does not prevent the Tribunal from adopting a contextual approach to contract interpretation: *Lee Chee Wei v Tan Hor Peow*[xii].

238. The Claimant's price bid proposed a charge of US$2 per passenger for entry into and departure from the Maldives (including Maldivian nationals). The TEB described and evaluated the bid on the basis of US$2 per "passenger (in and out)" (see CHB 1857 and 1 RBD 3-5).

239. The charges clauses in the 290710 Draft (see 4 CHB 2365-2398) referred only to passengers entering the Maldives. No mention was made of departing passengers. However, the 171010 Draft (executed by the Parties) amended the charges clauses to exclude Maldivian nationals, and also to add in references to departing passengers. As a result, amended clause 5.2.1 is read as set out at [233] above.

240. The executed CA was a negotiated text. In his statement to the ACC (see RBD at 2552), Ilyas stated:

> After tender valuation board awarded the bid and informed immigration, work commenced to form an agreement with the awarded party. The draft agreement was not one presented by Nexbis. I created the original of the draft by making reference to previous agreements. **The draft was completed based on several negotiations with them. This would include a big input of Nexbis.** (Emphasis added)

241. Similarly, in his statement to the ACC at [2567]-[2568], Abdulla Muiz, the current Attorney General, said:

> On behalf of the [AGO], I attended and gave legal opinion in 2 meetings, which was to review the draft agreement that was to be signed with Malaysia's Nexbis to establish the [DOIE's] Border Control System. No other person attended the meeting from the [AGO]. The other attendees were from the [MOFT], Nexbis Ltd and the [DOIE]. If I remember correctly, the meeting took about 45 minutes.

(i) Negotiations not prima facie evidence

242. In the Tribunal's view, there is no doubt that the CA was a negotiated text to the extent that representatives of the Claimant were present when the text of the CA was finalised. There was at least one meeting where the Claimant's representatives attended at which the draft CA was discussed and amendments to it were proposed and agreed by the Parties on 13 October 2012. However, the fact that the text was a negotiated text does not, in itself, lead to the inexorable conclusion that clause 5.2.1 bears the meaning as contended for by the Claimant. It is not even *prima facie* evidence. Whether or not there was a "bargain struck" between the Parties within the meaning of clause 5.2.1 does not depend on the fact of negotiations, but on what terms were actually negotiated. On this point, the Claimant has produced no evidence to show that the Parties actually negotiated changes to the Charges Clauses in the 171010 Draft. As a matter of fact, the minutes of the meeting at which amendments were proposed to the draft CA recorded amendments only to clauses 3.9, 3.9.2, 5.2.5, 5.2.6, 8.1 and 12.3 of "the draft concession agreement" (see 3RBD 2116). The text of this "concession agreement" is not the same as the 171010 Draft. There appears to be an intervening draft CA which has not been produced by either Party.

(ii) Subsequent conduct

243. The Claimant relies strongly on the consensus view of the Respondent's agencies, including the Cabinet, the AGO and Parliament, that clause 5.2.1

means what the Claimant was entitled to claim US$4 per passenger. For instance, the Claimant argues at CCS 156(b) and CCS 164:

> [156(b)] "The evidence shows that the Respondent's AGO, MOFT, DOIE as well as the ACC all understood the CA to mean that the Claimant was entitled to charge every non-Maldivian passenger $2 upon arrival and $2 upon departure. They shared this understanding – consistently and universally - even before the Claimant rendered its first invoice."
>
> [164] The evidence shows that the various functionaries of the Maldivian government, the ACC, and the Parliament, at all points independently and collectively understood the CA to mean that the Claimant was entitled to charge every non-Maldivian passenger $2 upon arrival and $2 upon departure.

244. The Respondent's general response to this argument is two-fold. Firstly, none of the Respondent's officers whose subsequent conduct has been relied upon by the Claimant was a member of the TEB or was present at the evaluation, and therefore might not have known that the Claimant's financial bid was for US$2 per passenger. Secondly, subsequent conduct may not be reliable as evidence of fact as it enables a party to pick and choose the conduct that favours his position, and ignores that which is against his position.

(iii) The Tribunal's views

245. The Tribunal's view on the argument based on subsequent conduct or understanding is as follows:

(a) The meaning of clause 5.2.1 is a matter of interpretation solely for the Tribunal to decide according to established principles of documentary interpretation.

(b) The Respondent's understanding of the meaning of clause 5.2.1 (which it has now rejected) is a factor the Tribunal may take into account, but it is not, and cannot be, determinative of the issue.

(c) The past understanding of the Respondent on the meaning of clause 5.2.1 is not binding on it. It could have been based on a mistake of law or of fact. Hence, unless it has acted on the understanding in a way that estops it from arguing that that clause has or was intended to have a different meaning. .

(d) The fact that the Respondent did not question the accuracy of the unpaid invoices when they were received does not mean that the amounts claimed therein were correct on the true meaning of clause 5.2.1. Even if the Respondent has acted on the basis of that interpretation, it could still plead that it made a mistake, whether of fact or law, unless it is estopped from doing so.

(e) Indeed, even if the Claimant had paid the invoices, the law would still allow it to argue that it had made a mistake of fact or law. The Claimant's argument is valid only where, as a matter of law, the Claimant is estopped from denying their correctness. This is not the case here.

(f) Accordingly, even though the Respondent failed to challenge the correctness of the unpaid invoices, and has amended its pleading at the last minute to do so (and it does not matter who suggested it) these two facts do not strengthen the Claimant's interpretation, or weaken its own. There is no principle of law which says that the Respondent cannot now deny their correctness, or that it had made a mistake in not rejecting them.

(g) For these reasons, the Claimant's reliance on the subsequent "conduct" of the Respondent's agencies is misplaced. There is no principle of law which says that the Respondent may not now deny their correctness, or that it had made a mistake in not rejecting them.

246. On the issue of pleadings, the Tribunal finds that the Respondent has pleaded a general denial of the claim of the Claimant based on its interpretation of clause 5.2.1, and has put the Claimant to strict proof thereof (RDC [39.1]). This is sufficient to put the issue in play.

247. The Tribunal also does not accept the Claimant's argument that it was Leow who suggested the meaning of clause 5.2.1 to the Respondent. Leow was given

a list of subject matter for him to provide an opinion on (see "LQS-2" at [9]), including:

> "The total fee per foreign passenger who arrives and departs Maldives is US $2... Please calculate the Claimant's loss for the [following] period[s]..."

The thrust of this subject matter is that the Claimant might only be entitled to claim US$2 per passenger. In any case, this is an inconsequential issue. The Tribunal is only concerned with whether the interpretation is correct in law, and not with who suggested the interpretation.

(g) Differences between the 290710 Draft and the 171010 Draft

248. Two versions of the concession agreement are found in the CHB. The first version bears the words "Dated 290710". However, the front page contains the typewritten words "Dated the day of October 2010", **but it also bears the handwritten words on the top left hand corner "07/10 Afeef + Abd Waheed visit... discussion"** (Emphasis added). The second is the executed CA dated 17 October 2010 (1 CHB 22).

249. The Claimant's case is that a comparison of the language used in clause 5.2.1 of both versions puts it beyond doubt that, in the 171010 Draft, the Parties intended the Claimant to be entitled to charge every passenger (excluding Maldivian passport holders) US$2 upon arrival and US$2 upon departure, i.e. US$4 per passenger. The Respondent's case is that the language of clause 5.2.1 in the 171010 Draft is ambiguous, and that it should be interpreted to reflect the Claimant's price bid of US$2 per (arriving and departing) passenger, as it was the bid that was accepted by the TEB. If clause 5.2.1 of the 171010 Draft were intended to allow the Claimant to charge US$4 per passenger, it would have used clear and unambiguous language.

(h) Who drafted the CA?

250. The Parties disagree on which Party prepared the CA. The Claimant contends that it was Ilyas as he had admitted it in his statement to the ACC. The Claimant's factual witness, Chua, denied that it was the Claimant when he was questioned on it. The Respondent contends that the CA was prepared by the Claimant, even though Ilyas might have admitted it as he did not have the expertise to draft such kind of agreement.

251. The relevance of this issue to the Respondent's case is that Ilyas lied on this issue as he did not want the ACC to know that it was the Claimant who had prepared the draft CA. If he had told the ACC that it was the Claimant who had prepared the CA, the ACC might suspect that he had allowed the Claimant to insert in the CA terms and conditions that were not in the interest of the Respondent.

252. However, the minutes of the 13 October 2010 meeting of the relevant Respondent's agencies (including the AGO) and the Claimant's representatives show that they discussed and finalised the amendments to the draft CA. The final draft of the CA was the product of their joint efforts. Who then prepared the draft CA that was discussed at this meeting?

253. In the Tribunal's view, Ilyas did not draft the CA as he certainly did not have the expertise or experience to draft an agreement of this nature. The Tribunal is also of the view that Ilyas did not make any admission that he drafted the CA. On the contrary, his statement suggested that it was the Claimant who had prepared the draft CA and had given it to him to consider. His statement to the ACC (at RBB) is as follows:

> After tender evaluation board awarded the bid and informed immigration, work commenced to form an agreement with the awarded party. And finance sent an official letter to commence work of forming the agreement. **The draft agreement was not one presented by [the Claimant]. I created the original of the draft by**

making reference to previous agreements. The draft was completed based on several negotiations with them. This would include a big input of [the Claimant]. A lot of people's discussions would be included. However original draft was created from immigration by me. ...In drafting parts of the main parts of the agreement, advice was sought from immigration legal counsel, Ibrahim Afeef, Attorney General Abdullah Muiz was consulted on the draft of the agreement. And meetings were held with all the relevant authorities. The party who won the project took part in the discussions. As such, Attorney General Abdullah Muiz was met with and requested to hasten the agreement, and as such [the Claimant], finance ministry and immigration met with the [AGO] to discuss the agreement. This was a meeting especially to finalize the draft of the agreement. This was an official meeting. It was decided to proceed with the agreement with minor changes, after each clause of the agreement was separately discussed and amended as needed. Home ministry was also consulted at a policy level regarding the agreement. The points they raised regarding the agreement were the issue of arbitration and tax issues. ÁG Abdullah Muiz also pointed out the same issue issues. The agreement included clauses to levy a $2 tax from all foreigners arriving and departing from the Maldives and a charge of $15 for every visa card issued as doing so was discussed and approved by NPC in official meetings and other meetings, and also after the current AG Abdullah Muiz and former Finance Minister Hashim talked about it and said that it was possible to do so. As this and other provisions of the agreement were finalized with the approval of the Attorney General, I do not believe I have to be responsible for it. If anyone has to bear responsibility, it has to be NPC, Finance Ministry and the [AGO]. The [AGO] had even told immigration in writing to amend the agreement as per the discussions at the [AGO] and to proceed after incorporating the amendments. NPC had also instructed us similarly. Therefore, in this issue filed at the anti-corruption commission regarding the border control system of the department of immigration. I have done nothing to use my position to acquire an unfair advantage to anyone. Nor have I even tried to acquire an unfair advantage for anyone." (Emphasis added)

254. In this statement, Ilyas stated that

> "The draft agreement was not the one presented by [the Claimant]. I created the original of the draft by making reference to previous ones."

Ilyas did not say the draft agreement was not presented by [the Claimant]. What he said was that the draft agreement was **not the one** presented by [the Claimant], implying that there was an earlier draft presented by the Claimant which he had used to prepare his own draft for consideration by the Respondent.

255. AG Abdullah Muiz (who represented the then Attorney General at the meeting) confirms substantially Ilyas' account. At RBD 2569-2570, he states:

> We also discussed article 5.2.1 of the agreement which states that every foreigner that arrives in Maldives will be charged $2, every foreigner that departs Maldives will be charged $2 and every visa will be charged $15…….The [AGO] was not asked to assist in the drafting of the agreement signed between [Respondent] and [Claimant] to establish the [MIBCS]. **I was informed that the draft was prepared and sent by the successful bidder, [the Claimant]. Since there was no lawyer working on the Immigration at that time and since there was no such agreement among the bidding documents prepared by Immigration, I do not believe that the agreement was drafted by Immigration.**" (Emphasis added)

The objective evidence

256. The objective evidence shows that it was the Claimant who prepared the first draft CA. Two draft versions are disclosed in the Common Hearing Bundles of Documents filed in these proceedings. The first version contains the reference "Draft 290710" (the 290710 Draft) on every page (see 4 CHB 2360). The front page contains the reference "Dated this day of October 2010". On the top left hand corner appear in handwriting is the following entry: "**07/10 Afeef + Abd (?) Waheed visit… discussion**", indicating a visit by Waheed for a discussion of the draft agreement. The entry "7/10" can mean either July 2010 or 7 October 2010. These entries indicate that there was discussion of the 290710 Draft on either of these dates.

257. The second version is the CA dated 17 October 2012 (see CHB 22 and RBD 2141). This was the draft discussed by the Respondent's agencies, *viz*, the AGO, the MOFT, the DOIE, and the Claimant on 13 October 2010 at which a draft CA was amended (see RBD 2116).

258. The Respondent argues that the Claimant prepared the 290710 Draft because the following clues show it to have originated from a Malaysian source:

(a) It is marked "**Draft 290710**" indicating its calendar date as 29 July 2010, before the price bids were opened on 22 September 2010 (CHB 1587 – Evaluation on 29/9/2010].

(b) The definition of "Working Day" is "a day other than - (a) Saturdays, Sundays..." As Sunday is a working day in the Maldives, the definition could only have been drafted by someone who was unfamiliar with the Maldivian work week. The definition was changed in the CA to refer to "Friday" and "Saturday" which are non-working days in the Maldives.

(c) The draft provided that the governing law of the contract would be the laws of Malaysia and that Parties would submit to the exclusive jurisdiction of the Malaysian Courts. Furthermore, it was also stated that any arbitration was to be held in Malaysia.

(d) The clause relating to "Notice to the Company" was filled in with the Claimant's details, while that of the Respondent was left blank.

(e) Finally, the royalty clause reads that:

> "8.4 Royalty
> The company agree to pay to the Government a **royalty fee amounting to 5% on project net profits declared by the Company annually** for the duration of the Concession Period or until such time the Government implements a corporate profit tax or GST." (Emphasis added.)

The Claimant's financial bid was that royalty would be 5% of the Claimant's <u>income</u> on a monthly basis. The MOFT also stated "[r]oyalties of 5% of the gross <u>revenue</u> per year for 20 years" in its letter to the DOIE, informing them that the Claimant had been awarded the MIBCS Project. The Respondent's officers would not have reduced the amount of royalty payable to itself.

259. The Tribunal accepts the analysis of the Respondent. In its view, the tell-tales referred to at [258 (a)-(d)] are conclusive of the Malaysian source of the 290710 Draft. The denial of the Claimant's factual witness on this issue is not credible.

(i) The Tribunal's interpretation of clause 5.2.1 of the CA

260. Given the state of the evidence before the Tribunal, and especially the absence of any oral testimony by any witness who attended the negotiations on 13 October 2010, the Tribunal's interpretation is limited to the text of clause 5.2.1 in the context of the CA as a whole. Having regard to the entire agreement clause, the wording of the Claimant's price bid cannot be used to change the meaning of clause 5.2.1 if its meaning is plain. However, if clause 5.2.1 is ambiguous as expressed, or contextually, the Tribunal is entitled to take into account the Claimant's price bid in order to determine two issues: (a) whether the Parties intended clause 5.2.1 to change the Claimant's price bid; and (b) whether it has changed the said bid.

261. The starting point is the undisputed fact that there was an initial agreement between the Respondent and the Claimant, based on the latter's price bid which the Respondent had accepted, that the passenger fee would be US$2 per arriving and departing passenger. The crux of the Claimant's argument on the meaning of clause 5.2.1 (which was amended after negotiations) is that it had superseded the initial agreement. The Claimant's case is that clause 5.2.1 has increased the fee to US$4 per passenger, i.e., US$2 on arrival and US$2 on departure. It is the Tribunal's view that the Claimant has the burden of proving that clause 5.2.1 was amended to allow it to charge US$4 per non-Maldivian arriving and departing passenger.

<u>Entire agreement clause</u>

262. The entire agreement clause (clause 32) provides as follows:

> This Agreement constitutes the entire agreement between the Parties hereto with respect to the matters dealt with herein and supersedes any previous agreement or understanding between the Parties hereto in relation to such matters. Each of the Parties hereby acknowledge that in entering into the Agreement, it has not relied on any representation or warranty save as expressly set out herein or in any document expressly referred to herein.

As mentioned earlier, the Claimant bears the burden of proving that clause 5.2.1 has superseded the initial agreement between the Parties.

263. From a commercial perspective, the increase of a fee by 100% within a short period between 29 September 2010 (the date of acceptance by the TEB of the price bid) and 17 October 2010 (when the CA was executed), which is a short period of about three weeks, is not only puzzling, but most unusual commercially, to say the least, especially when the bid was accepted as a result of a public tender. The Respondent has described any intention to increase the passenger fee as "illogical", presumably meaning "commercially illogical". Actually, it may be aptly described as highly suspicious had there been such intention, given the circumstances in which the bid was awarded to the Claimant, and in the context where the Respondent's objective was to increase tourist arrivals to the Maldives, even though an additional US$2 might appear to be a small sum of money.

264. Any claim that the passenger fee had been increased from US$2 per passenger to US$4 per passenger in these circumstances would, or should, not have escaped the attention of the Respondent's agencies, especially the AGO. If clause 5.2.1 has the meaning or effect as claimed by the Claimant, it would have to provide a justifiable commercial reason for the increase. From the Respondent's perspective, it would have to identify a good reason for the increase and at the same time for giving an almost immediate windfall to the Claimant. A normal functional and responsible government does not act in this way in giving long- term concessions to the private sector. The Claimant has argued that the Respondent agreed to the increase because the price bid of US$2 per passenger was reduced by excluding Maldivian nationals from the charge, thereby reducing the price bid of the Claimant. However, the Claimant has produced no evidence to show that the Respondent had agreed to allow the

Claimant to increase its fee to US$4 per foreign passenger to compensate such prospective loss. Apart from interpreting the text of clause 5.2.1 itself, the Claimant has produced no evidence, written or oral, of any such agreement. No correspondence between the Parties has been produced. Even worse than that, the Claimant has not been able to produce any contemporaneous internal record, not even a contemporary email from its representatives who had attended the 13 October 2010 meeting, to celebrate such a windfall. In the Tribunal's view, the absence of any evidence of or reference to such an agreement is telling. It suggests that, save for the drafting of clause 5.2.1, there was no discussion on its meaning, or that it was intended to give effect to an agreement to allow the Claimant to increase it price bid from US$2 to US$4 per passenger. Given these circumstances, the probability is that clause 5.2.1 was not intended to change the meaning of the charge clauses in the 290710 Draft.

265. The Claimant has advanced four arguments that clause 5.2.1 was amended to allow it to charge a passenger fee of US$4:

(a) there were extensive negotiations between the Parties on the drafting of the CA;

(b) the words of clause 5.2.1, the charge clauses, are clear and unambiguous. They plainly mean that the Claimant is entitled to charge per passenger US$2 on arrival and US$2 on departure, i.e. US$4;

(c) the initial bid of US$2 per passenger was intended to apply also to Maldivian passport holders. As the Respondent wanted to exclude Maldivians from this imposition, it was agreed that the Claimant be allowed to charge US$4 per passenger to make up for the loss of revenue; and

(d) the Respondent was agreeable to the increase in the passenger fee as it would double the royalty it would be receiving under the CA.

266. The Tribunal is unable to accept the Claimant's arguments, even collectively, for the following reasons.

(a) Argument (a) is not borne out by the evidence as recorded in the ACC Report which shows that there was only one meeting at which the Claimant's representatives were present, i.e., on 13 October 2010, and the minutes of that meeting did not record any negotiations on clause 5.2.1 or any of the charge clauses. Moreover, the recollections of the Respondent's officers who had attended the 13 October 2010 meeting show that the quantum of the passenger fee was not discussed.

(b) The Tribunal does not accept argument (b). The meaning of clause 5.2.1 is neither plain nor clear. Contextually, its meaning is consonant with the Respondent's interpretation rather than the Claimant's interpretation (see [236] above).

(c) Argument (c) is entirely speculative. The Claimant has produced no evidence to support it.

(d) Likewise, argument (d) is entirely speculative. The Claimant has produced no evidence to support it. It makes no commercial sense for the Respondent to agree to double the passenger fee to US$4 in order to increase its royalty based on 5% of the total receipts, when it could have collected 100% of the additional fee of US$4 per passenger for its own benefit.

267. For the above reasons, the Tribunal finds that the Claimant has failed to discharge the burden of proving that there was an agreement by the Respondent to revise the Claimant's price bid of US$2 per passenger to US$4 per passenger under clause 5.2.1, or that clause 5.2.1 reflected such an agreement.

268. In the Tribunal's view, clause 5.2.1 of the CA does nothing more than to state in different words the Claimant's original formulation of the passenger fee. This formulation was truncated in the 290710 charge clauses to refer only to arrivals, but not departures. No reference was made to departing passengers, because it

was not necessary to do so. The fee collected on arrival would mean that no fee would be charged for departure.

269. Here are the reasons for the Tribunal's conclusion:

(a) The formulation of the Claimant's price bid was "USD 2 per passenger arrival and departure" (3CHB 1233). The TEB's Evaluation Sheet at (RBD 4, 5) shows that the TEB shortened the Claimant's formulation to read "Passengers (In & Out 2.00)".

(b) The word "Charges" in clause 1 of the CA is defined as

> "USD 2.00… for every passenger using a non-Maldivian passport arriving into and departing from the Republic of the Maldives"

The definition of "Charges" is clear and precise. It is the same (i) as the Claimant's formulation of "USD 2 per passenger arrival and departure", and (ii) as the shortened version in the Evaluation Sheet "Passengers (In & Out 2.00)".

(c) The expression "Charges" as defined is used with the same meaning in (i) clause 3.9.2 (Respondent agrees to review Charges during the Concession Period if inflation in the Maldives exceed by 50% the inflation rate for the previous year); (ii) clauses 5.2.4-5.2.7, (iii) clause 8.1, and (iv) clause 12.3.

(d) Clause 5.2 sets out the charging mechanism in clause 5.2.1. As a mechanism, it cannot provide for a charge that exceeds the Charges as defined in clause 1. Accordingly, it must be interpreted to mean what Charges as defined means. In fact, this is what clause 5.2.1 does, as it reads:

> The [Claimant] is authorised by the [Respondent] to impose upon and collect levy or fee from:
>
> Each and every passenger using non-Maldivian passport arriving into and departing from the Republic of the Maldives, a fee of USD2.00 per passenger…

Clause 5.2.1 has two additional words, i.e., "per passenger" after the fee of US$2. In the Tribunal's views, these two words serve to confirm that the fee is US$2 per passenger. There is no reason to add those two words except for that purpose since the imposition of the fee is already prefaced by the words "Each and every passenger".

(e) Clause 5.2.7 provides that all invoices for the Charges shall be calculated in accordance with the price mechanisms as set out in Appendix B which provides:

> 1.1 The [Respondent] shall pay the [Claimant] on the following schedule:-
>
> 1.1.1 For each and every non-Maldivian passport holder passenger arriving into and departing from the Republic of Maldives, the [Respondent] agrees to charge and collect a levy or fee for onward payment to the [Respondent] of USD2.00...per passenger.

The price mechanism in Appendix B makes it clear beyond doubt that the onward payment to the Respondent is US$2 per passenger.

(f) There is no logical reason for clause 5.2.1 to provide, in the same words, a passenger fee that is different from the passenger fee set out in the other clauses.

(j) The Tribunal's finding on the meaning of clause 5.2.1 of the CA

270. For the reasons given above, the Tribunal finds that clause 5.2.1 allows the Claimant to charge every foreign passenger only US$2 on arrival into and departure from the Maldives, i.e., in and out, and ***not*** US$2 both ways *for* arrival into and *for* departure from the Maldives.

D. THE CORRUPTION ISSUE

1. The Respondent's defence that the CA was tainted with corruption

271. The main defence of the Respondent to the Claimant's claim for damages for breach of the CA is that the CA was tainted with corruption, and therefore unenforceable. As the Respondent relies entirely on the ACC Report to support this defence, it is necessary that the Tribunal first examine the role of the ACC

in the Maldives, the nature of the offences of bribery and corruption and other related offences under the PPCA, and the ACC Report.

(a) The ACC

272. The ACC is a body constituted under Article 199 of the Constitution as an independent and impartial institution to prevent and combat corruption within all activities of the Maldives without fear in accordance with the Constitution and any laws enacted by Parliament. To ensure its independence from the Executive, the members of the ACC are appointed by the President from persons approved by a majority of the members of Parliament present and voting, from the names submitted to Parliament as provided for in the statute governing the ACC. A member of the ACC may be removed from office only: (a) on the ground of misconduct, incapacity or incompetence; and (b) a finding to that effect by a committee of Parliament pursuant to article (a) and upon the approval of such finding by Parliament by a majority of those present and voting, calling for the member's removal from office, such member shall be deemed removed from office.

(b) The Prohibition and Prevention of Corruption Act (PPCA)

273. The law enacted by Parliament to combat corruption in the Maldives is the PPCA. Its scope is broad as it applies not only to acts of bribery and corruption but also to the conferment of undue advantage by public officers through the use of influence from its position, i.e., abuse of office. The preamble at section 1(a) of the PPCA states:

> This Act is to prevent the offer and acceptance of bribery, the prevention and prohibition of attainment of undue advantage or the facilitation of attainment of undue advantage through use of influence from position, and the prevention of such.

274. Section 28 defines the words "bribery", and "undue advantage", to mean, unless the context otherwise requires:

> (a) **'Bribery' is referred to as money, goods and property, conveniences and other benefits**, other than salary, wages, benefits, perks and conveniences offered by the employer commensurate to employment, **offered or obtained in order to act or omit to act or to lessen the burden, to ease, to benefit, to give any advantage whatsoever, to inconvenience or to make burdensome or to inflict any harm whatsoever on a specific party or to motivate or reward someone to carry out such.**
>
> (b) **'Undue advantage' refers to anything** other than bribery **obtained through use of influence from position** in addition to salary, wages, benefits, perks and conveniences commensurate with work offered by the employer.
>
> (Emphasis added)

(i) Bribery offences

275. The bribery offences in the PPCA are as follows:

(a) Sections 2 to 5 provide for the offence of offering and accepting bribery

(i) in relation to a task undertaken by the government (section 2);

(ii) by members of Parliament (section 3);

(iii) in the judicial sector (section 4); and

(iv) in relation to a task undertaken by a member of the public (section 5).

(b) Section 6 provides for the offence of offering bribery to a person without powers to fulfil a purpose for which bribery was offered.

(c) Section 7 provides for the offence committing or attempting to commit a bribery through a person or a group in relation to an offence under sections 2 to 5.

(d) Section 8 provides for the offence of bribery to exert influence, etc.

(e) Section 9 provides for the offence of failing to inform about an attempt to offer bribery and the offer of bribery.

(ii) Conferring undue advantage offences

276. The conferment of undue advantage offences are as follows:

> (a) Section 12(a) provides that "[i]t is an offence for an employee of Government or a Government venture to use position or influence from position, to gain or confer an undue advantage pertaining to a task or connected to a task being carried out by the agency or place of his employment."
>
> (b) Section 13(a) provides that "[i]t is an offence for any government employee to act in a manner that precludes the public or state from attaining advantage of anything the public or state could have benefited from, or to act in a manner that diminishes the benefits that could have been attained, or diverts the benefits or a part of the benefits to the employee or the employee's wife or husband."

(c) The ACC Report dated 27 November 2011

277. On **27 November 2011**, the ACC published the ACC Report under section 21 of the Anti-Corruption Act of 2008 (see RBD [3-2609] in Dihevi, with English translation, comprising a 94-page report, a 71-page statement, and the remainder annexes, including statements of officers involved in the MIBCS Project). The ACC Report was the result of an investigation by the ACC following a complaint made by an individual on 14 October 2010 that, in relation to the award of the MIBCS Project to the Claimant which had tendered the highest price, "the bid was awarded in a way that promotes corruption" (see [21.1 of the ACC Report]).

278. The ACC investigators examined numerous documents, minutes of meetings of the relevant committees, letters, the bid proposals, etc. contained in 60 annexes and interviewed 29 persons who gave statements of their roles at all the relevant stages of the MIBCS Project leading to its award to the Claimant. Although the ACC's investigation was a thorough investigation, it failed to find evidence of bribery. The ACC found lapses in procedure and documentation of the

processes involved in the bid and evaluation of the MIBCS Project and issued a number of directives for compliance in future cases by the DOIE, the NPC, the TEB and the AGO (see [9.1]-[9.4] of the ACC Report).

279. The factual matters summarised in this section, including the findings of the ACC against Ilyas and Ageel, are extracted from the ACC Report. The main finding of the ACC was that there was non-compliance and/or irregularities in the way the competing bids were evaluated. The bids for the MIBCS Project were submitted in two parts, each with its own specifications, and were evaluated separately. The first part was the technical bid which was evaluated on the basis of 60 marks. The second part was the price bid which was evaluated on the basis of 40 marks. The project was awarded to the Claimant on the basis of its overall best or highest marks out of 100 marks.

(i) The technical evaluations

280. The first TE was done on **2 June 2010** by a committee consisting of Ilyas, Ibrahim Asraf, Admed Waheed and Ahmad Naseem from the DOIE and Ahmade Jinaah Ibrahim from the Tender Evaluation Section ("**TES**") of the DOIE. The TES awarded the highest marks to the Claimant. The result was presented to the TEB for approval at its 16th meeting of 2 June 2010. At its 17th meeting on **3 June 2010**, the TEB decided that the evaluation was questionable for the reason that the category of "Capacity building", which was not specified in the RFP, was evaluated by the committee which awarded the highest marks to the Claimant. The TEB rejected the evaluation and declared it invalid and directed or proposed that an independent team be appointed to conduct the TE again. Such a team was formed by MOFT, but the ACC Report does not state the date it was formed.

281. The independent team conducted the second TE on **1 September 2010**, almost three months after the first evaluation. There is no evidence on why the second

evaluation took such a long time. The new team managed to evaluate only three out of the six specified categories, *viz*, (1) Service Response (BOT Solution), (2) Installation and Implementation details and (3) Training, due to pressure of time. The team evaluated 40 out of the 60 marks specified for the three categories. The remaining categories, *viz*. (4) Bidders Profile, (5) References and experience, and (6) Supplemental Information, had a value of 20 marks, and were later evaluated by either Ageel or the TES.

282. The ACC found that there was a difference in the marks given to the bidders in the first and second evaluations, but nevertheless the Claimant scored the highest marks in both evaluations. The ACC also concluded that the result of the second evaluation was questionable as it could not determine who made the evaluation of the remaining three categories. The minute sheet at CHB 2062 states that the additional scores were evaluated by the TES. In his statement to the ACC, Ageel stated that the evaluation could only have been done by the TES, for which he was responsible as its head.

(ii) The price evaluation

283. The TEB evaluated the price bids (which was allotted 40 marks) on **22 September 2010** at its 24th meeting. Under the RFP guidelines, the 40 marks were subdivided into 10 marks for royalty, and 30 marks for the other three categories. The minutes of the meeting recorded as follows (ACC Report at 143):

> [5.7.2.1] ...at the meeting before opening the price proposal of the four companies...the members decided to divide the total 40 marks given to the Price Proposal equally among the four categories to which the Price Proposal was to be offered, that is 10 marks for passenger fees, 10 marks for work permit fee, 10 marks for visa card fee and 10 marks for royalty...the meeting started at 10 am and ended at 11.23.
>
> [5.7.2.2] ... The [TEB] decided to divide the 40 marks allocated to the Financial Evaluation on the same day the Price Proposals were opened.

> [5.7.3.1] … it is not clear who did the financial evaluation.

284. The ACC Report noted the difference in the outcomes due to the TEB dividing the parts and allocating marks which it found was contrary to the RFP guidelines:

> [5.7.4.2] The investigation revealed that the results are different because marks had not been awarded according to RFP and it would not be [the Claimant] who would have won the project if the RFP guidelines were followed.
>
> [5.7.4.2] If financial evaluation marks are given according to RFP, Iris would get the most marks. Iris is the party that proposed to pay the most to the government as royalty. When the fees allocated in this section are combined, the lowest price is proposed by Informatix. The second lowest price is proposed by Iris. It is noted that the party who won the project, [the Claimant] proposed the third lowest price.
>
> [5.8.2.1] [The Claimant] attained the most marks for this project by combining the technical evaluation and financial evaluation score. That is 66.40% points…
>
> [5.8.2.2] When looking at the total marks of this project after adding up the technical evaluation and financial evaluation it is not [the Claimant] who attained the most in these parts. If marks were given in this manner, Iris would attain the most marks. That is 66.88 points. [The Claimant] would be second place. That is 1.5% less than Iris.

(iii) Ilyas' statement on the first technical evaluation

285. Ilyas's statement to the ACC on his role in the first TE is as follows (at RBD [2551, line 11 and 2552, line 4]):

> [11] However, the form given by the ministry to evaluate the EOI, RFP and proposal included 5 major parts to give marks for. Apart from the 4 parts mentioned in the EOI, the additional part was called "Capacity Building". *I don't know who included that part. Or may be that the tender board did it. We gave marks to the parts in the form because it was set by the finance ministry.* I did not notice that nay parties were eliminated as a result of this additional part….
>
> [4] After we finished our technical evaluation, we handed it over to the Finance Ministry. After that, the technical team was summoned to the tender board regarding the technical evaluation. And they complained about how we gave marks to the

training aspect. I think that the omitted part was capacity building. After evaluating for a second time by an independent party, [the Claimant] still scored the most marks.

(iv) Ageel's statement on the technical/price evaluations

286. Ageel made two statements to the ACC - on 22 March 2011 and on 27 October 2011 - on his role in the technical and price evaluation. In his second statement, he made the following statement on the division of the price bid into four categories of 10 marks each. At RBD 2599, 2nd line from the bottom, he states:

> I do not know to say whether or not the parties submitting the proposal would not know how to structurize their proposed accordingly, if it is not mentioned in the RFP that the evaluation of the project fee, for example, will be divided into 3 sub-criteria. However, I believe that every party who submits the proposal must know that the most marks will be given to the party who proposed the lowest price in every category. While the proposal fee is divided into 3 categories, if there is no submission in one of these categories, it means that either the party who submitted the proposal will provide the particular service free or they aren't complying with the criteria. Thus, if they have decided that they will provide the service for free (if they have not proposed any fee for that service) then they will receive full marks. However, while prorating marks for those parties who did not impose a fee for the service (the fee of the service is 0), I did not think before that by prorating full marks for those parties in this way, there could be a situation where the other parties who took part in the bid might not get any marks. This is because the rest of the parties will be prorated from 0. However, during the long period I have worked in in the Tender Evaluation Section of [MOFT], I have not come across situation where a part or a service of the project was not changed. Since the division of the criteria into sub-criteria are done by the Evaluation committee, I do not know what principles the Board used in establishing the sub-criteria. I will only know to say anything about the division into sub-criteria after looking into how it happened. Before the price, of the 4 parties that passed the project technical evaluation asper the agenda number 14 of the minutes of the [TEB's] 24th meeting, was opened, the members decided that the 40 marks that is to be awarded to the prince proposal would be divided into 4 equal parts. There are 10 marks for passenger fee, 10 marks for work permit fee, 10 marks for visa card fee and 10 marks for royalty. I believe that if there are 4 fees, dividing the total marks into 4 equal parts is not a problem. This is because there is no way of knowing which among the 4 fees will be most beneficial. I do not know which members decided to divide the marks in the meeting previously mentioned I have to check the minutes of the meeting to see which member proposed the division. .....
> [line 8 from the bottom of 2599]...I do not believe that the way the marks for the project were awarded by dividing it into sub-criteria, could put any one party that submitted the bid at an "unfair advantage". After taking part in a "competitive bid"

and if they propose not to impose any fees, then in my opinion, they deserve full marks. According to the rules of the Tender Board, unless the member wants it, the things that they say cannot be recorded in the minutes along with their names. I do not believe that the reason for this is has any hidden secretive purposes. This is just because the way minutes are written is different in different institutions.

"Therefore, I cannot say exactly which member proposed the structure for awarding marks. I do not know to say if this was my proposal either. However, as the secretariat of the Board, I was also part of and informed about the proposal. I think that the division of fees was included in the [RFP]. If the fees were not included, how would the bidders have known which fees to propose? Board decisions are always made unanimously between the members that attended the meeting. Therefore the decision to divide the fees were also made unanimously and this is evident from the minutes of the meeting. If they did not agree to it unanimously, it would have been stated in the minutes of the meeting. .... The minutes can only be finalised after the draft of the minutes have been presented to the members of the Board and after they bring any changes necessary to it. My job is to submit it to the Board the way it is in the [RFP] (total 40 marks). The board members will decided on how to divide the marks and structure of it. If there are any suspicions about the issue, I believe the bidders would have wanted to clarify that. However, no such clarifications have been requested until now. I also do not believe that any party who took part in the bid would have got any inside information. Any party who suspects that can bring forward the issue to us. However, no such issue has been brought to our attention even until today. *An advantage to a specific party could have been given only if the criteria for the fee were made after the bid was opened. However, since the criteria for the fee has to be made before opening the bid documents, there is no way for us to know how they have proposed their fees in those documents. The bidders would submit both the financial bid and the technical bid at the same time. I do not believe that it is possible to check the technical bid and encourage a specific party to change their financial bid in order to give that party an advantage.* The technical evaluation was done for a second time by technical experts on request by the former Minister, after there were some suspicions about the first evaluation that was done by a team of the [DOIE]. The second team was formed by the Minister, consisted of individuals that held high positions in the Government and were independent experts who worked in this field. ...The team did not finish the entire technical evaluation of the project because they could not give enough time due to their busy schedules. However, they did say that they would finish the most important parts or components of the work they were assigned. I think they evaluated only the "BOT" solution's component. Therefore they only evaluated 40% out of the total of 60%. The rest of the 20% were evaluated by the Tender Section. Therefore, I believe that I, as the head of the section, should be responsible for the 20% that was evaluated by the [TEB]. This is because the woks of the section are completed under my supervision according to my instructions."

(v) Findings and recommendations of the ACC against Ilyas and Ageel

287. The ACC Report contains adverse findings against two officers, Ilyas and Ageel, in relation to the evaluations of the technical bid and the price bid. The ACC found: (a) that Ilyas was involved in the first TE that was cancelled for irregularity; and (b) that Ageel was responsible for the TEB's financial evaluation which did not comply with the RFP guidelines, resulting in the MIBCS Project being awarded to the Claimant.

288. The ACC Report made seven adverse findings against Ilyas and four adverse findings against Ageel as detailed below. The description "particular party" in the ACC's recommendations to prosecute under the PPCA refers to the Claimant since the Claimant was awarded the MIBCS Project.

i. Ilyas

(i) In submitting the RFP in a letter dated 7 March 2010 to the MOFT which was not the proposal approved by the NPC for the MIBCS Project, which "appears to be Ultra Vires, and as it appears to the investigation that Ilyas abused his position at the department in order to provide an unfair advantage to a particular party," the ACC referred the matter to the Prosecutor General's Office ("**PGO**") to prosecute Ilyas for an offence under section 12(a) of the PPCA (see [8.1] of the ACC Report).

(ii) Ilyas evaluated the bid by including an additional criterion of "Capacity Building" and gave marks to increase the marks of a particular party [the Claimant] and also that the guidelines used to evaluate the "Training" category in the TE were not evaluated on a uniform basis, the TE was cancelled, and "[a]s it appears that Ilyas had abused his position at the department in order to provide an unfair advantage to a particular party," the ACC referred the matter to the PGO to prosecute Ilyas for an offence under section 12(a) of the PPCA (see [8.2] of the ACC Report).

(iii) In not including in the CA the 29 scholarships and 200,000 National ID Cards mentioned in the Claimant's technical proposal (at [RBD 1307]), "[i]t appears to the investigation that this act of Ilyas deprived the government of a profit that it would otherwise get". The ACC referred the matter to the PGO to prosecute Ilyas under clause 13(a) of the PPCA (see [8.3] of the ACC Report).

(iv) In signing the CA which provides that US$2 could be charged from each foreign passenger arriving and departing the Maldives, when the financial proposal from the Claimant mentioned charging US$2 from each passenger, "[i]t appears to the investigation that this act of Ilyas deprived the government of a profit that it would otherwise get." The ACC referred the matter to the PGO to prosecute Ilyas for an offence under section 13(a) of the PPCA (see [8.4] of the ACC Report).

(v) In mentioning in the CA that the payments to the Claimant would be exempt from tax, and if this was not permitted, to increase the charges taken by the Claimant under the CA, when *firstly*, the exemption had no legal effect as the Business Profits Tax Act 2010 (under which the exemption was purported to be granted) came into force on 18 January 2011 before the date of the CA, and *secondly*, the Government had not approved any duty exemption for the payments under clause 14 of the Foreign Investments Carried out in the Maldives Act of 1979 ("**Act 25/79**"). With respect to the MIBCS project, (a) "[i]t appears to the investigation that the power to give approvals for exemption of tax under the [CA] is not given to Ilyas", and (b) "[i]t appears to the investigation that this act of Ilyas deprived the government of a profit that it would otherwise get." The ACC referred the matter to the PGO to prosecute Ilyas for an offence under section 13(a) of the PPCA (see [8.5] of the ACC Report).

(vi) As the Claimant, a foreign company, (a) had not obtained the requisite approvals under the Company Law of the Maldives 1996, and registered with the Ministry of Trade and Industry as a foreign investment, (b) had not registered under Act 25/79 its investment at the Ministry of Trade and Industries and Labor and signed an agreement, with the exception of works relating to tourism, and "[a]s it appears to the investigation that [the Claimant] has physically carried out put business transactions in the Maldives under the [CA]", and "[a]s it appears to the investigation that Ilyas had abused his position at the department in order to provide an unfair advantage to a particular party", the ACC referred the matter to the PGO to prosecute Ilyas for an offence under section 12(a) of the PPCA (see [8.6] of the ACC Report).

(vii) In signing the CA with the Claimant when the proposal for the MIBCS project was made in the name of a consortium, and under section 5 of the Contract Law of 1994 that "a contract can be entered into when an offer is made by one party to another and this offer is accepted by the offeree", hence the CA may not be valid without the approval of the consortium, "[i]t appears to the investigation that Ilyas had abused his position at the department in order to provide an unfair advantage to a particular party". The ACC referred the matter to the PGO to prosecute Ilyas for an offence under section 12(a) of the PPCA (see [8.7] of the ACC Report).

ii. *Ageel*

(viii) In evaluating the Claimant's bid (which was valid for 90 days), and awarding its proposal out of time on the 93rd day, 20 marks out of 60 and 114 days later, "Price Bid" was opened [and] evaluated under the supervision of [Ageel]. "As it appears to the investigation that ... Ageel abused his position at the department to provide unfair advantage to a particular party," the ACC sent the case to the PGO to prosecute Ageel under section 12(a) of the PPCA (see [8.8] of the ACC Report).

(ix) In accepting a power of attorney given by the Claimant to its Sales and Business Development Director instead of a power of attorney given by the consortium which had originally submitted the bid, "it appears to the investigation that ... Ageel had abused his position at the department in order to provide an unfair advantage to a particular party". The ACC sent the case to the PGO to prosecute Ageel under section 12(a) of the PPCA (see [8.9] of the ACC Report).

(x) In accepting and evaluating a proposal (for 20 marks out of 60 marks) which became invalid according to the project RFP, ".. it appears to the investigation that ... Ageel had abused his position at the department in order to provide an unfair advantage to a particular party". The ACC sent the case to the PGO to prosecute Ageel under section 12(a) of the PPCA (see [8.10] of the ACC Report).

(xi) In changing the allocation of marks to evaluate the Price Proposal from 30 marks for price category and 10 marks to royalty to 10 marks for four equal categories, as a result of which the Claimant was awarded the MBICS project, it "appears to the investigation that … Ageel had abused his position at the department in order to provide an unfair advantage to a particular party". The ACC sent the case to the PGO to prosecute Ageel under section 12(a) of the PPCA (see [8.11] of the ACC Report).

(vi) The PGO's criminal charges against Ilyas and Ageel

289. Although the ACC had, on 27 November 2011, referred to seven complaints against Ilyas for contravention of section 12(a) and section 13(a) of the PPCA, and four complaints against Ageel for contravention of section 12(a) of the PPCA, the PGO did not initiate any criminal proceedings against either of them until 10 March 2013, two months after the Claimant served the Notice of Arbitration on the Respondent. Even then, both Ilyas and Ageel were charged with only one offence each.

290. With respect to Ilyas, the PGO charged Ilyas for committing a section 12(a) offence on 10 March 2013 for using the influence of his position to gain an unlawful benefit in relation to the 29 scholarships and 200,000 free I/Cs that had been offered by the Claimant in its bid proposal but which were not included in the CA (see [40] of Suood's Witness Statement of 5 October 2015 and Annex HS-15). According to Suood, the case is ongoing.

291. With respect to Ageel, the PGO charged him for committing a section 12(a) offence on 10 March 2013 for using the influence of his position to gain an unlawful benefit in relation to the introduction of an additional category for evaluation during the bid process which had not been included in the RFP (see

[41] of Suood's Witness Statement of 5 October 2015). Suood states that he does not have a copy of the charge form, and that the case is ongoing.

292. Up to the date of this Award, the Tribunal has not been informed of any further developments in these two prosecutions.

(d) Proceedings in the Maldivian courts involving ACC, the DOIE, and the Claimant in connection with the MIBCS Project

293. Given the suspicions of the ACC as detailed in the ACC Report, it was therefore not surprising that the ACC attempted to stop the execution of the CA, and also its implementation after its execution by the Parties. On 2 November 2011 (prior to the publication of the ACC Report on 27 November 2011), the ACC filed CC 2158/2011 and obtained on 3 November 2011 an interim injunction suspending work under the CA. Thereafter, there followed a series of court proceedings by the ACC against the DOIE to stop the Respondent (represented by the DOIE) from proceeding with the works under the CA which it had signed with the Claimant. In CC 2158/2011, the Claimant successfully applied to the court to be joined as a third party to the proceedings. These proceedings generated other proceedings, some of which were appealed to the Supreme Court of the Maldives.

294. Ultimately, the Supreme Court held that the ACC had only investigative powers under the ACC Act, and that it had no power to direct the DOIE not to sign the CA or to implement it. The case summaries of the decisions of the courts (in English translation) are set out in the witness statement of Husnu Al Suood of Suood & Anwar LLP dated 23 August 2015.

E. THE PARTIES' PLEADED CASES ON CORRUPTION AND/OR/ ILLEGALITY

1. The Respondent's defence: the CA was tainted with corruption

295. At [8] of its D/C Am2, the Respondent pleads that the CA is voidable as it was tainted with corruption as a result of Ilyas and Ageel having conferred an undue advantage on the Claimant on an irregular basis and without the requisite approvals from the Respondent. Ilyas was then the Minister of State and Controller of DOIE, from 13 Nov 2008 to 21 Feb 2011 and from 8 Feb 2012 to 23 May 2012. Ageel was the Director General in MOFT at the time the CA was signed.

296. The particulars of this defence are set out at [10]-[24].[xiii] The material paragraphs are [11] and [18]-[24] as follows:

> 11 Samee Ageel, who was the then Director General of the Tender Evaluation Section of the Ministry of Finance and Treasury ("**MoFT**") and the then Controller, Mr Ilyas Hussain Ibrahim ("**Controller**"), who signed the Concession Agreement for and on behalf of the Department of Immigration and Emigration ("**DOIE**"), had conferred an undue advantage on the Claimant by awarding the MIBCS project to the Claimant without following the proper procedure and obtaining the requisite approvals.
>
> 18 As to the technical evaluation:
>
> 18.1 The first evaluation of the technical evaluation was held on or around 31 May 2010 ("**First Evaluation**"). The Controller was part of the Tender Evaluation Committee for this First Evaluation.
>
> 18.2 At meetings held on 2 and 3 June 2010 in respect of the First Evaluation, the First Evaluation was held to be invalid.
>
> 18.3 Subsequently, the Tender Evaluation Committee was changed. As a result of such change, the Controller was no longer part of the Tender Evaluation Committee. A second evaluation in respect of the technical evaluation was then held on 1 September 2010 ("**Second Evaluation**").
>
> 18.4 However, according to the summary report of the new Tender Evaluation Committee for the Second Evaluation, the new Tender Evaluation Committee had only awarded marks for three (3) out of the six (6) components which had been stipulated at clause 3.1 of the RFP.

18.5 On a separate technical evaluation sheet, the bidders were evaluated for the remaining components set out in clause 3.1. However, it is unclear who and / or which team had carried out this evaluation for the remaining components.

19 As to the financial evaluation, this was carried out on or around 22 September 2010. However, the team doing such financial evaluation had used a method of calculation which did not comply with what was set out at clause 6.16 of the RFP. Subsequently, the Anti-Corruption Commission ("ACC") discovered that had the calculation method in clause 6.16 of the RFP been used instead, it would have been less advantageous to the Claimant's final score under the financial evaluation, and more advantageous to other parties. This in turn would have meant that the Claimant would not have been the highest bidder when the total scores of the technical and financial evaluations were added together.

20 On or around 29 September 2010, a project award letter was sent to the Claimant informing them that they had won the bid. This letter was signed by Samee Ageel.

21 Samee Ageel and the Controller have since been charged on or around 26 February 2013 and 27 February 2013, respectively, under the PPCA 2000, in the Maldivian criminal courts in relation to the tender process of the Concession Agreement. Their cases are still before the Maldivian criminal courts.

22 For the reasons set out in this section above, the proper procedure for the bidding and tender of the MIBCS project pursuant to the President's Office Directive and as set out by the RFP which had been approved by the NPC, were not followed, thus contravening the PPCA 2000. Furthermore, the evaluation process was carried out in a manner that contravened the PFR 2009 and PPCA 2000. Consequently, the Concession Agreement is tainted by corruption under Maldivian Law and is thus voidable.

23 It is against public policy to uphold a concession agreement which is tainted by corruption.

24 By way of a letter dated 5 August 2013, the Respondent notified the Claimant of these circumstances and held the Concession Agreement to be void ("**5 August 2013 Letter**").

2. Claimant's pleaded case on the facts

297. In its Reply and Defence to Counterclaim (No 1), the Claimant denies the Respondent's averments (at [8]-[9]) that the CA was tainted with corruption as particularised by the Respondent, for the reasons that:

(a) it was not privy to the internal processes of the Respondent, and therefore had no personal knowledge of these matters, and that the alleged non-compliance and/or irregularities with the Respondent's own internal regulatory and/or assessment processes by its own representatives and/or agents (which are not admitted) do not affect the validity of the CA;

(b) the Claimant as an external party should not be affected by any of the alleged non-compliance/irregularities;

(c) even if Ilyas and/or Ageel were convicted of the charges against them, the Respondent has to plead and prove the alleged acts of corruption on the part of the Claimant, which it has not done; and

(d) the Maldivian Supreme Court has made a finding in Case No 2012/SC-A26 that the decision to "enforce" the CA with the Claimant was taken by the Executive Cabinet of the Respondent. No case has been brought in the Maldives to declare the legal status of the CA under Maldivian law.

3. Position of Ilyas and Ageel in this arbitration

298. Ilyas and Ageel are not parties to this arbitration, and have not been called to testify for either Party. The Respondent has also not called any witness to testify against Ilyas and Ageel on the alleged criminal conduct in the ACC Report in connection with their respective roles in the TE and price evaluation of the four competing bids for the MIBCS Project.

299. However, the Respondent has relied on the ACC's adverse findings and recommendations to prosecute them as evidence that they have committed offences under section 12 of the PPCA which the Respondent has characterized as corruption, or a form of corruption because they are included as offences in the PPCA. It is in this sense that the CA is alleged to have been tainted with corruption.

4. The Respondent's evidence that the CA was tainted with corruption

300. Even though the initial claim of the Claimant was for damages of US$258,234,764, the Respondent did not call any witness to testify on the facts

to lay the ground for the defence that the CA was tainted with corruption. Instead, the Respondent called as its sole witness, Naseer the current Chief Immigration Officer. Naseer has worked at the DOIE since 1982 and has held the position of Assistant Controller since 2004, and during the time of the bidding process and the signing of the CA.

301. Naseer signed and affirmed two witness statements. In his second statement, Naseer admits that he was not primarily involved in the bidding process and that his account of the bidding process is largely based on documents in the DOIE's possession and from information publicly available, such as press reports or courts decisions, and the ACC Report. Naseer gave a statement to the ACC on 4 May 2011 (see RBD 2526-2528) which makes no adverse allegations against either Ilyas or Ageel or the Claimant in relation to the bidding or evaluation process of the competing bids. In other words, Naseer did not have any first-hand knowledge of the facts.

5. The Claimant's response to Naseer's evidence

302. The Claimant's response to Naseer's evidence is set out at [201]-[232] of its Closing Submissions.[xiv] In summary, the Claimant's submission is as follows:

> (a) Although many members of the Maldivian government were involved in the MIBCS project, the Respondent chose to put forward a single witness, Nasser, who was not a "factual" witness as he was almost completely uninvolved in the MIBCS project.
>
> (b) Further, Nasser was not a credible or reliable witness. He claimed that he drafted his witness statement himself, in the Maldivian language, with inputs from a team of people and with help for its translation. However, when questioned, he betrayed that he knew very little of the contents of his own witness statements, or the exhibits to them. On the stand, he also contradicted the evidence in his witness statement several times.

(c) Nasser's witness statement was based on the ACC Report which could not be relied upon as (a) the makers of the ACC Report were not called; and (b) the evidence suggests that the ACC Report is unreliable.

(d) In the circumstances, the Tribunal should draw an adverse inference against the Respondent for failing to call any relevant witness to prove its case.

6. Ilyas and the first technical evaluation

303. In the light of Nasser's irrelevant testimony, the Respondent's defence is based entirely on the findings of the ACC against Ilyas and Ageel. In relation to Ilyas, the ACC Report states at [8.2] (see [288] above):

> Ilyas evaluated the bid by including an additional category entitled "Capacity Building" and gave marks to increase the marks of a particular party and also that the guidelines used to evaluate the "Training" category in the technical evaluation was not evaluated in a uniform basis, the technical evaluation was cancelled, and "As it appears that Ilyas had abused his position at the department in order to provide an unfair advantage to a particular party, the ACC sent the case to the PGO to prosecute Ilyas and the Minister of State for an offence under s 12(a) of the PPCA).

304. At [199]-[205] of its Closing Submissions,[xv] the Respondent submits:

(a) Ilyas was a member of the team that included an extra component in evaluating the first TE. This was improper and resulted in the evaluation being rejected by the TEB who called for a second evaluation.

(b) Thereafter he went out of his way to ensure that the Claimant would be awarded the CA by "removing from its path" officials who had been involved in the MIBCS project but were not in favour of the Claimant.

(c) Ilyas even went to the extent of claiming he had drafted the CA.

7. Tribunal's finding on Ilyas' role in the first technical evaluation

305. The Tribunal finds that the Respondent has not made out its allegations that Ilyas' role in the TE of the Claimant's bid had tainted the CA for the following reasons:

(a) Ilyas was not involved in the second TE after the cancellation of the first TE in which Ilyas participated.

(b) The second TE was conducted by an independent team of experts appointed by the MOFT. The second evaluation also gave the highest marks to the Claimant's technical proposals, and it was accepted by the TEB at its 23rd meeting on 10 September 2010 (see ACC Report at [5.6.6.1] at RBD 142).

(c) There is no evidence of any nexus between Ilyas' alleged removal of obstacles and the outcome of the second evaluation. Any irregularity in the first TE involving Ilyas was neutralized by the second TE. Although the ACC found the second evaluation questionable because it evaluated 40 out of 60 marks, and the remaining 20 marks were evaluated by either Ageel or the TES, no allegation has been made against Ilyas on this aspect of the evaluation.

(d) The PGO has not charged Ilyas with any offence in connection with the first TE, although the ACC had recommended a charge under section 12(a) of the PPCA. Instead, the PGO has charged Ilyas for using the influence of his position to gain an unlawful benefit in relation to the 29 scholarships and 200,000 free National I/Cs that had been offered by the Claimant in its bid proposal but which were not included in the CA (see [40] of Suood's Witness Statement of 5 October 2015 and Annex "HS-15). The Respondent's allegation against Ilyas is not based on this finding.

306. The Tribunal also finds that there is no evidence that the Claimant was in any way privy to or had prior knowledge of the manner in which the first and second TEs were conducted, and therefore, even if Ilyas had committed any unlawful act, the Claimant would not have been privy to such acts.

8. Ageel's role in the second technical evaluation

307. The Respondent argues (at [131]-[14] of its Closing Submissions[xvi]) that Ageel played a questionable role in the second TE as follows:

(a) His duty was to organize the second TE but he merely "cobbled" together the second team without apprising them of their work. Three members of the new team, *viz*, Faaiq Umar (at 3RBD 2507); Mohamed Naaiz (at 3RBD 2545); and Mohamed Faisal (3RBD 2541) have stated in their ACC statements that they were not formally requested to conduct a second TE, but to discuss a tender or give a technical opinion on a technical bid. They were given short preparation time to analyze the bids (3RBD 2545). Ageel was named by Faaiq Umar as the person who had called him for this purpose (see 3RBD 2507).

(b) The evaluation sheet purporting to be scores for the second TE presented to the TEB for approval was dubious (4CHB 2714). Only three categories were evaluated by the second team. The remaining three categories were stated by Ageel to have been evaluated by the TES. Since, Ageel was the head of the TES, the likelihood was that Ageel himself made the evaluation (see statements of Ahmed Jinah Ibrahim and Ageel quoted at [133] of the Closing Submission).

(c) Ageel's statement is problematical. First, the second team did not even consider that they were giving an evaluation but had merely given a technical opinion. They did not fill up an evaluation sheet, but merely rendered a report on the TE setting out some of their findings.

(d) Second, Ageel gave contradictory reasons for the second team making a partial evaluation of the bids. He explained that (i) the remaining categories could be evaluated by the TES; and (ii) the MOFT had advised that only three categories would be sufficient to determine the technical part of the entire bid. The second reason is not credible because the RFP guidelines required a full evaluation, and Ageel stated that as head of the TES, he was responsible for evaluating the remaining three categories, for which marks out of 20 had been entered in the evaluation sheet (at [141] of the Closing Submission and 3RBD 2600).

9. The financial evaluation

308. The RFP guidelines require the TEB to evaluate the price bid on the basis of 30 marks for passenger fee, work permit fee and visa card fee collectively, and 10 marks for royalty. The minutes of the 24th meeting of the TEB on 22 September 2010 record under "Agenda Item No 14: Determination of the Price Scores of the Immigration Border Control's Project" as follows:

> "Prior to the opening of the price proposals of four (4) parties who passed the Project's Technical Evaluation, the members decided to allocate the 40 marks, which is given to the price proposal, in four (4) equal parts which is as follows:
>
> | | |
> |---|---|
> | Passenger Fee: | 10 marks |
> | Work Permit Fee: | 10 marks |
> | Visa Card Fee: | 10 marks |
> | Royalty: | 10 marks |

309. The following were members of the TEB (see *Dramatis Personae*) representing their respective agencies who attended the meeting.

(5) Ahmed Mausoom (PO),
(10) Al'Usthaadh Ahmed Usham (MOFT),
(11) Ali Arif (MOFT),
(17) Anwar Ali (Department of National Planning),
(25) Ismail Asif) (Maldives National Chamber of Commerce and Industry),
(28) Mohamed Amir (MOFT), and
(38) Zeeniya Ahmed (Ministry of Housing and Development).

310. There is no dispute that the division of the 30 marks into 10, 10, 10 marks for each of the categories of passenger fee, work permit fee and visa card fee (**"10/10/10 Calculation Method"**) was not in accordance with the RFP guidelines.

10. The Respondent's submissions on the financial evaluation

311. At [146]-[198] of its Closing Submissions, the Respondent contends:

(a) Ageel presented to the TEB the 10/10/10 Calculation Method to evaluate the price bids in violation of the RFP guidelines.

(b) The only reason Ageel did this was to confer upon the Claimant an undue advantage of securing the CA when it otherwise would not have won the bid.

(c) There was therefore no need for any further subdivision of the 30 marks as stated in the RFP. There was no difficulty in giving 30 marks collectively to the three categories as provided in the RFP.

(d) The 10/10/10 Calculation Method was not permitted by the RFP. Even if it were permissible, Ageel's action falls within section 12(a) of the PPCA as it was done with the specific intention to confer an undue benefit to the Claimant (Ageel's statement at RBD 2599).

> "When we look at the proposed fees of the Immigration Border Control Project, these fees have been divided into different parts. They are passenger fee, work permit fee, and visa card fee. I do not believe that we have to award the project to the party that proposed the lowest total fee when all these different fees are added together. This is because, these fees are totally different types of fees and it is not just to add all of them together. This is because the work permit and visa card need not be made for all the passengers that arrive and this amount would be different from other sub-criteria. Therefore, although [the Claimant] did not propose the lowest total fee, when we look at the types of proposed fees and their weights, they might be the most eligible party...I believe that the structure the Evaluation Committee designed to award marks is a fair and just structure. I would not know to say right now, whether or not this structure is the most beneficial to the state. The bid evaluators will base their evaluation on the evaluation criteria. They will not see if this would be a profit or a loss for the Government." (Emphasis added.).

(e) The financial evaluation team had been led, or misled, by Ageel to use the 10/10/10 Calculation Method for the purpose of conferring an undue advantage to the Claimant. This team was in fact that of the TES (as confirmed by Ageel at RBD 2516).

(f) The 10/10/10 Calculation Method worked to provide the Claimant with an advantage. By using the Claimant's $0 proposal in the formula, all the other parties received 0 marks for the Work Permit category, as follows:

Informatics	$0 \times 10 \div 5.90 = 0$
Iris	$0 \times 10 \div 7.66 = 0$
Dibena	$0 \times 10 \div 15 = 0$

Even if a party submitted a $0.01 bid, it would also receive 0 marks given that $0 \times 10 \div 0.01 = 0$.

(g) Significantly, if the formula had been applied equally to the Claimant, the Claimant would not have obtained 10 marks as there would be a division by zero error [$0 \times 10 \div 0 = 0$]. Ageel would have known about this error when he was awarding the marks for the Financial Evaluation, as shown by the following two statements.

(i) (At RBD 2597-8):

> "However, I believe that every party who submits the proposal must know that the most marks will be given to the party who proposed the lowest price in every category. While the proposal fee is divided into 3 categories, if there is no fee submission in one of these categories, it means that either the party who submitted the proposal will provide that particular service for free or they aren't complying with those criteria. Thus, if they have decided that they will provide the service for free (if they have not proposed a fee for that service) then they will receive full marks. However, while prorating marks for those parties who did not impose a fee for the service (the fee of the service is 0), I did not think before that by prorating full marks for those parties this way, there could be a situation where the other parties who took part in the bid might not get any marks. This is because the rest of the parties will be prorated from 0. However, during the long period I have worked in the Tender Evaluation Section of the Ministry of Finance and Treasury, I have not come across a situation where a part or a service of the project was not charged." (Emphasis added)

(ii) (At RBD 2599):

> "After taking part in a "competitive bid" and if they propose to not impose any fees, then in my opinion, they deserve full marks."

> "From the above extracts, it is therefore clear that although the formula was applied to the other bidders, the same standard was not applied to the Claimant's submission of 0 marks for the Work Permit Fee and a flat full marks was given notwithstanding that [Ageel] himself had claimed that he had never seen a submission of a free component before." (see [192] of the Closing Submissions)

11. The Tribunal's finding on the financial evaluation

312. The Tribunal finds on the evidence in the ACC Report that it was Ageel who introduced, or was responsible for introducing, the 10/10/10 Calculation Method to the TEB to evaluate the price bid. Ahmad Usham, Ismail Asif and Zeeniya Ahmed stated in their ACC statements that, or to the effect that, it was the Secretariat of the TEB, i.e., Ageel, who submitted the proposal of distributing the 40 marks equally into four parts at 10% each (at RBD 2584, 2589-90, 2602-6 respectively). They had merely made the evaluation on the basis of the distribution of the marks. Anwar Ali named Ageel as the person who originated the proposal to divide the 30% marks into three sub-criteria of 10% marks each. At RBD 2587 he states:

> "The Secretariat of the Board Mr Samee Ageel submitted a way in which the marks can be given to do the financial evaluation of the Maldives Border Control Project of the [DOIE]. So, in giving marks to the price proposal, the committee passed to distribute 40 marks equally to four parts that were allocated in the request for proposal (RFP) for the financial evaluation, But I have not seen the RFP of that project. Hence, I do not know whether there is a specific standard categorized in giving marks to the price proposal in RFP. I believe it was decided in the meeting that to distribute the marks of the price proposal since the Secretariat appointed by the Ministry of Finance to the Board decided to distribute the marks in that manner since the Tender Evaluation Board believes that the documents submitted by the Secretariat were valid document."

313. In contrast, Ageel did not deny that he had proposed the 10/10/10 Calculation Method by stating that he could not say who made it, and that he could only say that the TEB decided unanimously to proceed with the price evaluation on that basis. He tried to downplay the effect of using the formula by explaining that no

bidder could have gained any unfair advantage unless it knew in advance what the formula was, and that the TEB had no way of knowing the price bids of bidders since it decided to use the formula before opening the bid documents.

314. The application of the 10/10/10 Calculation Method was also unfair or erroneous because the Claimant was given the full 10 marks, and to the other bidders 0 mark. Whatever price the other bids were, they must be entitled to some marks out of 10 (see [311(f)] above).

315. The manner in which Ageel formed the second team, the amount of time given to them to do the second evaluation, and the introduction of the 10/10/10 Calculation Method could give rise to the suspicion that Ageel had rigged the bid process to ensure a successful outcome for the Claimant. There was an interval of more than two months between the first evaluation and the second evaluation which appeared to have been done in a day. He also did the evaluation of the other three categories which the second team did not do. However, even then, as against these negative aspects, the second team did give the highest marks to the Claimant on the three (more significant) categories they evaluated.

316. In the Tribunal's view, such circumstantial evidence is not sufficient to prove that Ageel had intentionally introduced the 10/10/10 Calculation Method in order to confer an undue advantage on the Claimant. For the Claimant to obtain an undue advantage in this respect, it would have to know that Ageel would be introducing the 10/10/10 Calculation Method before the bids were submitted. There is no such evidence.

(a) No evidence of intention to confer undue advantage

317. The outcome of the evaluations, in itself, does not justify the Tribunal to draw an inference that there was an intention to benefit the Claimant. The circumstances might be suspicious, but they are not sufficient for the Tribunal

to infer that Ageel had rigged the financial evaluation in favour of the Claimant. Circumstantial evidence has to inevitably and inexorably lead to the conclusion of Ageel's guilt. The circumstantial evidence must be compelling to eliminate any other possibility. There is no evidence in the ACC Report to justify the Tribunal to make such inferential fact against Ageel. The ACC did not appear to have asked Ageel to explain why the second team did not have or was not given enough time to do a full TE.

318. It is the Tribunal's view that an offence under section 12 of the PPCA requires *mens rea*, or guilty knowledge. It is not a strict liability offence. The acts must be done intentionally or with knowledge of the probable outcome. The Tribunal accepts the evidence of Munavvar, the Claimant's Maldivian Law expert, that *mens rea* could be based on inference, and that the threshold is that if the court is of the view that the person "would have been aware of the consequences of his actions" he then "possessed the knowledge or the intention of his unlawful act" (see RCS [213]).

319. The Respondent's case is that there was *mens rea*, and that it could be inferred from the evidence against Ilyas and Ageel as recorded in the ACC Report. The Tribunal is unable to accept this argument which is that Ageel has committed an offence or offences under section 12 of the PPCA. The standard of proof under Maldivian law is not on a balance of probabilities but that of beyond a reasonable doubt. The criminal standard of proof cannot be discharged by making inferences from the ACC findings against Ageel. Hearsay evidence is admissible in arbitral proceedings, but its cogency depends on its reliability. A high degree of reliability is required if the Tribunal is asked to find that a party has committed an offence purely on hearsay evidence against him. Whichever officer in the ACC who questioned Ageel should have testified on what kind of questions he had asked Ageel. Furthermore, Ageel has a pending criminal charge against him for an offence under section 12 of the PPCA. Unless there is

clear and cogent evidence that Ageel has committed an offence under section 12 of the PPCA, this Tribunal is not prepared to usurp the function of the Maldivian courts in coming to such a conclusion.

12. Are offences under section 12 of the PPCA bribery and corruption offences?

320. At [104]-[109] of its Closing Submissions, the Respondent argues that offences under section 12 of the PPCA are bribery and corruption offences:

> 104. The [PPCA] is therefore the appropriate legislation put in place to combat corruption at the national level in the Maldives. It is the Respondent's case that [Ilyas] and [Ageel], had acted in a manner which contravened the PPCA. Specifically, both [of them] have been charged ...under [a] 12(a) of the PPCA.
>
> 105. In order to determine what constitutes corruption under Maldivian Law, the [ACCA], as well as the PPCA, are instructive.
>
> 106. Section 23 of the ACCA provides that "corruption" refers to the offences set out in the PPCA. This is not in dispute and has been agreed to by both the Respondent and the Claimant, as can be seen in the Joint Statement of the Maldivian Law Experts, at paragraph (i). The main purpose of the PPCA, as set out in its preamble, is to (a) prevent and criminalize the offer and acceptance of bribery, and (b) prevent and criminalize the attainment of undue benefit or the facilitation of attainment of undue benefit through use of influence from position.
>
> 107. Section 12(a) of the PPCA states [text omitted]
>
> 108. It is clear that [s] 12(a) falls squarely within the definition of corruption. It must therefore flow that if it is shown that the actions of Ageel and [Ilyas] fall within [s] 12(a), then given that this is an act of corruption, public policy rules would apply and the [CA] may not be upheld. To this end, Singapore law is not dissimilar.
>
> 109. Further, transnational public policies and mandatory laws should apply in international arbitrations, notwithstanding the governing law of the contract.
>
> 110 While the definition of a mandatory law is not set in stone, the following two explanations are illustrative of what a mandatory law should be. As considered by Hwang, S.C. and Lim, mandatory laws are "imperative provisions of law which must be applied to an international relationship irrespective of the law that governs that relationship". Overriding mandatory provisions have also been defined to mean norms "the respect for which is regarded as crucial by a country for safeguarding its

public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract". The law on corruption is such a law. Corruption is an issue which would have the effect of pervading the society in a country. National laws combating corruption therefore form the cornerstone in providing for a stable society and economy.

111 As to the issue of transnational public policy, the Tribunal in *World Duty Free v Kenya* commented, regarding the role of international arbitrators and allegations of corruption in arbitration, that they (international arbitrators) may base their decisions on transnational public policy, being the universal standards and accepted norms of conduct that must be applied in all for a, and found that claims based on contracts of corruption or contracts obtained by corruption cannot be upheld.

112 This has also been accepted with regards to investment treaty claims, which is analogous to our present situation. Applying transnational public policies, Cosar notes that "a claim arising from an investment tainted by illegality may be declared inadmissible" and that "enforcing a contract obtained by wrongful means would be contrary to the basic notion of international public policy". Therefore, a tribunal should not assist in upholding a contract which is tainted by corruption.

321. At [41], [42], [46]-[48] of its Skeletal Arguments, the Respondent contends:

41. The Claimant agrees that the real issue is illegality. It is illegal in the Maldives to give an undue advantage. This false distinction by the Claimant that you need to come within the "bribing" sections of the PPCA in order to succeed in illegality has no basis.

42. Once an illegal act is shown to take place within the jurisdiction, one must then turn to Singapore law on contract to determine the effect it has on the contract. Under Singapore law, it can be avoided.

....

46. Where the contract is illegal or contrary to public policy by statute or common law, state of mind is irrelevant [4RBA, Tab – 4 at 13.119].

47. Even if intention is relevant (where there is no statutory or common law illegality), Phang, citing Buckley, states that where only one party performs the illegality, the innocent party is entitled to refuse to perform the contract and it does not matter whether the "innocent" party learns of the contract and it does not matter whether the "innocent" party learns of the scheme after the formation of the contract [4RBA, Tab – 4 at 13.121].

48. Buckley contends however, that if this innocent party continues with the performance, after acquisition of the relevant knowledge, he should forfeit any right to contractual remuneration which might accrue [4RBA, Tab – 3].

13. The Claimant's submissions on bribery and corruption

322. At [267]-[272] of its Closing Submissions, the Claimant contends:

267. In these proceedings, the Respondent particularised the so-called acts of "corruption" which it says tainted the CA:-

a. The RFP deviated from the proposal that was initially approved by the NPC: BP, Tab 10, [14];

b. When the EOI were evaluated, an additional category of "Capacity building" was used as a criteria to evaluate the EOI, when it had not been listed in the Invitation for EOI as a criteria for evaluation: BP, Tab 10, [14B];

c. When the technical bids were evaluated, it was not clear who had carried out the evaluation for 3 out of 6 components: BP, Tab 10, [18]; and

d. When the financial bids were evaluated, instead of giving 30% weightage for the visa fee and passenger fee as stated in the RFP, equal weightage of 10% were given for each of the categories of passenger fee, visa fee and work permit fee: BP, Tab 10, [19]; 2 IN [36].

268. According to the Claimant, these acts amounted to offences under sections 12 and 13 of the [PCCA]: Claimant's Bundle of Authorities, Tab I.

269. Section 12 is the offence of gaining or conferring an undue advantage by a government employee.

270. Section 13 is the offence of preventing the state from attaining an advantage.

271. Significantly, neither [s] 12 nor section 13 are bribery offences. Bribery offences are set out at [ss] 2 to 9 of the PPCA.

272. The Respondent's evidence was that "DOIE's position is that the acts of corruption which tainted the [CA] were committed by [Ilyas] and [Ageel]. DOIE is not aware of any officials of [the Claimant] being directly involved in this."

323. At [277]-[282], the Claimant contends:

> 277 The Respondent has not adduced any authority, Singaporean or Maldivian, for the proposition that a contract can be set aside for being "tainted with corruption" when that contract was not procured by bribery.
>
> 278 The Respondent's Maldivian law expert, Mr Siraj, confirmed that there is no Maldivian case where a contract was declared void solely on the ground that there was a breach of [s] 12, PPCA in connection with the making of the contract: Transcripts, Day 6, p. 100-101. In other words, there is no Maldivian Law authority in support of the Respondent's assertion that the CA can be terminated for being "tainted with corruption" in a case such as the present.
>
> 279 Mr Siraj also expressed the view that the government cannot terminate a contract just because one of its government servants had committed an act of corruption: Transcripts, Day 6, p. 109-110.
>
> 280 In fact, Mr Siraj agreed that "the government cannot terminate a contract just because its own internal processes were not followed": Transcripts, Day 6, p. 108, line 18 to p.109, line 2. This is consistent with the AGO's opinion given on 17 April 2011, where it stated that the lapses in the Respondent's internal processes were not a basis to terminate the CA, even though "it is in the government's discretion to sanction the person responsible for acting in contravention of the established procedure": 3 CHB 1691 at [21].
>
> 281 The Respondent, in its pleaded case, has not alleged that the Claimant was involved in any of these lapses of the Respondent's internal processes. According to it, [Ilyas] and [Ageel] were the only persons responsible for the lapses in the Respondent's internal processes. Effectively, the Respondent is attempting to terminate the CA on the basis that its internal processes were not followed. However, according to its own expert witness, it is not permissible for the Respondent to do that.
>
> 282 Given that the Respondent has not provided a legal basis for the termination of the CA on the ground that tit was "tainted with corruption", it is unclear if the Respondent is pursuing this line of its defence and counterclaim.

324. At [61]-[63] of the Claimant's Reply Submissions, the Claimant contends:

> 61. At [277] to [282], CCS, the Claimant submitted that the Respondent had not adduced any legal authority for the proposition that the Respondent could set aside the CA for being "tainted with corruption" when that contract was not procured by bribery, and where the Claimant was not involved in any corrupt act.

62. Even in the RCS, the Respondent has failed to unpack what "tainted with corruption" means, and has not elucidated any legal principle on which it can be said that a contract can be set aside for being "tainted with corruption".

63. In this section we:

a. Set out the law on when a contract can be avoided for corruption; and

b. Show that the authorities cited by the Respondent do not stand for the proposition that the CA can be set aside even when it was not procured by bribery, and where the Claimant did not commit any corrupt act.

325. At [64]-[97],[xvii] the Claimant discussed the law on this issue.

14. The Tribunal's discussion on bribery and corruption

326. The Tribunal has considered the arguments of the Parties and also the copious citations of authority on this issue. The Tribunal agrees to the principles of law set out at [76]-[79] of the Claimant's Closing Submissions as follows:

76 In *PT International Nickel Indonesia v General Trading Corp (M) Sdn Bhd* [1977 – 1978] SLR(R) 58 , the Singapore Court of Appeal, in the context of a summary judgment application, considered what would be the contractual implications if the defendant-appellant was able to prove its allegations that the plaintiff-respondent had procured its 35 contracts with the appellant by bribery.

77 The Court of Appeal held at [13] and [23] that:-

> "Every contract made or act done by an agent under the influence of bribery, or, to the knowledge of the other contracting party, in violation of his duty to his principal, is voidable by the principal"
>
> ...
>
> "It is clear law that the contract between the briber and the recipient of the bribe is an illegal contract and it cannot form the basis of a claim before the courts."

78 In other words, to avoid the CA vis-à-vis the Claimant, the Respondent must show either:-

a. That the Claimant bribed its government officials, which were its agents; or

> b. The government officials were violating their duties to it, and this was known to the Claimant.
>
> 79 There is no principle in Singapore law that a principal may avoid a contract where an agent has, unknown to the third party, conferred an undue advantage on the third party, by failing to follow its own internal procedures.

327. The Tribunal is of the view that offences under section 12 and section 13 of the PPCA are not bribery offences, and are not "corruption" offences since these specific offences have been provided for in other sections of the PPCA. A section 12 offence does not involve and does not require the public officer to do a favour to a third party in exchange for a gratification from the third party. A true bribery or corruption offence involves a giver and a taker. Such acts when committed on a large scale damage the economy of a country, injure efficiency in government, and ultimately damage the welfare of the state and the people. Hence, they are universally condemned and proscribed. The offences under sections 12 and 13 of the PPCA are of a different nature. They are essentially acts or omissions of public servants in failing to protect or advance the interest of the state, to obtain a gain or prevent a loss to the state. No gratification is required to commit a section12 offence. Any economic loss or gain to the state through a failure to discharge a public duty is sufficient. The PPCA clearly makes a distinction between the two types of offences. However, an offence under section 12 of the PPCA impacts on the legality of any contract entered into with knowledge of the commission of such an offence. A contract tainted with illegality is also unenforceable if the claimant obtained the contract with knowledge that it is illegal for the other party to enter into the contract with it. Hence, instead of pleading that the CA was tainted with corruption, the Respondent should have pleaded that it was tainted with illegality, accordingly it is voidable and liable to be set aside.

328. On this analysis, the issue is therefore, as submitted by the Respondent one of illegality in connection with the commission of an offence under section 12 of

the PPCA. The Respondent argues that Ilyas and/or Ageel had committed offences under section 12 of the PPCA, and that is enough to taint the CA with "corruption" in the sense used by the Respondent. The Respondent has not alleged, nor is there any evidence in the ACC Report to show, that either Ilyas or Ageel had received any gratification for conferring or taking actions with a view to conferring an undue advantage on the Claimant. The Respondent's case is based on Ilyas and/or Ageel having committed offences under section 12 of the PPCA.

329. The Tribunal finds that the Respondent has not produced sufficient evidence to show that either Ilyas or Ageel has committed any section 12 PPCA offence. Furthermore, the Tribunal also finds that there is no evidence in the ACC Report to show or from which the Tribunal may infer that the Claimant was privy to any unlawful act committed by Ilyas or Ageel.

(a) The mystery of the 290710 Draft

330. In this connection, the Tribunal would refer to the mystery of the 290710 Draft. The Tribunal has earlier found as a fact that the Claimant had prepared this draft, even though its factual witness had denied it when questioned.[xviii] At [164.1] of its Reply Submissions, the Respondent observes:

> 164.1. Firstly, the document is marked "Draft 290710" at the top, very likely 29 July 2010. This was a time when the price bids had not even been opened by the Respondent and it would not have prepared a draft with the Claimant's name. It is slightly intriguing to see that the Claimant was so certain at that point of time that it would be awarded the tender and had started drafting the agreement between the Respondent, its potential subsidiary and itself.

Beyond observing that the time when the 290710 Draft was intriguing, the Respondent has made no submission on its relevance or significance as a piece of evidence to support its defence.

331. The Respondent has not gone beyond making this submission to argue that the Claimant could not have been so certain unless it had been informed by Ilyas and/or Ageel that the MIBCS Project would be rigged in favour of the Claimant. The fact that the Claimant had drafted the 290710 Draft before the TE is a matter that should have called for an explanation. There is nothing in the ACC Report to suggest that the ACC saw any significance in the date of the 290710 Draft as neither Abdullah Waheed nor Afeef (who had discussed the 290710 Draft on "7/10") is recorded by the ACC to have said anything on how, when or why they were given the 290710 Draft. It would appear that the ACC did not pay any particular attention to the anomaly of the Claimant having prepared the 290710 Draft, even before the MIBCS Project was awarded to it.

332. In the absence of any findings by the ACC, the Tribunal is not in a position to investigate this issue solely on the basis of the ACC Report. In the circumstances, the Tribunal finds that the Respondent has not produced any or sufficient evidence to show that Ilyas and/or Ageel had committed offences under section 12 of the PPCA. It follows that there is no evidence that the CA was tainted with illegality or corruption in the sense used by the Respondent.

333. On the evidence of the ACC Report, the Tribunal finds that there is no evidence that the Claimant was privy to or had knowledge of their misconduct or impropriety when it signed the CA on 17 October 2012. There is insufficient evidence to show that the Claimant had prior knowledge that Ageel and/or had committed any offence under Maldivian law in relation to the evaluation of the technical and price bids for the MIBCS Project.

15. Are "administrative contracts" under Maldivian law different from ordinary contracts?

334. At [21]-[30] of it Closing Submissions, the Respondent also contends that Maldives has a distinctive and unique form of contract called an "administrative

contract" that is different from the normal civil contract. This form of contract was referred to the Supreme Court of the Maldives in Case No. 2012/SC-A/26 (English translation at Vol E, Bundle of Maldivian law authorities at [556], and that the Claimant's Maldivian Law Expert, Munavvar, had also confirmed this distinction between administrative contracts and civil contracts [Transcripts, Day 8, 15 October 2015, page 163, lines 4 to 20]). The second part of this assertion is not correct as Munavvar only conceded, when questioned on it, that the Supreme Court had "tried to distinguish between administrative contracts and civil contracts".

335. In Case No. 2012/SC-A/26, three members of the court (the other two did not join in this opinion) made the following statements at [561-562]:

> (g) Seventh point: In an investigation conducted by the [ACC] regarding the [CA] executed between [Respondent] and [Claimant] on 17 October 2010 to establish a border control system in Maldives, the ACC, nothing that there were elements of corruption involved, on 24 January 2011 ordered that if the work regarding the Border Control System is to be continued further, it should be submitted to the [NPC] or Cabinet of Ministers, and an RFP must be prepared in accordance with the [NPC] or Cabinet of Ministers decisions and should be re-submitted to the bidding process. However, after this, the Cabinet of Ministers at the meeting of 18 October 2011 decided to carry on the [CA] to establish the [MIBCS Project] and this decision was published in the 31 October 2011 issue of the Government Gazette. It is thus clear that the decision to carry on the [CA] was made after the order given by the ACC's letter [of 24 January 2011] based on the decision of the Cabinet, and where one of the three arms of the State, the Government had decided to carry on the [CA], it can only be decided otherwise by a decision of the Cabinet or a Court. The validity of the [CA] in question has not been challenged in a court of law claiming that it contravenes a statute or regulation in force and the [CA] had not been declared void by any court of law.
>
> (h) Eighth point: Where a "public law" institution of the state, that is, the State or a State institution or a body contracts with a private party or private company to manage public utilities of the State or public services, such administrative contracts for the benefit of the society or the public interest are entered into by the State and a private party acting in its own personal interest. Such administrative contracts are not between parties having the same interest, and therefore unlike a civil contract between private parties acting in their own interest, in such administrative contracts the

> principle of Pacta Sun Servanda, freedom of contract between parties, is not without limitation and is not absolute. In administrative contracts, in matters such as when the State or the relevant State's institution chooses a contracting party, restrictions imposed by public law such as administrative law and public finance laws must be complied with. Such administrative contracts include concession agreements, supply contracts, and contracts for public works and in such a contract, the State which is party to the contract or the State entity party to the contract has rights and privileges in amending the terms of the contract, monitoring the implementation of the contract and taking required measures in relation to contract implementation, and in such contracts, the State which is party to the contract or the State entity party to the contract also has rights and powers as the unilateral termination of the contract at its own discretion. (Emphasis added)

336. It is not disputed that the CA is an administrative contract in the sense used by the majority judges of the Supreme Court. However, the judges' statement (in bold) does not say that under Maldivian law, the State has an absolute right to terminate such contract unilaterally free from any claim for damages for breach of contract by the other party to the contract. It would be surprising if the three judges had intended to lay down such a principle in the light of the Maldivian Law of Contract Law No 4/91, section 20(a) and section 23(c) of which provide as follows:

> [20(a)] – A party to a contract must perform his obligations in accordance with the terms of the contract
> [23(a)] - A party who commits a breach of contract shall be liable in damages for the loss arising from such breach.

337. In the Tribunal's view, such is not the law of Singapore, the governing law of the CA. At the highest, it might be argued that under Maldivian law, if the State were to unilaterally terminate an administrative contract, the innocent party would not be entitled to specific performance of the contract as that would be contrary to the nature of an administrative contract as understood by the three Supreme Court judges.

338. For these reasons, the Tribunal is unable to see how the statement of the majority judgment of the Supreme Court in Case No. 2012/SC-A/26 that the Respondent has the right to terminate unilaterally at its discretion an

administrative contract has any bearing on the claim by the Claimant for compensation or damages for wrongful termination of the CA by the Respondent.

16. Finding of the Tribunal

339. For the reasons given above, the Tribunal finds that the Respondent was in breach of contract in repudiating the CA on 5 August 2013.

F. SUMMARY OF THE TRIBUNAL'S FINDINGS ON THE DISPUTED ISSUES

340. The findings of the Tribunal on the disputed issues are restated below.

1 Frustration Issue

The CA was not frustrated by the Parliament approving the recommendations of the Finance Committee and the Budget Review Committee to terminate the CA as the approvals did not absolve the Respondent from having to, or make it illegal for the Respondent, to perform its contractual obligations under the CA (at [150]-[172] above).

2 Insolvency Issue under clause 11.1.1 of the CA

(a) The Respondent failed to prove that the Claimant was in breach of its obligations under clause 11.1 of the CA before and after 5 August 2013 which would have entitled the Respondent to terminate the CA under clause 11.1.1(ii) thereof, and

(b) If the Respondent had been entitled to give, and had given, notice of termination under clause 11.1.1(iv), the Claimant would have been able to remedy the breach within the time specified therein (at [197]-[198] above).

3 Damages Issue

(a) Alternative A claim

The Claimant is not entitled to claim liquidated damages comprising of: (a) the value of completed works; and (b) liquidated damages arising from the loss of revenue under clause 12.3 of the CA as the clause is a penalty provision (see [211] above). Reducing the amount of the claim by discounting the value to the present date does not erase its character as a penalty. It is merely a discounted penalty (see [213]-[214] above).

(b) Alternative B claim

The Claimant is entitled to claim common law damages against the Respondent at the agreed sum of either US$15,200,000 (at US$2 per passenger) or US$37,000,000 (at US$4 per passenger),.(at [298] above), as the case may be, subject to the Tribunal's finding on entitlement set out at (e) below.

(c) Claim for invoiced amounts

The Claimant is entitled to claim the amounts set out in the invoices and is entitled to be paid the total sum of either (i) US$1,885,654 (at US$2 per passenger) or (ii) US$3,771,308 (at US$4 per passenger) (at [223]-[224] above).

(d) The Claimant failed to prove agreement to revise financial bid

The Claimant has failed to prove an agreement to revise the financial bid. The Claimant has failed to discharge the burden of proving that the Respondent agreed to revise the Claimant's financial bid of US$2 per passenger to US$4 per passenger (see [340] above).

(e) The Claimant is entitled to charge a fee of only US$2 per passenger

The Claimant is entitled to charge a fee of only US$2 per passenger (in and out) or arriving into and leaving the Maldives (at [341]-[342] above).

(f) The Claimant's claim for damages not limited to voluntary administration

The damages payable to the Claimant are not limited to the date when it entered into voluntary administration (see [347]-[350] above).

4 The Corruption Issue

(a) Conduct of Ilyas in technical evaluations

On the evidence of the ACC Report, Ilyas had not done any act to further the cause of the Claimant at the second TE (at [305 above).

(b) The Claimant was not privy to technical evaluations

The Respondent has also not produced any evidence that the Claimant was in any way privy to or had prior knowledge of the manner in which the first and second TEs were done (at [306] above).

(c) Conduct of Ageel

The Respondent has not produced any or sufficient evidence of any improper conduct on the part of Ageel in relation to the financial evaluation that could have tainted the decision to award the MIBCS Project to the Claimant in this respect (see [307]) above).

(d) CA not voidable as not tainted with illegality ("corruption")

The CA was not tainted with illegality under the PPCA arising from the conduct of either Ilyas or Ageel as the Respondent had not produced any or any sufficient evidence to show that Ilyas or Ageel had intentionally conferred an undue advantage to the Claimant under section 12 of the PPCC (see [329] above).

(e) *The Claimant was not privy to financial evaluation*

The Respondent has not produced any sufficient evidence that the Claimant was in any way privy to or had prior knowledge of the manner in which the financial evaluation was to be done before it submitted its price bid, or that the Claimant was privy to any unlawful act committed by Ilyas or Ageel (see [329] above).

G. COSTS OF AND IN THE ARBITRATION - PRINCIPLES

1. The Claimant's submissions

341. The Claimant's submissions are as follows.

(a) If it succeeds in any part of its claim against the Respondent, it is entitled to its full legal costs, as well as the costs of the Tribunal and the administration fees of the SIAC - consistent with the SIAC Rules as well as the international trend in awarding costs in arbitrations.

(b) Under Rules 31 and 33 of the SIAC Rules, the Tribunal has wide discretion to decide on the allocation of costs.

(c) In international arbitrations, the emerging trend is for the arbitration tribunal to order the losing party to pay all or the substantial part of the costs of the arbitration: see Mistelis, Loukas A. Comparative International Commercial Arbitration, at [24-82].

(d) Legal costs normally include the costs of legal representation in the arbitration proceedings as well as the expenses of the legal teams for preparing the case and advising the parties: see Mistelis, at [24-84]. Legal costs incurred prior to the arbitration proceedings are not recoverable, but legal costs incurred in the preparation of arbitration proceedings would be recoverable.

2. The Respondent's submissions

342. The Respondent's submission are as follows.

(a) In Singapore, the incidence of costs in civil litigation is governed by the "indemnity principle", i.e., that an unsuccessful party would generally be ordered to pay the successful party's reasonable litigation costs. The indemnity principle is subject to the court's overriding discretion. Underlying the indemnity principle, costs are generally imposed to compensate the successful party, rather than to punish the losing party. The indemnity principle extends only to costs reasonably incurred, rather than to all costs incurred.

(b) Applying the principle of proportionality, the Tribunal should have regard to the issues that are in dispute and consider which party has prevailed on which issue(s), in determining what costs the successful party should be entitled to.

(c) The Claimant's submission at [341(a)] is unreasonable. Even if the Claimant succeeds completely in its claim, it does not follow that the Claimant should be awarded all of its legal costs: see *Trans Eurokars v Koh Wee Meng* [2015] SGHCR 6, and authorities cited therein.

3. The Tribunal's views

343. Rules 31 and 33 of the SIAC Rules are expressed in general language. The two rules provide as follows:

> "31 ...unless the parties have agreed otherwise, the Tribunal shall determine in the award the apportionment of the costs of the arbitration among the parties."

> "33 The Tribunal shall have the authority to order in its award that all or a part of the legal or other costs of a party be paid by another party."

344. Implicit in these two Rules is the Tribunal's power to award costs in its discretion. Neither Rule tells the Tribunal how to do it or what principles it should apply to apportion the costs or to order one party to pay the costs of the other party. Both Rules assume that there are already generally accepted or established principles. In arbitrations under English law, English courts have decided that arbitral tribunals should follow the principles for determining costs in litigation, and that an arbitral tribunal cannot do what a judge cannot do in awarding costs, subject to any express agreement of the parties or the

institutional or national rules governing the arbitration. Singapore courts generally follow the English practice.

345. On this basis, the Tribunal's power to determine and award costs in the arbitration is not absolute, and must be exercised judiciously, i.e., fairly and reasonably, having regard to, *inter alia*, (a) the issues of fact and/or law raised by the parties to the dispute; (b) their number and complexity; (c) the duration of the hearing; (d) the size of the legal representation; and (d) the conduct of the parties (or their counsel) in prolonging the hearing by making unnecessary procedural applications and/or objections.

346. The underlying principle is costs follow the event, but in a complicated case with many issues of law and/or fact, the Tribunal may allocate costs between the parties that fairly represent their entitlement to reasonable costs based on the outcome of the dispute, and also, if appropriate, the legal and factual issues on which a party may have succeeded (as Rule 33 provides). As a general rule, the Tribunal should only award legal fees that are not unreasonably incurred.

347. The general approach which tribunals in common law jurisdictions apply is that "costs follow the event". It means that the successful party is entitled to be paid its costs by the other party on an indemnity basis. The application of this principle is very much within the authority of the tribunal to apply under the SIAC Rules, unless the Parties have expressly agreed not to apply it.

348. That is the starting position when there are few issues in dispute. However, where the dispute involves numerous issues of law and fact, which may vary in complexity, the tribunal may adopt a nuanced approach that takes into account the complexity of the issues and their outcomes, and not solely on the outcome of the claim or counterclaim, as the case may be. In this connection, it is pertinent to note that section 19A(2) of the IAA also provides that the arbitral tribunal may make an award relating to an issue affecting the whole claim or a

part only of the claim, counterclaim or cross-claim which is submitted for its decision.

349. However, notwithstanding the generality of the SIAC Rules, they cannot be read to authorize the Tribunal to award legal and related costs incurred by a successful party *prior to the commencement of the arbitration*. Such costs cannot be considered as costs in the arbitration, unless they are incurred directly in connection with or for the purpose of the arbitration proceedings, i.e., its commencement or response.

4. The Parties' claims

350. The Claimant claims legal costs and disbursements incurred from 27 January 2015 onwards, totaling **S$1,657,729.91** as follows -

(a) S$1,355,392.27 as the legal costs of Singapore counsel.

(b) S$105,070.48 for Maldivian legal counsel.

(c) S$156,031.82 for expert witnesses.

(d) S$41,235.34 for other miscellaneous expenses.

351. The Respondent claims legal costs and disbursements totaling **S$1,252,340.18** as follows -

(a) S$500,000 + S$35,000 GST as legal costs on a time basis for Singapore counsel, which is less than 40% the Claimant's claims for its Singapore counsel.

(b) S$353,870.90 as arbitration costs (advanced deposits, hearing room and transcription fees.

(c) S$306,706.51 for expert witnesses (legal and financial).

(d) S$56,762.77 for other miscellaneous expenses

5. Discussion

352. As a starting point, the Claimant has succeeded in its claim against the Respondent (which means that the Respondent's counterclaim has also failed as it was based on the same issues of fact and law), the Claimant is therefore entitled to the costs of and in the arbitration. The Claimant's claim was a simple claim for breach of contract. The Respondent mounted a complicated defence under many different heads, all of which the Claimant contested. As the Respondent has succeeded in some of these issues, it had contested certain heads of cost-claims of the Claimant as well as their quantum. These objections will now be discussed.

(a) Pre-arbitration costs and disbursements

353. The Claimant commenced arbitration on **9 January 2014**, and has claimed pre-arbitration legal costs of S$298,160.22 (Annex B) incurred from September 2011 to August 2013 for M/s Suood & Anwar (**"S&A"**), its Maldivian legal counsel, in intervening in various court proceedings commenced by the ACC to prevent the CA from being unlawfully terminated. The Respondent argues that as these costs are not related to the arbitration proceedings, they cannot be claimed as arbitration costs.

354. The Tribunal agrees with the Respondent's submission. Pre-arbitration costs may not be claimed in the arbitration. However, preparatory legal work may be claimed. But, if such costs involved getting up on the law or the facts for such work are claimed, then in principle, they cannot be claimed all over again, but only partially on a refresher basis, as the arbitration progresses. Furthermore, there cannot be too many refresher claims for costs.

355. The same analysis applies to the pre-arbitration costs of the Claimant's legal counsel, R&D, incurred between May 2011 and Dec 2013 amounting to S$100,000 and S$1,575.81. These two items form part of the bill of costs

S$319,868.68 rendered by R&D for work done from May 2011 and 27 January 2015 when they ceased acting for the Claimant.

(b) Legal costs of Rodyk & Davidson

356. The Claimant has claimed post-arbitration legal fees of S$216,000 paid to R&D up to **27 January 2015.** The Respondent argues that the Claimant's costs have been unnecessarily incurred by changing lawyers in mid-stream on 27 January 2015. In principle, the Tribunal accepts that there is merit in this argument. If R&D had continued to act in this arbitration, the new lawyers, PLA, would not have had to do the same work all over again. R&D has charged legal fees of S$150,000 for work done up to 27 January 2015. What is the value of the work duplicated by PLA that should be disallowed? The Respondent has not assisted the Tribunal to assess the avoidable added costs. In the circumstances, the Tribunal considers a deduction of S$100,000 reasonable as avoidable costs. The sum of **S$100,000** should be deducted from the costs of PLA.

(c) Legal costs of Suood & Anwar

357. The Respondent objects to the Claimant's claim for S$105,070.48 paid for the services of its Maldivian lawyers, S&A, on the ground that it is excessive as it is only 10 pages long and that the annexes were merely write-ups of the cases in which represented the Claimant in the Maldivian court proceedings. Moreover, S&A's fees are disproportionate when compared with Munavvar's fees of S$18,803.

358. The Tribunal agrees with the Respondent's submission. Suood's witness statement is merely an account in English of the 13 proceedings before the Maldivian courts. This evidence, although useful as background, had marginal relevance to the disputed issues before the Tribunal. Suood was essentially a factual witness. In the Tribunal's view, the claim for Suood's fee is manifestly excessive. The Tribunal considers a reasonable fee to be **S$10,000**.

(d) Costs of the Claimant's Singapore legal counsel

359. The bulk of the costs claimed in the arbitration by the Claimant is for legal fees and expenses paid and/or payable to its Singapore legal counsel: (a) S$216,000 for R&D up to 27 January 2015, and (b) S$1,043,392.20 for PLA from 27 January 2015 until the date of the oral hearing on 5 October 2015, the filing of the Claimant's Cost Submissions on 24 March 2016, and the oral hearing on 30 March 2016.

360. The total time spent by PLA on the case from 27 January 2015 up to the oral hearing on 30 March 2016 is approximately 1,662.1 hours made up as follows:

(a) Until 27 March 2015 - 151 hours, 3 lawyers
(b) Until 30 April 2015 - 45.2 hours, 3 lawyers (excluding legal support)
(c) Until 31 May 2015 - 59.9 hours, 3 lawyers (excluding legal support)
(d) Until 30 June 2015 - 75.7 hours, 3 counsel (excluding legal support)
(e) Until 31 August 2015 - 397.2 hours, 2 counsel (excluding legal support)
(f) Until 16 October 2015 - 639.4 hours, 3 counsel (excluding legal support), including attendance at hearing on 5, 6, 7, 8, 12, 13, 14, 15 October 2015
(g) Until 30 December 2015 - 116.9 hours, 2 counsel (excluding legal support)
(h) Until 4 Feb 2016 - 129.8 hours, 2 counsel (excluding legal support)
(i) Until 30 March 2016 - 40 hours prep work + full day hearing of 7 hours (estimated)

361. The average charging rate of PLA per lawyer/counsel is S$628 per hour. PLA's legal work was done by a group of 3 lawyers and 3 counsel whose hourly rates of charge have not been disclosed. It is reasonable to assume that the precedent counsel or partner will charge more than the others on a descending scale. At

the hearing itself, the Claimant was represented by one precedent counsel and two junior counsel/lawyers.

362. In contrast, the Respondent has only claimed time costs totaling S$500,000 for one precedent counsel and two counsel/lawyers. The Tribunal does not know how many hours they have spent on the case. At a comparable hourly charge of S$628 per hour, the Respondent's counsel would have spent about 796 hours on the case as compared with the Claimant's counsel of 1,662.1 hours, slightly more than 40% of the time spent by the latter.

363. As pleaded, the Claimant's claim against the Respondent is a standard claim for damages for breach of contract: (a) damages for delaying the implementation of the CA, (b) payment of the invoiced amounts for work done, and (c) future loss for repudiating the CA. Claim (a) was withdrawn after the closure of the proceedings.

364. As pleaded, the Respondent's defence and counterclaim raised more complex issues of:

(1) lack of jurisdiction,

(2) corrupt agreement and/or illegality under Maldivian law,

(3) recognition of illegality under Singapore law,

(4) *ultra vires* due to Ilyas' lack of authority in signing the CA,

(5) national security and public interest considerations,

(6) insolvency of the Claimant, and

(7) frustration of the CA arising from the Maldivian Parliament passing the annual budget recommendations of the Budget Review Committee.

365. The Respondent abandoned or withdrew defences (1), (3), (4) and (5) at various stages of the proceedings. As a result, the final contested issues were narrowed down to (2), (6), (7) and the quantum of damages. What is significant about the abandoned/withdrawn issues, and the contested issues is that all of them were issues of law, except for (6) which involved issues of financial facts. As can be seen from the Tribunal's findings, the Tribunal has decided all these issues on the documents disclosed by the Parties in the proceedings, especially the ACC Report and the statement of accounts of the Claimant.

366. Although both Parties called witnesses to testify on the basis of their witness statements, their oral evidence had no material impact on the Tribunal's findings on the legal issues. Similarly, although the Parties filed expert evidence on the quantum of damages claimed or entitled to claim, ultimately the Parties' financial experts were able to agree on the quantum of damages, depending on whether the Claimant was entitled to a US$2 or US$4 fee for each foreign visitor to the Maldives under the CA.

367. Against this background, there is some merit in the Respondent's argument that the Claimant's claim for legal fees is disproportionate, unreasonable and unnecessary for the disposal of the issues raised by the Respondent, including those issues that were abandoned/withdrawn. The Respondent had a much more difficult case to disprove the Claimant's case by way of defence. The laws on frustration, illegality, the nature of bribery or corruption, the standard of proof of criminal conduct, liquidated damages and penal damages and insolvency under Singapore law are well established. In so far as Maldivian law is based on English case law, the legal principles are also well established.

368. The Claimant is entitled to claim costs on the four abandoned/withdrawn defences. Some were withdrawn earlier than others. The issues of law raised by these defences were predicated on facts on which there was no evidence. Hence,

they were withdrawn. The Tribunal assesses the total costs payable to the Claimant on these abandoned these defences to be **S$200,000.**

369. The Claimant is entitled to claim costs on the failed defences (2), (6), (7). The Tribunal assesses the Claimant's counsel's costs as **S$600,000**, i.e., S$200,000 for each defence.

370. However, the Claimant did not succeed in all the legal issues arising from the abandoned and failed defences. The Claimant was not successful on the following issues where it:

(a) withdrew its claim for damages alleged to have been caused by the Respondent's delay or failure to expedite the implementation of the MIBCS Project;

(b) failed in its Alternative A claim;

(c) failed in its claim for damages based on US$4 per foreign visitor to the Maldives.

371. The Respondent is entitled to claim a deductions of the costs it has incurred with respect to these issues by way of set-off against the Claimant's costs as set out at [368] above. The Tribunal estimates the total costs to be **S$200,000.**

372. On the basis of [356]-[357], [368]-[369], the Claimant is entitled to claim the following legal costs:

(a) S$150,000 – R&D's legal fees (at [356] above)
(b) S$10,000 being Suood's fees (at [357] above)
(c) S$200,000 (at [368] above)
(d) S$600,000 (at [369] above)
Total

S$960,000

less

(e) S$1005,000 (at [356] above)
(f) S$200,000 (at [371] above

Net total **S$660,000.**

(e) Disbursements

373. The Claimant has claimed the following disbursements: S$156,031.82 for expert witnesses, *viz.* (a) Deloitte & Touche Financial Advisory Services Pte Ltd (Tam Chee Chong): Professional fees and disbursements of S$137,228.47, (b) Munavvar (S$18,803.35), and S$41,235.34 for other expenses.

374. The Claimant also claims payment of S$315,378.97 paid to SIAC as advance deposits. These sums are payable by the Respondent in so far as they have been appropriated to pay the fees of the Tribunal and SIAC's administrative fees.

375. The Tribunal allows the claims of the Claimant at [373], i.e., (a) S$156,031.82, (b) S$18,803.35, S$41, 235.34 totalling S$216,070.51.

376 The Respondent will bear its own legal costs and expense of the arbitration, and will also have to pay the costs of the arbitration which have determined by the Registrar of the SIAC in the amounts set out in the table below.	SGD
Tribunal's Fees & Expenses	
Chan Sek Keong SJ	
Judge Chan's Fees	390,261.86
Judge Chan's Expenses	846.26
Sub-total	*391,108.12*
SIAC Fees & Expenses	
Administration Fee	43,225.00
SIAC Incidentals	250.00
GST on SIAC Admin Fee & Expenses (7%)	17.50
TOTAL SIAC ADMINISTRATION FEES & EXPENSES	*43,492.50*
TOTAL COSTS OF ARBITRATION	434,600.62

H. DISPOSITIONS

376. In the premises, the Tribunal awards to the Claimant and orders the Respondent to pay (1) the Claimant the damages and legal fees and expenses, (2) the Tribunal's fee and expenses, and (3) the administrative fees and expenses of the SIAC, in the sums set out below:

(a) US$15,200,000 damages for breach of the CA on the basis of US$2 per passenger (at [340(3)(b)] above);

(b) US$1,885,654 being the total amount of fees represented by the invoices on the basis of US$2 per passenger (at [340(3)(c)] above);

(c) the legal costs of the Claimant in the sum of S$660,000 and disbursements of S$216,070.51.

(d) the Tribunal's fee and expenses in the amount of S$391,108.12.

(e) SIAC's administration fees and expenses in the amount of S$43,492.50

377. PLA is to be released from its Undertaking on security for costs dated 9 March 2015.

Place of arbitration: Singapore

Dated: the 24th day of November 2016

Chan Sek Keong

CHAN SEK KEONG

THE TRIBUNAL

ENDNOTES

[i] [382]-[398] read:

Balance Sheet Test

382. For ease of reference, the Claimant's 2013 management accounts balance sheet (at [5CHB 3236]) is reproduced here:

3236

Noxbis Pty Limited
Level 40
100 Miller Street
North Sydney
NSW 2060 Australia

Balance Sheet

As of June 2013

8/7/2015
6:50:20 PM

Assets			
Current Assets			
Cash & Cash Equivalents	$3,941.10		
Deposit	$1,353.00		
Due From ASN Solutions Sdn Bhd	$2,970,020.75		
Total Current Assets		$2,975,304.85	
Non Current Assets			
Due From NSA Solutions Sdn Bhd	$59,004,501.78		
Total Non Current Assets		$59,004,501.78	
Total Assets			$61,979,886.63
Liabilities			
Current Liabilities			
Non Trade Creditors	$440.03		
GST Paid	($2,430.10)		
Accrual	$588,000.00		
Total Current Liabilities		$586,009.93	
Total Liabilities			$586,009.93
Net Assets			$61,393,876.70
Equity			
Equity		$110,493,168.34	
Retained Earnings/(Acc Losses)			
Retained Earnings/(Acc Losses)	($42,658,610.17)		
Current Year Earnings/(Losses)	($6,440,081.47)		
Total Retained Earnings/(Acc Losses)		($49,099,291.64)	
Total Equity			$61,393,876.70

383. The Respondent's Financial Expert had observed at [9.61] of [Volume D of the Bundle of Respondent's Expert Reports (Vol 1 of 2), Tab LQS-3, Pages 58 to 60] ("[LQS1WS]") that:

"A. Financial and Solvency Position

I note from the balance sheet as at 30 June 2013 that:

a. Nexbis had net assets amounting to A$61.3m (total assets of A$61.9m less total liabilities of A$0.59m);

b. Nexbis' had neither intangible asset, property, plant & equipment, trade receivable nor trade payable. Instead, the main assets of Nexbis comprised a sum of A$2.9m due from ASN and a sum of A$59m due from NSA only."

384. Additionally, the Respondent's Financial Expert observed that :

384.1. The Claimant was dormant: - There was no revenue generated ([9.64(a)], and the Claimant was not trading as there were no trade receivables or payables ([9.64(c)].

384.2. The Claimant had no assets: - There was no investments or intangible assets recorded in its balance sheet. ([9.64(b) & (d)].

384.3. The Claimant was making a loss: - Operating expenses of A$0.9m were incurred despite Nexbis being dormant, with directors' fees of A$0.5m and business entertainment of A$0.1m being the major operating expenses ([9.64(e)].

385. The Respondent's Financial Expert was of the view that:

385.1. The debt owed by ASN should be set off: - ASN Solutions Sdn Bhd ("ASN") had already incurred expenses of A$3.9m on 30 June 2013, on behalf of the Claimant, and this sum should have been set off against the sum of A$2.9m that ASN owed the Claimant. This would result in the Claimant owing ASN A$1m. The Respondent's Financial Expert stated that it appeared that the Claimant "would not be able to settle the aforesaid sum. In 2014, the sum due to ASN increased to A$1.7m before Nexbis went into voluntary administration."

385.2. The debt owed by NSA should be written off: - The sum of A$59m that NSA Solutions Sdn Bhd ("NSA") owed the Claimant should have been written off as at 30 June 2013 as the prospect of recovering the amount due could already be doubtful on that date due to NSA's poor financial position. The Respondent's Financial Expert stated that:

"[b]ased on NSA's Audited Financial Statements for the financial year ended 30 June 2013, I note that NSA was in a net current liability position of RM149.1m (A$51.6m), i.e. its current liabilities of RM156m (A$54m) were more than its current assets of RM6.9m (A$2.39m) Its main asset (non-current) was an investment in an associate with net book value of RM174m (A$60.2m) as at 30 June 2013. In this regard, I note that the receivable of A$59m due from NSA was written off entirely as at 30 June 2014. In view of the foregoing, it appears that the prospect of recovering the amount due from NSA could already be doubtful as at 30 June 2013.". ([9.64(h)].

386. Therefore, the Respondent's Financial Expert had concluded (at [9.64] of [Volume D of the Bundle of Respondent's Expert Reports (Vol 1 of 2), Tab LQS-3, Pages 58 to 60]) that the Claimant was insolvent by A$1.58m as at 30 June 2013:

Nexbis' balance sheet for the financial year ended 30 June 2013 marked "8 July 2015"		Adjusted Nexbis' balance sheet for the financial year ended 30 June 2013 after taking into consideration the comments in paragraph 9.64 (g) to 9.64 (j) of LQS.1WS	
Assets		Assets	
Cash and bank balances	A$3.9k	Cash and bank balances	A$3.9k
Deposit	A$1.3k	Deposit	A$1.3k
Due from ASN Solutions Sdn Bhd	**A$2.9m**	Due from ASN Solutions Sdn Bhd	**NIL**
Due from NSA Solutions Sdn Bhd	**A$59m**	Due from NSA Solutions Sdn Bhd	**NIL**
Total Assets	A$61.9m	Total Assets	A$5.8k
Liabilities		Liabilities	
Non-trade creditors	A$0.04k	Non-trade creditors	A$0.04k
GST Paid	(A$2.4k)	GST Paid	(A$2.4k)
Accruals	**A$588k**	**Accruals**	**A$588k**
		Due to ASN Solutions Sdn Bhd	**A$1m**
Net Assets / Liability	A$61.3m	Net Assets / Liability	**(A$1.58m)**

Source: Table at [9.64] of [LQS1WS]. (Emphasis in bold added)

387. At [9.65] of [LQS1WS], the Respondent's Financial Expert stated "[b]ased on the above adjusted Nexbis' balance sheet, there is a sum of A$1m "due to ASN" after the "set-off" of A$2.9m. It appears that Nexbis would not be able to settle the aforesaid sum. In 2014, the sum due to ASN increased to A$1.7m before Nexbis went into voluntary administration."

388. Furthermore, after reviewing the Claimant's Factual Witness' 3rd Witness Statement that was filed in response to the Respondent's Financial Expert's report, the Respondent's Financial Expert has since (in his second witness statement dated 10 October 2015 [Vol D, Bundle of Respondent's Expert Reports (Vol. 2)] further opined at Page,21, [11.16] that the A$59m NSA debt would have been written off on 5 July 2013. This is because by utilising the "prudence" accounting principle that the Claimant's Factual Witness advocated in his 3rd Witness Statement, the amount due of A$59m due from NSA would have been written off on 5 July 2013 when all the Claimant's restructuring efforts were complete, thereby causing the Claimant to become insolvent on that date.

389. It is submitted that the above write-off / set-off is justified the Claimant was never going to recover these sums of money. As set out earlier, in *Joanne Marie Bucci v Russell John Carman*, Lord Justice Lewison stated at [27]:

> "In my judgment the following points emerge from the decision of the Supreme Court in *Eurosail* (and in particular the judgment of Lord Walker):
>
> ...

iii) The cash-flow test and the balance sheet test stand side by side: para [35]. The balance sheet test, especially when applied to contingent and prospective liabilities is not a mechanical test: para [30]. The express reference to assets and liabilities is a practical recognition that once the court has to move beyond the reasonably near future any attempt to apply a cash-flow test will become completely speculative and a comparison of present assets with present and future liabilities (discounted for contingencies and deferment) becomes the only sensible test: para [37].

iv) But it is very far from an exact test: para [37]. Whether the balance sheet test is satisfied depends on the available evidence as to the circumstances of the particular case: para [38]. It requires the court to make a judgment whether it has been established that, looking at the company's assets and making proper allowance for its prospective and contingent liabilities, it cannot reasonably be expected to meet those liabilities. If so, it will be deemed insolvent even though it is currently able to pay its debts as they fall due: para [42]."
[Emphasis added]

(i) Analysis of the amount due from NSA

390. An examination of NSA Solutions Sdn Bhd's 2013 accounts provides further insight into the terms of this A$59m that was due to the Claimant. At [6CHB 3843], [12], NSA's Note to the Financial Statements explains that the amount due to the Claimant "mainly comprised payment made on behalf of the company and were unsecured, interest free and repayment term was to be made based on presentation of at least one year's notice". Apart from NSA's poor financial health (net current liability of A$51.6m) (see [9.64h] of [Volume D of the Bundle of Respondent's Expert Reports (Vol 1 of 2), Tab LQS-3, Page 59]), the notice requirement makes it is clear that Claimant could never have called for repayment of this A$59m on or around 5 August 2013.

(ii) Financial Status of ASN / S5

391. The same repayment terms also applied for ASN / S5. At [6CHB 3757], it can be seen that the repayment term for the amount owed to the ultimate holding company was based on the presentation of at least one year's notice. This amount was ultimately set off. Further, at [6CHB 3759], under the heading "Liquidity risk", it is stated that "[S5 Solutions] depends on operating cash flow and financial support from holding, ultimate holding and related companies to meet the liabilities when they fall due". It is clear that despite the Claimant's Factual Witness claims, S5 / ASN was never going to "save" the Claimant. During cross-examination [Transcripts, Day 2, Page 90], the Claimant's Factual Witness agreed that there was only approximately USD255,000 in available cash/bank deposits for S5 Systems to use.

(iii) Outstanding Directors' Fees

392. Apart from the outstanding amount which would be due to ASN / S5, the Claimant was facing claims in the form of directors' fees. This is reflected in the Accruals of A$588k recorded under the Claimant's liabilities in the 2013 management accounts (see also [6CHB 3911] where KordaMentha reflected that the Claimant's liabilities comprised of directors' fees of A$572k). It is perhaps apt to note that the Claimant had paid large directors' fees of A$2.41 in 2011, A$3.305m in 2012, and A$544k in 2013.

393. The Claimant's Factual Witness elaborated on the directors' fees during the Arbitration hearing [Transcripts, Day 2, Pages 151 – 153]. He stated that when the Claimant entered into voluntary administration, the creditors of the company were ASN Solutions and three other directors who were owed director fees (Johann Young, Peter Dykes and Chua Yu Yue (himself)). The Claimant's Factual Witness explained that while Johann Young and he were still part of the Claimant, "Peter Dykes was the CFO in Nexbis Limited prior to this when the company was listed". It can be seen (from [5CHB 3197]) that Peter Dykes resigned on 5 July 2012 and thus his director's fees would clearly be outstanding on 30 June 2013.

394. During re-examination, the Claimant's Factual Witness further elaborated on the payment of Johann Young's and Peter Dykes' fees [Transcripts, Day 2, Page 162]:

ARBITRATOR: Now, earlier on, you said there were, what, three creditors, was it?
MR VERGIS: Four.
ARBITRATOR: Four creditors.
MR VERGIS: Three directors who were seeking their fees, including him, and the company.
ARBITRATOR: So as a result of that administration, all of you were paid out?
A. No, a scheme has been arranged. Frankly, my fees and Dato Sri Johann Young's fees are small in comparison, and it's more for priority to deal with Peter Dykes' fees because he has since left the company already.
ARBITRATOR: Peter Dykes?
A. Yes.
ARBITRATOR: Was he the former controlling shareholder?
A. No, he was the former CFO of the company.
ARBITRATOR: All right.
MR VERGIS: Was he a shareholder of the company.
A. He was a shareholder when it was listed.
ARBITRATOR: That's what I meant. Because he was paying himself lots and lots of money.
MR VERGIS: It was 800,000.
ARBITRATOR: So he was.
(Emphasis added)

395. In fact, till this day, it appears that the Directors' claims still exist. They merely have, pursuant to a binding Deed of Company Arrangement ("DOCA") [6CHB 3927], been moved to a Creditor's Trust. See in particular, [6CHB 3933] where Johann Young has an admitted claim of A$500,000 and Peter Dykes has an admitted claim of A$475,000, which has only been partially paid. According to the Australian Securities and Investments Commission website :
"A deed of company arrangement (DOCA) is a binding arrangement between a company and its creditors governing how the company's affairs will be dealt with, which may be agreed to as a result of the company entering voluntary administration. It aims to maximise the chances of the company, or as much as possible of its business, continuing, or to provide a better return for creditors than an immediate winding up of the company, or both.
The DOCA binds all unsecured creditors, even if they voted against the proposal.
A creditors' trust is a separate legal arrangement used to accelerate a company's exit from external administration. Creditors' claims are generally transferred to a newly created creditors' trust and any return is received from the trustee of the trust, not the deed

administrator. The DOCA generally terminates after the creditors' claims against the company are moved to the trust."
(Emphasis added)

396. According to paragraph 3.3 of the DOCA (see [6CHB 3936]), the Claimant had agreed to pay a further sum of A$237,500 with interest to Peter Dykes if the arbitration case between the Claimant and the Respondent is either successfully prosecuted by the Claimant or settled with adequate funds. Likewise, according to paragraph 3.6 of the DOCA, Johann Young would receive his full claim of A$500,000 if arbitration against the Respondent is successful or settled.

397. Therefore it is clear that the Claimant had merely shifted its debt to the creditors' trust.

398. The Claimant's continued reliance on the fact that they came out of voluntary administration within 4 months is merely a misdirection. The debts owed by the Claimant have been outstanding since 2013 and have simply been transferred to the creditor's trust. Ironically, any payment depends on the Claimant's success in this arbitration.

[ii] [235]-[261] read:

235 In this section, it will be shown that even if the broad interpretation advocated by the Respondent is applied, the Claimant was not insolvent.

i. The Applicable Legal Principles

236 Under Singapore company law, there is no single test for insolvency: *Kon Yin Tong,* at [30][ii]. The Singapore courts have held that it is not helpful or necessary to lean in favour of one test or another when determining the insolvency of a company: see *Chip Thye Enterprises* at [20][ii].

....

239 To determine the solvency of a company, one must scrutinise all the relevant evidence available and regard must be had to all the evidence that appears relevant to the question of insolvency: *Kon Tin Yong*, at [31]. The court (or Tribunal in this instance) may apply a combination of tests to determine whether company unable to pay its debts: *Chip Thye Enterprises*, [19]

238 The determination of whether a company is insolvent is a question of fact. *"A company is insolvent or unable to pay its debts when it is unable to meet current demands... insolvency in this commercial sense is principally a question of fact." Chip Thye Enterprises*, [34]. In this regard, the courts have held that:

a. Proof that a creditor's debt not paid *per se* does not establish inability to pay debt: *Kon Yin Tong,* [34]
b. Temporary lack of liquidity is not tantamount to insolvency: *Kon Yin Tong,* [34]
c. A surplus or deficiency of net assets is indicative but not necessarily determinative in establishing whether or not an entity is able to pay all its debts as and when they become due and payable: *Chip Thye Enterprises,* [19]

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239 The essential question is **whether the company's financial position is such that it can continue in business and still pay its way**: *Kon Yin Tong*, [38].

240 Although there is no single test for insolvency, two primary indicia of a company's inability to pay debts are: (a) the balance sheet test; and (b) the cash flow test.

The Balance Sheet Test

241 Under the balance sheet test, a company is deemed insolvent if its assets are insufficient to meet its liabilities, including prospective and contingent liabilities: *Kon Yin Tong*, [39].

242 In the United Kingdom, the balance sheet test is encapsulated in section 123(2) of its Insolvency Act: *BNY Corporate Trustee Services Ltd*, at [40-42][ii];

243 In interpreting section 123(2), the English court has held that:-

d. *"In practical terms, it would extraordinary if section 123(2) was satisfied every time a company's liabilities exceeded the value of its assets. Many companies which are solvent and successful, and many companies early on in their lives, would be deemed unable to pay their debts if this was the meaning of section 123(2)": BNY Corporate Trustee Services Ltd*, at [40][ii];

e. A company should not be at risk of being wound up simply because the aggregate value (however calculated) of its liabilities exceeds that of its assets. <u>Many companies in that position are successful and creditworthy, and cannot in any way be characterised as "unable to pay their debts".</u> Section 123(2) does not give such a mechanistic and artificial reason for permitting a creditor to present a petition to wind up a company: *BNY Corporate Trustee Services Ltd*, at [41] [ii];

f. Section 123(2) requires the court to make a judgment whether it has been established that, looking at the company's assets and making proper allowance for its prospective and contingent liabilities, <u>it cannot reasonably be expected to meet those liabilities.</u> If so, it will be deemed insolvent although it is currently able to pay its debts as they fall due. The more distant the liabilities, the harder this will be for the creditor to establish that the company is unable to meet them: *BNY Corporate Trustee Services Ltd*, at [42];

g. Where the company's liabilities can be deferred for over many years and <u>where the company is (without any permanent increase in borrowings) paying its debts as they fall due, the court should proceed with the greatest caution in deciding that the company is in a state of balance-sheet insolvency</u> under section 123(2): *BNY Corporate Trustee Services Ltd*, at [42].

The Cash Flow Test

244 Under the cash flow test, a company is deemed to be insolvent when it cannot meet its obligations as and when the fall due: *Kon Yin Tong*[ii], [36].

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245 In determining whether a company is cash flow insolvent, the courts look at the company's financial position taken as a whole: *Kon Tin Yong*, [37]. Factors that the courts look at include the following:-

h. All of the company's debts at the material time in order to determine when those debts were due and payable: *Kon Tin Yong*, at [37]

i. All of the assets of the company as at that time in order to determine the extent to which those assets were liquid or were realisable within a timeframe that would allow each of the debts to be paid as and when it became due and payable: *Kon Tin Yong*, at [37]

j. Company's business as at that time in order to determine **its expected net cash flow from the business by deducting from projected future sales the cash expenses which would be necessary to generate those sales**: *Kon Tin Yong*, at [37]

k. **Arrangements between the company and prospective lenders, such as its bankers and shareholders, in order to determine whether any shortfall in liquid and realisable assets and cash flow could be made up by borrowings which would be repayable at a time later than the debts**: *Kon Tin Yong*, at [37]

l. Whether any liquidity problem is purely temporary and can be cured in the reasonably near future: *Kon Tin Yong*, at [38]

ii. *Balance Sheet Test: The Claimant was in net asset position as at 5 August 2013*

246 Factually, the Claimant's management accounts show that as at 30 June 2013, **the Claimant was in a net asset position of A$61.3M**. It also had **a net current asset position of A$2.4M**: 5 CHB 3236. Under the balance sheet test, it was solvent.

247 The Respondent, using creative and unsustainable accounting arguments, alleges that by 30 June 2013, the Claimant was balance sheet insolvent with net liability of A$1.58M. Using 30 June 2013 as a proxy for the Respondent's financial position as at 5 August 2013, the Respondent concludes that the Claimant was insolvent and unable to pay its debts as at 5 August 2013, such that the Respondent was entitled to terminate the CA under Clause 11.1.1(ii). The Respondent's assertion is baseless.

248 In order to advance their position that the Claimant was in a net liability position, the Respondent had to rely on several unsustainable premises:

a. The Respondent takes the unreasonable position that the **costs** of the MIBCS project as at 30 June 2013 **should be included** the Claimant's balance sheet, but that the **revenues** generated by MIBCS project up till 30 June 2013 **should be excluded** from the balance sheet;

b. Based on this unreasonable position, the Respondent asserts that the sum of A$2,970,090.75 due to the Claimant from ASN Solutions Sdn Bhd (**"ASN"**) should be set-off against the A$3.9M that ASN had incurred for the MIBCS project by 30 June 2013 and which had later been invoiced to the Claimant. However the Claimant does not similarly add to the Claimant's balance sheet the revenues for the MIBCS project; and

c. The Respondent also asserts that the sum of A$59,004,501.78 due to the Claimant from NSA Solutions Sdn Bhd should have been written-off as at 30 June 2013.

249 The Respondent's premises are meritless.

250 First, it is unreasonable for the Respondent to take the position that the costs of the MIBCS project should be have been included in the Claimant's balance sheet, but not the revenues from that project.

251 This Tribunal should either (a) include both the costs and revenues of the MIBCS project as at 30 June 2013 in the Claimant's balance sheet; or (b) exclude them both. On either basis, the Claimant will be in a net asset position, even if the A$59M due from NSA is written off from the Claimant's balance sheet, and regardless of whether the revenues are calculated on the basis of US$4 or US$2 per passenger. We illustrate in the table below.

Claimant's Net Assets	**Amount**
Factual, based on 2013 Management Accounts (dated 8 July 2015)	A$61.3M
Excluding A$59M due from NSA, and excluding costs and revenues from MIBCS Project	**A$2.3M**
Excluding A$59M due from NSA, and including costs and revenues of MIBCS Project as at 30 June 2013 (calculated on the basis of US$4 per passenger)	A$2.3M – A$3.9M + A$3.4M[ii] = **A$1.8M**
Excluding A$59M due from NSA, and including costs and revenues of MIBCS Project (calculated on the basis of US$2 per passenger)	A$2.3M – A$3.9M + A$1.7M[ii] = **A$0.1M**

252 Mr Leow himself admitted that it even if the revenues had been booked with ASN / S5 Solutions, it would be necessary to factor in that income when examining the Claimant's ability to do its work: Transcripts, Day 5, p. 51-52.

253 Further the A$3.9M costs of the MIBCS project as at 30 June 2013 included **A$237,000**[ii] of legal fees which the Claimant incurred for engaging lawyers to correspond with the Respondent as a result of their delay in implementing the CA, and defend the injunctions and law suits brought by the ACC to suspect / terminate the performance of the CA. If these costs are excluded from the Claimant's balance sheet on the basis that the

Respondent cannot take advantage of its own wrong, the Claimant's net assets would be even higher.

254 On this basis alone, the Respondent's assertion that the Claimant was in a net liability position as at 5 August 2013 should be rejected.

255 Second, the Respondent's assertion that the amount due from NSA to the Claimant should have been written off by 5 August 2013 is also baseless.

256 The Respondent asserts that the A$59M due from NSA to the Claimant should have been written off in the Claimant's 2013 management accounts for the following reasons:-

d. The A$59M was written off in the Claimant's 2014 management accounts which suggests that NSA's ability to make payment was doubtful even in 2013; and
e. NSA was in a net current liability position of A$51.6M in its 2013 accounts.

257 The Respondent's assertion falls away in light of the evidence and the Respondent's own financial expert's concessions at the hearing.

258 The evidence shows that the Claimant had undergone a restructuring exercise which involved disposing of its shares in its subsidiaries. On cross-examination, the Respondent's financial expert Mr Leow accepted that (a) in a restructuring scenario, debts are often written-off for reasons other than that the debtor was unable to pay its debts; (b) the Claimant's writing off of NSA's debt of A$59M could have been part of a larger group restructuring exercise; and (c) the fact that debts were written off in 2014 as part of a larger restructuring exercise cannot be the basis for suggesting that in 2013, provision for doubtful debt of the full amount ought to have been made: Transcripts, Day 5, p. 21-23.

Further, Mr Leow also admitted that if the Claimant and NSA had been ultimately owned by
259 the same owners (as the evidence suggests that they were), it would be a matter of accounting treatment how debts from the related companies are dealt with: Transcripts, Day 5, p. 85.

260 Finally, NSA's 2013 accounts shows that it was in a net asset position of RM 25,998,157 (see 6 CHB 3818) and its assets included NSA's investment in its associate company, ASN / S5 Systems which continued to be a profitable. There is therefore no basis to say that the NSA's debt owing to the Claimant was doubtful / would not have been recoverable in the normal course, if not for the restructuring exercise.

261 Applying the balance sheet test, the Claimant was clearly solvent as at 5 August 2013.

[iii] E. TERMINATION OF THE CONCESSION AGREEMENT BY THE CLAIMANT AS RESULT OF THE RESPONDENT'S REPUDIATORY BREACHES

39. On 20 December 2013, the Claimant issued a notice of termination of the Concession Agreement to the Respondent pursuant to Clause 12.2 of the Concession Agreement. Further or alternatively, by the same notice, the Claimant accepted the Respondent's repudiatory breaches of the Concession Agreement.

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40. As a result of the Respondent's breaches as set out in paragraphs [11] to [34] above, the Claimant has suffered loss and damage, including but not limited to, actual costs and expenses and loss of investment incurred by the Claimant, non-payment of outstanding invoices and loss of revenue and/or loss of profit for the remainder of the 20-year Concession Period until 20 September 2032.

Particulars of Actual Losses

a. The Claimant has suffered actual losses of comprising the following:

i. the actual costs and expense and loss of investment that the Claimant incurred to design, install, implement and maintain the MIBCS (including all the costs and expenses incurred in acquiring the information technology system, hardware, software, equipment, database, technical support, manpower, transport, duties and taxes);

ii. the actual costs and expense the Claimant incurred in management, consultation costs and fees for professional services incurred by the Claimant, and all research and development costs relating to the MIBCS; and

iii. the actual costs and expense the Claimant has incurred in capitalising interest and financing costs;

b. The Claimant has suffered loss and damage from the premature termination of the Concession Agreement in the form of loss of revenue and/or loss of profits that the Claimant would have otherwise earned for the remainder of the 20-year Concession Period until 20 September 2032; and

c. Further and/or in the alternative to 40(b) above, pursuant to clause 12.3, the quantum of the Claimant's loss of revenue as assessed by the Claimant for the duration of the Concession Period for now comes up to around US$258,234,764.00. A copy of the certificate issued by the independent firm or auditors pursuant to clause 16.3 of the Concession Agreement is exhibited herein and marked "Annex A".

40. Pursuant to clause 12.3, the quantum of losses as assessed by the Claimant for the duration of the Concession Period for now comes up to around US$258,234,764.00. A copy of the certificate issued by the independent firm or auditors pursuant to clause 16.3 of the Concession Agreement is exhibited herein and marked "Annex A".

41. As a result of the Claimant's wrongful conduct, in breach of its contractual obligations, the Respondent has incurred loss, damage, cost and expense.

42. By reason of the above, the Claimant claims:

a. Damages for delays in implementation of the Concession Agreement to be assessed (pursuant to paragraph 27 above);

b. The sum of US$3,771,308.10 being the total outstanding invoiced amounts, as per paragraph 31(f) above;

c. Damages in the form of actual costs and expenses and loss of investment incurred by the Claimant to be assessed (pursuant to paragraph 40(a) above);

d. Damages in the form of loss of revenue and/or loss of profit for termination of the Concession Agreement to be assessed pursuant to paragraph 40(b) above and/or for the sum of US$258,234,764.00 pursuant to paragraph 40(c) above;

e. Costs; and

f. Such further and other relief as the Tribunal may see fit to award.

[iv] [32]-[42] state as follows:

C. **Damages Issue**

32. To quantify its claim for compensation for the repudiatory breaches and/or termination of the Concession Agreement, the Claimant will be relying on Mr Tam Chee Chong ("TCC")'s valuation report.

33. To be clear, the Claimant is putting forward two alternative premises for the quantification of its damages claim.

34. Alternative A: The Claimant is seeking contractual damages pursuant to Clause 12.3 of the Concession Agreement which entitled the Claimant to claim the following:

(a) "Value of the Completed Works" which in essence is the costs incurred by the Claimant to implement the MIBCS Project (e.g. design, installation and financing costs);
(b) Loss of gross revenue of US$2 per entry and US$2 per exit (i.e. US$4 in aggregate) for each foreign traveller (the "Foreign Traveller Charges") projected for the remainder of the Concession Period and discounted for present value;
(c) Loss of gross revenue of US$15 per work visa (the "Foreign Worker Charges") projected to be been issued / renewed / extended for the remainder of the Concession Period and discounted for present value.

35. The quantum of damages the Claimant is seeking on this basis using the discounted cash flow ("DCF") method is between US$64,938,053 and US$74,074,855, as explained at paragraphs 5.1 – 5.24 of TCC's valuation report.

36. Alternative B: The Claimant is seeking common law damages, being loss of net profits it would have earned through the gross revenues generated through the Foreign Traveller Charges and Foreign Worker Charges referred to above. TCC estimates that the present value of loss of profits for the remainder of the 20-year Concession Period is between US$29,571,944 and US$34,381,332 (see paragraphs 6.1 – 6.18 of TCC's valuation report).

37. In addition to either of the two Alternatives above, the Claimant further claims an aggregate sum of US$3,771,308.10, being the actual Foreign Traveller Charges payable

based on 12 invoices issued to the Respondent for operating the MIBCS between 1 September 2012 and 19 August 2013.

38. The Respondent relies on Mr Leow Quek Siong ("LQS")'s valuation report to assess the Claimant's claim for damages.

39. LQS's Report has not assessed the value of the Claimant's claim for contractual damages (i.e. "Alternative A"). Neither has he opined on the Claimant's claim based on unpaid invoices. LQS's Report mainly seeks to assess the Claimant's claim for common law damages based on the net present value of the Claimant's loss of profits (i.e. "Alternative B"). In this regard, LQS's methodology and assumptions quite closely resemble TCC's approach.

40. Like TCC, LQS estimated the present value of the Claimant's loss of profits based on the DCF method. He has estimated the quantum of the Claimant's loss of profits to be US$23,208,089 (see page 102 of LQS's valuation report).

41. The main difference is that LQS has calculated the Foreign Traveller Charges based on US$2 per foreign traveller entering and departing the Maldives, whereas TCC's calculations proceeded on the basis of US$2 per entry and US$2 per exit for every foreign traveller visiting the Maldives.

42. Therefore, a key issue for the Tribunal's determination is the proper interpretation of Clause 5.2.1 of the Concession Agreement, having regard to all the surrounding facts and circumstances to determine whether the Foreign Traveller Charges ought to be calculated on a US$2 or US$4 basis.

[v] [145]-[149] read as follows:

145. Clause 12.3 of the CA provides that in the event of termination by the Claimant pursuant to Clause 12.2, the Respondent is to pay the Claimant:-

a. The "Value of Completed Works" which is defined at Clause 14;

b. A compensation sum equivalent to the total charges multiplied by the projected number of passengers entering into or departing from Maldives using non-Maldivian passports and foreign worker or visa cards that would have been issued / renewed / extended by the Respondent for the remainder of the Concession Period. In short, this amounts to the Claimant's loss of revenue over the Concession Period.

146. This is the equivalent of a liquidated damages clause, by which the parties have agreed on the formula to be used in calculating the Claimant's compensation in the event of the Respondent's default. Insofar as this provision for contractual damages represents the bargain freely entered into by a private corporate entity and a sovereign nation, we submit that the Tribunal is entitled to award contractual damages for termination pursuant to Clause 12.3.

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147. In the alternative, the Claimant is entitled to damages in common law. As stated by the Court of Appeal in Gunac Enterprises (Pte) Ltd v Utraco Pte Ltd [1994] 3 SLR(R) 889 at [11], where a contract has been breached, "As far as possible, the innocent party is to be put in as good a position as if the contract had been performed."

148. In the present case, had the CA been fully performed, the Claimant would have been paid for the invoices it rendered between September 2012 and September 2013, and would have also expected to earn the profits from operating the MIBCS project over the remainder of the 20-year concession period.

149. As the financial experts of both parties have admirably reached a consensus on best estimates of loss of profits suffered by the Claimant on the alternative scenarios of charging $2 or $4 per non-Maldivian passenger, only 2 questions remain for this Tribunal's determination on the assessment of damages:-

a. First, whether under the CA, the Claimant was entitled to charge every non-Maldivian passenger (i) only $2 per passenger; or (ii) $2 upon arrival and $2 upon departure (i.e., $4 per passenger); and

b. Second, whether the Claimant should be awarded damages under Clause 12.3 of the CA, or common law damages.

[vi] [150]-[200] of the Claimant's Closing Statements read:

> **A. Under the [CA] it was agreed that every non-Maldivian passenger would be charged a fee of $2 upon arrival and $2 upon departure**

150 The first issue on assessment of damages turns on how Clause 5.2.1 of the CA is to be interpreted.

151 Clause 5.2.1 of the CA states:

> *"The Company is authorised by the Government to impose upon and collect levy or fee from:*
>
> > *Each and every passenger using non-Maldivian passport arriving into and departing from the Republic of Maldives, a fee of USD2.00 (UNITED STATES DOLLAR TWO ONLY) per passenger via a levy or fee imposed or to be imposed by the Government to be charged on such a passenger."*

152 The Claimant has consistently taken the position that on the correct interpretation of this Clause, the Claimant was entitled to impose a fee of $2 on every arriving non-Maldivian passenger, and $2 on every departing non-Maldivian passenger.

153 In contrast, the Respondent began to contend for the first time and only very recently since 7 September 2015 (*almost 4 years after the CA was entered into*) that this Clause only entitled the Claimant to impose a fee of only $2 on every non-Maldivian passenger arriving into the Maldives.

154` In interpreting Clause 5.2.1, the Tribunal should have regard to the following 3 matters:-

f. First, Singapore law, the applicable law of the CA, has adopted a contextual approach to contractual interpretation. Under it, interpretation is the ascertainment of the meaning which expressions in a document would convey to a reasonable person **having all the background knowledge which would reasonably have been available to the parties at the time of the contract**: see *Sembcorp Marine Ltd v PPL Holdings & Anor* [2013] SGCA 43 at [33].

g. Second, the rules of evidence which govern admissibility of extrinsic evidence are separate and distinct from the rules of contractual interpretation: see *Sembcorp Marine* at [40]. The Singapore Evidence Act does not apply in this Tribunal, and this Tribunal can determine relevance, materiality and admissibility of all evidence, including evidence not admissible in law: see Section 2(1), Evidence Act; Rule 16.2, SIAC Rules. Therefore, **this Tribunal may** adopt a robust approach to contractual interpretation, and **consider both pre-contractual negotiations and the parties' subsequent conduct in order to aid the contractual interpretation.** This approach has been adopted in New Zealand, several civil law jurisdictions, and in transnational conventions dealing with contractual interpretation: see *Sembcorp Marine Ltd* at [36] to [37].

h. Third, **the CA contains an entire agreement clause** (Clause 32) which clearly states that the CA *"constitutes the entire agreement between the Parties"*, *"supersedes any previous agreement or understanding between the Parties"* and that the Claimant and the Respondent had not *"relied on any representation or warranty save as expressly set out herein or in any document expressly referred to herein."* In other words, regardless of what was in the bid documents, the entire agreement of the parties is encapsulated in the CA. However, the entire agreement clause does not prevent this Tribunal from looking at extrinsic evidence to ascertain the meaning of what was stated in the CA: *Lee Chee Wei v Tan Hor Peow Victor & Anor* [2007] SGCA 22.

155 In this case, the evidence of the parties' pre-contractual negotiations, the terms of the contract themselves, and the parties' subsequent conduct are all consistent with only one interpretation of Clause 5.2.1: the Claimant was entitled to charge $2 for every arriving non-Maldivian passenger, and $2 for every departing non-Maldivian passenger.

156 In this section, we show that:-

a The parties may have originally contemplated that the Claimant would charge every passenger, regardless of nationality, a $2 fee. However, the bargain struck in the CA was that the Claimant would charge only non-Maldivian passengers, but that they would be charged $2 upon arrival and $2 upon departure. This becomes clear, when the relevant context of a previous draft of the CA is examined side-by-side with the CA that was eventually signed.

b The evidence shows that the Respondent's AGO, MOFT, DOIE as well as the ACC all understood the CA to mean that the Claimant was entitled to charge every non-Maldivian passenger $2 upon arrival and $2 upon departure. They shared this understanding – consistently and universally - even before the Claimant rendered its first invoice.

c The parties' subsequent conduct also evidences their common understanding that the Claimant was entitled to charge every non-Maldivian passenger $2 upon arrival and $2 upon departure. In particular, the Respondent's failure to challenge the Claimant's invoices, which calculated the amount due to the Claimant on the basis that $2 was to be collected from every arriving *and* every departing passenger, is very revealing and instructive.

d The Respondent's sole factual witness, Mr Naseer, admitted at the hearing that it was the Respondent's financial expert, Mr Leow, who had raised the issue of whether the Claimant was entitled to charge $2 or $4 per passenger, and that following that, the Respondent decided to make an argument of it in these proceedings.

i. The bargain struck in the CA was that the Claimant would be entitled to charge non-Maldivian passengers $2 upon arrival and $2 upon departure (i.e., a total of $4 per non-Maldivian passenger)

157 It is clear on the evidence that between 29 September 2010, when the Claimant was awarded the MIBCS project, and 17 October 2010, when the CA was signed, there were extensive negotiations between the Claimant and the Respondent, and that the DOIE, MOFT and AGO participated in these negotiations on behalf of the Respondent.

158 Abdullah Muiz, the Solicitor General of Maldives at that time (who was second only to Attorney General), said in his statement to the ACC that he attended and gave legal opinions at 2 meetings which were held to review the draft agreement: 3 RBD 2567.

159 Ibrahim Afeef, the Deputy Director General of the Legal Affairs Department of the DOIE at that time, recalled in his statement to the ACC that the MOFT had sent a draft agreement to DOIE. Thereafter he and Abdullah Waheed went to see Abdullah Muiz with the draft. One of the comments made by Abdullah Muiz on the draft was that the arbitration should be held in Singapore, rather than in Malaysia or the Maldives: 3 RBD 2592 at 2593 to 2594.

160 A copy of the draft with which Ibrahim Afeef went to see Abdullah Muiz can be seen at 4 CHB 2360. On the first page there is a handwritten annotation which indicated that Ibrahim Afeef and Abdullah Waheed had visited someone with this draft and discussed it. In this draft, it had been proposed that any dispute be resolved by arbitration in Malaysia: 4 CHB 2391. As we know, the eventual CA that was signed provided that any dispute be resolved by arbitration in Singapore. This indicates that the document at 4 CHB 2360 was an early draft of the CA which was amended after the AGO's opinion on it has been sought, and parties had negotiated its terms further.

161 A comparison of the language used in the draft compared with the language used eventually in the CA puts it beyond doubt that the parties, in the CA, intended that the Claimant would be entitled to charge every non-Maldivian passenger $2 upon arrival and $2 upon departure.

162 A comparison of the terms of the draft CA and the final CA, together with the Claimant's submission on each comparison, is set out in the table below.

Cl.	Draft CA: 4 CHB 2360	Final CA: 1 CHB 22	Claimant's submission
1.1	***Definitions*** ... *Charges* *USD 2.00 (UNITED STATES DOLLAR TWO) for <u>every passenger arrival into Maldives</u>...*	***Definitions*** ... *Charges* *USD 2.00 (UNITED STATED DOLLAR TWO ONLY) for <u>every passenger using a non-Maldivian passport arriving into and departing from</u> the Republic of Maldives...*	Whereas the draft CA provided that Charges applied to *every arriving passenger*, it was finally agreed in the CA that the Charges would only apply to *passengers using non-Maldivian passports*, but both upon arrival *and departure*.
2.1	*... the Company is hereby allowed to charge, demand, collect and retain the Charges:-* *(a) from <u>each passenger arriving into</u> the Republic of Maldives...*	*... the Company is hereby allowed to charge, demand, collect and retain the Charges:-* *(a) from <u>each passenger using a non-Maldivian passport</u> arriving into <u>and departing from</u> the Republic of Maldives...*	Ditto.

5.0	*5.0 PAYMENT PROCEDURE* ***5.1 Provision of Statement by the Government*** *5.1.1 The Government shall, on or before the seventh (7th) day of every month, provide a statement / report to the Company specifying the total number of passenger arrivals..."*	*5.0 PAYMENT PROCEDURE* ***5.1 Provision of Statement by the Government*** *5.1.1 The Government shall, on or before the seventh (7th) day of every month, provide a statement / report to the Company specifying the total number of passenger arriving into and departing from the Government of Maldives.* ...	First, Clause 5.1.1 of the final CA, without comparison to the draft CA, shows that the parties intentions, objectively ascertained, was for the Claimant to be paid for both arriving and departing passengers. There would be no need for the GoM to provide statistics of *departing passengers* as part of the payment procedure, unless the Claimant was to be paid for departing passengers as well as arriving passengers. Second, Clause 5.1.1 in the final CA compared with Clause 5.1.1. in the draft CA shows that the payment procedure proposed in each of the draft CA and the final CA were each consistent with the understanding of what the Charges were to mean, under each of them. In the draft CA, the GoM was only obliged to state the total number of passenger arrivals in its report, as the Claimant was to be paid for passenger arrivals only. In the final CA, the GoM was obliged to state the total number of passenger arrivals and *departures*, as the Claimant was to be paid for both arrivals and departures.
5.2	*5.2 Charging Mechanism* *5.2.1 ... the Company is authorised to impose upon and collect from:* *i. Each and every passenger arriving into the Republic of Maldives, a fee of USD2.00 (UNITED STATES DOLLAR TWO ONLY) per passenger via a Security Tax imposed by the Government to be charged on every passenger entering the Republic of Maldives.* ...	*5.2 Charging Mechanism* *5.2.1 The Company is authorised by the Government to impose upon and collect levy or fee from:* *i. Each and every passenger using non-Maldivian passport arriving into and departing from the Republic of Maldives, a fee of USD2.00 (UNITED STATES DOLLAR TWO ONLY) per passenger via a levy or fee imposed or to be imposed by the Government to be charged on such passenger.* ...	Same comment as for Clause 1.1 above.

5.2.3	No equivalent in draft CA	*The MIBCS is considered to be used by the Government upon: (A) the processing by the Government of passengers entering into <u>or</u> departing from the Maldives using MIBCS...*	The final CA made it clear that the processing of passengers whether when they were entering into <u>or</u> departing from the Maldives, was a use of the MIBCS which entitled it to charge a fee.
5.2.4 / 5.2.7	*5.2.4 All invoices for the Charges shall be calculated in accordance with the price mechanisms set out in Appendix B...*	*5.2.7 All invoices for the Charges shall be calculated in accordance with the price mechanisms set out in Appendix B...*	These clauses are identical in both the draft CA and final CA. Both provided that the invoices were to be calculated in accordance with the mechanism set out in Appendix B. As we see below, Appendix B in the final CA made it clear that the GoM was to be invoiced for both arriving and departing passengers.
5.3.1	*The Company shall submit to the Government on or before the fourteenth (14th) day of each month, an invoice in respect of the aggregate Fees and Costs payable as specified in Appendix B by the Government ta the Company for the preceding month.*	*The Company shall submit to the Government on or before the fourteenth (14th) day of each month, an invoice in respect of the aggregate Fees and Costs payable as specified in Appendix B by the Government to the Company for the preceding month.*	
12.3	***Consequences of Termination*** *... In addition to the Value of Works, the Government agrees to pay to the Company a compensation sum equivalent to the total Charges multiplied by the projected number of <u>passenger arrivals</u> and foreign worker or visa cards issued for the remainder of the Concession Period in accordance with Clause 16."*	***Consequences of Termination*** *... In addition to the Value of Works, the Government agrees to pay to the Company a compensation sum equivalent to the total Charges multiplied by the projected number of <u>passengers entering into or departing from Maldives using non-Maldivian passports</u> and foreign worker or visa cards that would have been issued / renewed / extended by the Government for the remainder of the Concession Period in occordance with Clause 16."*	In calculating the damages to be paid to the Claimant in the event of termination, the final CA made it clear that the Charges were to be multiplied by the number of both arrivals and departures.

Appendix B 1.1	*1. Charges* *Payment of the Charges throughout the Concession Period shall be as follows:* *1.1 The Government shall pay the Company the on the following schedule:-* *1.1.1 For each and every passenger arriving into the Republic of Maldives, the Government agrees to pay a fee of USD2.00 (UNITES STATES DOLLAR TWO) per passenger via a Security Tax imposed by the Government to be charged on every passenger entering the Republic of Maldives.*	*1. Charges* *Payment of Charges collected throughout the Concession Period shall be as follows:-* *1.1 The Government shall pay the Company on the following schedule:-* *1.1.1 For each and every <u>non-Maldivian passport holder</u> passenger arriving into <u>and departing from</u> the Republic of Maldives, the Government agrees to charge and collect a levy or fee for onward payment to the Company of USD2.00 (UNITED STATES DOLLAR TWO ONLY) per passenger.*	Both the draft Ca and the final CA provided that the invoices were to be calculated in accordance with the mechanism set out in Appendix B. Appendix B of the final CA made it clear that the GoM was to pay the Claimant only for non-Maldivian passport holders, but for both arrivals and departures.
Appendix B 1.2	*Payments will commence upon the supply of the preprinted documents base before personalization...*	*Charges for payments will commence upon the followings* *(a) the processing with MIBCS by the Government of passengers entering into <u>or</u> departing Maldives; or...*	Same comment as for 5.2.3 above.

(All <u>emphases</u> ours)

16 The Claimant's argument is two-fold:-

a. First, that when Clause 5.2.1 of the final CA is considered in the context of the architecture of the final CA, it is clear that the Respondent was to pay the Claimant $2 for upon every non-Maldivian passenger's arrival and $2 upon every non-Maldivian passenger's departure. In this regard, there is remarkable consistency in the contractual language espousing the twin concepts of *non-Maldivian passengers* who are *arriving in and departing from the Maldives* even in the differing contexts in which such language is employed. It would have been unnecessary for the Respondent to provide the Claimant with statistics of both arriving and departing passengers as part of the payment procedure, unless the Claimant was to be paid for both arriving and departing passengers. Clause 12.3 also makes it clear that when calculating damages payable to the Claimant, the charges were to be multiplied by the number of passengers arriving, or departing, as the case may be.

b. Second, when the final CA is compared with the draft CA, it is clear that the basis and mechanism for imposing charges in the final CA was conceptually different from what was originally envisaged. Under the draft CA, <u>all passengers</u>, regardless of nationality, were to be charged <u>once</u> – upon arrival. Under the final CA, <u>only non-Maldivian passengers</u> would be charged, and they would have to pay <u>both ways</u> - upon arrival and departure.

<u>*ii The AGO, MOFT, DOIE, ACC and Parliament understood the CA to mean that the Claimant was entitled to charge every non-Maldivian passenger $2 upon arrival and $2 upon departure*</u>

164 The evidence shows that the various functionaries of the Maldivian government, the ACC, and the Parliament, at all points independently and collectively understood the CA to mean that the Claimant was entitled to charge every non-Maldivian passenger $2 upon arrival and $2 upon departure.

165 On 25 April 2011, some 6 months after the entry into the CA, the DOIE submitted a cabinet paper to the MHA to submit to the Cabinet so that the Cabinet could decide whether to terminate the CA. The Respondent's translation of the cabinet paper can be found at 3 RBD 2271. As some portions were not translated, the Claimant had its own translation done, which can be found at CBD 116.

166 In the cabinet paper, DOIE set out the Claimant's estimated income over a 20-year period using tables. In each table, the DOIE set out :

a the estimated number of foreigners entering the Maldives, and multiplied that by 2 to arrive at the total fees earned from arriving passengers;

b the estimated number of foreigners departing the Maldives, and multiplied that by 2 to arrive at the total fees earned from departing passengers; and

c the estimated number of foreign workers applying for work visa registration and multiplied that by 15 to arrive at the total fees earned from work visas.

167 Based on this, DOIE calculated that over 20 years, the Respondent would receive USD 8,775,000.00 as royalty and that the Claimant would receive USD 166,725,000.00 as income.

168 The cabinet paper shows that the DOIE internally understood that the Claimant was entitled to charge foreign passengers $2 upon arrival and $2 upon departure.

169 It is clear that even Abdullah Shahid, who assumed the role of Controller of the DOIE after the CA was signed and was intent on terminating the CA, after carrying out a careful study of the CA and the circumstances surrounding its signing, understood the CA to mean that the Claimant was entitled to charge every non-Maldivian passenger $2 upon arrival and $2 upon departure.

170 In his statement to the ACC, he accepted that "*every foreigner has to pay $2 upon arrival and $2 upon departure.*" Based on this, he calculated that "*if 1 million foreigners enter the Maldives and they are charged $2 on arrival and $2 on departure (a total of $4) then the cost would be $4 million... it is estimated that 5 million passengers will enter the Maldives by 2025. If we calculate the $4 per head fee for those 5 million passengers, $20 million would be spent as passenger fees every year.*": 3 RBD 2555

171 He took the same position in his letter to the MHA dated 24 May 2011 where he stated "*By looking at the way which was decided to charge in order to cover the investment of the project, a return of more than 4 million dollars is anticipated for the first year itself.*": 3 CHB 1707 at 1708. Mr Naseer admitted that in this letter, Shahid was working on the

premise that the foreigners will be charged both upon arrival and upon departure: Transcripts, Day 4, p. 36 lines 9-23; p. 38, lines 9-16.

172 When Dr Mohamed Ali subsequently took over as Controller of the DOIE, the same view persisted within the DOIE. In the 7th PSC Meeting on 13 February 2013, chaired by Dr Mohamed Ali and attended by other members of the DOIE, the DOIE agreed to *"facilitate the arrangements with IATA for payment processing direct from all foreign passenger per arrival into and per departure from Maldives..."* (Emphasis ours)

173 The overwhelming evidence is that the DOIE, as the department that conceived, consummated and carried out the MIBCS Project, had invariably internalized the revenue model of every foreigner paying $2 upon arrival and upon departure, which directly impacted the DoIE's royalty collection as well. To that extent, it is worth noting had the CA been fully performed by the Respondent, the Claimant's interpretation of the charging mechanism would have *directly benefitted the Respondent as well by literally doubling their royalty revenues.* Thus, it should come as no surprise that the Respondent has only now conjured up an awkward interpretation of the CA charging mechanism, virtually at the doorstep of the hearing – it is a desperate, last-ditch stab at damage control.

174 Evidence of the AGO's understanding is also critical, as it was involved in the early stages, when the CA was still being negotiated. It is clear that the AGO and the other parties autonomously understood, even at the negotiations stage, that foreigners will be charged $2 upon arrival and upon departure.

175 Abdullah Muiz, the Solicitor General from the AGO at that time, was present at a meeting between MOFT, the Claimant and Owhere the CA was discussed. His recollection was that at the meeting, the parties *"discussed article 5.2.1 of the agreement which states that every foreigner that arrives in Maldives will be charged $2 (two U.S. dollars), every foreigner that departs Maldives will be charged $2 (two U.S. dollars) and every visa card issues will be charged $15 (fifteen U.S. dollars)..."* : see 3 RBD 2567 at 2568. (Emphasis ours)

176 Abdullah Muiz's unallied evidence is illuminating on two fronts: it reveals that Clause 5.2.1 was actively discussed, and that parties clearly understood it to mean that foreigners would be charged twice for both arrivals and departures.

177 We would invite the Tribunal to ascribe special weight to Abdullah Muiz's unvarnished and non-aligned evidence for the following reasons:

a He was an official of the Respondent, who is totally independent of the Claimant.

b He was the second highest legal officer of the Respondent who was specifically brought in to give legal advice to the Respondent during the contract negotiations with the Claimant.

c His evidence was recorded by the ACC for its own investigations at a time when this particular issue had not yet surfaced.

178 Abdullah Muiz's evidence is corroborated by the recommendations made by the AGO recorded in the meeting minutes dated 13 October 2010. No recommendation was made in relation to Clause 5.2.1: see 3 RBD 2116.

179 The MOFT also autonomously understood Clause 5.2.1 to mean that the Claimant was entitled to charge every non-Maldivian passenger $2 upon arrival and $2 upon departure.

180 This is clear from the Samee Ageel's statement to the ACC recorded on 22 March 2011, some 5 months after the CA was signed. Samee Ageel was the Director General of the MOFT. In his recollection, *"The agreement states that every foreigner coming to or leaving Maldives must pay a fee of 2 US dollars and every visa card issued will be charged 15 US dollars."* (Emphasis ours): see 3 RBD 2514 at 2517.

181 This is consistent with the understanding put forward by the Claimant, which was clearly also the understanding of the DOIE and the AGO. Again, we would emphasize the probative value of Samee Ageel's evidence, which was recorded by the ACC in the course of their investigations. Given that the true construction of Clause 5.2.1 was a non-issue at that juncture, one can safely conclude that Samee Ageel's evidence on this matter was impartial and unadulterated.

182 When the various strands of evidence independently gathered by the ACC from high-level officials of the DOIE, AGO, and the MOFT are threaded together, they form a cord of proof of remarkable consistency: every significant person in those pre-contractual negotiations individually understood Clause 5.2.1 to mean that the Claimant will be entitled to charge foreigners $2 upon departure and $2 upon arrival.

183 It is therefore not surprising that following the conclusion of its investigations, the ACC similarly concluded that the Claimant was entitled under the CA to charge $2 from every foreigner upon arrival and upon departure. Indeed, this finding was the pivotal premise for the ACC's recommendation to the Prosecutor-General that Illyas Hussain be prosecuted for purportedly agreeing to allow the Claimant to charge a higher rate in the final CA even though the Claimant had initially proposed in their bid document to charge a fee of $2 for every arriving passenger: see 1 RBD 150 at 5.9.4.2, 1 RBD 184 at 6.69, and 1 RBD 191 at 8.4.

184 Not surprisingly, the Prosecutor-General declined to charge Illyas Hussain for this: Volume E, Respondent's Bundle of Maldivian Law Authorities, p. 281. The Prosecutor-General's rejection of the ACC recommendation to prosecute Illyas is quite clearly justified given the fact that the final terms of the CA had multi-department approval such that Illyas could not be said on the evidence to have single-handedly controlled this outcome. Nothing more needs to be said about the ACC's rejected recommendation.

185 What remains significant, however, is that following its comprehensive investigations, the ACC had conclusively found that the Claimant was entitled under the CA to charge foreigners $2 upon arrival and $2 upon departure. The irony is that the Respondent, despite placing great store on the various "findings" contained in the ACC Report, has now placed itself firmly on a collision course with the ACC's finding of fact on the proper interpretation of Clause 5.2.1.

186 There is *yet more evidence* undermining the Respondent's position. The Finance Committee (a standing committee of the Parliament) in its Parliamentary report dated 20 December 2012 (4 CHB 2412), noted that both the ACC and the DOIE had taken the view that every foreigner was to be charged $2 upon arrival and $2 upon departure:-

> *"4.1 Summary of submissions made by the Anti-Corruption Commission... <u>The agreement states that Nexbis would claim a fee of $2</u> as tax and $15 for every visa card issued <u>from every tourist entering and leaving the Maldives.</u> although the bid proposed by Nexbis stated that they would claim a fee of $2 from every tourist passenger. Therefore it is noted that Nexbis doubled the amount in contravention to what they proposed in the bid document."*
>
> ...
>
> *"4.2 Summary of information received from DOIE: <u>It was the tender evaluation board who decided to take $2 tax from foreign passengers arriving into and departing from Maldives,</u> and $15 for visa card based on the proposal submitted by Nexbis..."*
> (Emphasis ours)

<u>*iii The parties' subsequent conduct is consistent with the understanding that the Claimant was entitled to charge non-Maldivian passengers $2 upon arrival and $2 upon departure*</u>

187 We turn now to deal with the contractual parties' conduct in the performance of the CA. From September 2012 to September 2013, the Claimant rendered invoices setting out the amounts payable to it for the processing of foreigners upon arrival and upon departure: 4 CHB 2719 to 2747.

188 The invoices complied with Annex B of the CA as required under Clause 5.3.1 of the CA.

The invoices set out:

a the total number of non-Maldivian passengers arriving into the Republic of Maldives for the preceding month, and multiplied that by 2 to arrive at the amount of fees to be charged of arriving foreigners;

b the total number of non-Maldivian passengers departing from the Republic of Maldives for the preceding month, and multiplied that by 2 to arrive at the amount of fees to be charged of departing foreigners;

c the amount of royalty payable to the Respondent; and

d the amount payable to the Claimant after setting off the royalties payable to the Respondent from the total fees.

190 For a year, month after month, the Respondent received the invoices and acknowledged them without any protest.

191 The invoices were also presented at the 6th, 7th and 8th PSC Meetings between 19 December 2012 and 23 April 2013. As Mr Naseer admitted, the invoices were not challenged at the PSC Meeting: transcripts, Day 4, p. 36 line 13 to p. 97 line 19. On the contrary, at the 7th PSC Meeting, the DOIE unequivocally confirmed that it would work with the IATA to collect the fees from arriving *and* departing foreigners (see [0] above).

192 Some of the invoices were also sent to the Respondent's then solicitors Advocatus Law LLP: 4 CHB 2641. Neither the Respondent nor its solicitors took any issue with the invoices at that stage.

iv The Respondent's current contention that the Claimant was only entitled to charge $2 for every foreign passenger is disingenuous

193 The first time the Respondent took the position that the invoices were wrongly calculated on the pretext that the Claimant was only entitled to charge $2 per foreign passenger was on **7 September 2015**, *less than a month before the arbitral hearing*. For context, this was *5 years after the CA was entered into*, and some *3 years from the date of the first of the invoices*.

194 It was only on 30 September 2015, *mere days before the arbitration hearing*, that the Respondent amended its pleaded case to assert that *"it did not acknowledge and accept the invoiced sums"*: BP, Tab 10, [68.5].

195 By Mr Naseer's 3rd witness statement (which was supposed to set out the Respondent's rebuttal evidence) filed on 7 September 2015, the Respondent claimed for the first time that "*the sums which are the invoices set out at paragraph 214 of the Witness Statement of Chua Yu Ye are incorrect as Nexbis had invoiced DOIE for the sum of USD for each passenger arriving and another USD$2 for each passenger departing, i.e., a total of USD$4 per passenger... Nexbis' bid had been submitted on the basis that the charge of USD$2 was meant to cover both the arrival and departure of each passenger... DOIE is of the view that Nexbis had double charged in the invoices*" (at [20], [21], [28])

196 For reasons which we will explain, it is significant that Mr Naseer's witness statement was filed on the same day as Mr Leow's, the Respondent's financial expert. In his expert report at [6.19], Mr Leow reproduced Clause 5.2.1 and stated *"it appears that the passenger fee should be US$2 per passenger instead of US$2 upon arrival and a further US$2 upon departure, which will amount to a US$4 per passenger."*

197 As it turns out, it was Mr Leow, a Singapore accountant who was supposed to be giving expert opinion principally on the quantum of damages, who had introduced the idea that the CA should be read as a $2 fee per foreign passenger instead of a $4 fee per foreign passenger. Notably, Mr Leow had absolutely no personal knowledge of what had transpired in the pre-contractual negotiations, execution and performance of the CA and was seeking merely to offer a desktop interpretation of the CA that could potentially minimize his client's liability. To the extent that Mr Leow's opinion was an incursion into the realm of contractual interpretation, it is wholly irrelevant.

198 Nevertheless, the Respondent disingenuously seized upon that idea and proceeded to contrive "evidence" on this issue through Mr Nasser's witness statement. The fact that the

Respondent only raised this argument and led evidence on it for the very first time in Mr Naseer's *rebuttal* evidence betrays the lie in the Respondent's case and exposes the fact that this is and was nothing more than a "lawyer's argument" (albeit raised by an accountant). Given the colossal consequences for the parties that this argument implicates, one would have expected this point to be a cornerstone of the Respondent's case from the very beginning – if it were true. The fact that the Respondent only amended their pleadings on 30 September 2015 to reflect this position amply demonstrates that this argument is nothing but an afterthought to exploit any arguable ambiguity (which is denied) in the language of the CA.

199 Most damningly, Mr Naseer admitted under cross-examination that **the only reason the Respondent had raised this argument is because the financial expert had raised this as a potential issue and the Respondent decided to make an argument of it**: Transcripts, Day 4, p. 134-136.

200 The evidence is conclusive. Under Clause 5.2.1, the Claimant was entitled to charge every foreigner $2 upon arrival and $2 upon departure. This was the consistent understanding of the parties, the parties acted upon this understanding, and it is the only interpretation that makes sense against the relevant background. The Respondent's last-minute attempt to claim otherwise is disingenuous, and makes no sense in light of all the evidence.

[vii] (ii) Preliminary Issue (2) – Double claiming

453. Clause 12.3 of the Concession Agreement (as set out above) allows the Claimant to claim not only its wasted expenditure (the Value of Completed Works), but also loss of revenue. This is a prime example of claiming double compensation.

454. Chitty on Contract 32nd Ed states (at (page 1816, [26-029]): "Claims for both profit and reliance loss. Both expectation and (subject to the claimant's expectation) reliance interests are thus protected by the law on damages. May the claimant recover both, so long as he is not compensated twice for the same loss and is not put into a better position than if the contract had been performed? In principle, the claimant should be entitled to claim damages both for his wasted expenditure incurred up to the date of his terminating the contract and also for the net loss of profit which he would have made but for the breach. There can be no valid objection to this, provided the calculations show that there is no overlapping in the claimant's recovery, viz his net loss of profits is calculated by deducting from his expected gross return both the cost of his performance and reliance expenditure to the date of termination and the cost of the further expenditure which he would have incurred after that date if he had completed his performance."

455. Therefore, quite clearly, under Common Law, the Claimant is obviously not entitled to claim his reliance expenditure (Value of Completed Works) and loss of revenue according to clause 12.3. This ties in with the issue on penalty clauses and whether the amount payable is a genuine pre-estimate of loss.

Main Issue for Alternative A: Penalty Clause

456. Chitty on Contract 32nd Ed states (at page. 1798, [26-001]) "subject to a number of controls, (e.g. the law on penalties) the parties to a contract may themselves specify in their contract the remedy available to the innocent party following the other's breach".

457 For damages fixed by parties, Chitty on Contract 32nd Ed states (at pg 1912, [26-178]):

> "Where the parties to a contract agree that, in the event of a breach, the contract-breaker shall pay to the other a specified sum of money, the sum fixed may be classified by the courts either as a penalty (which is irrecoverable) or as liquidated damages (which are recoverable)." The test is whether the clause is a "genuine pre-estimate of loss" as opposed to being in the nature of a threat fixed "in terrorem" against the other party.

458. It is trite that damages are normally awarded to place the innocent party, as far as money can, in the position it would have been if the contract had been performed. In cases where a contract is wrongfully terminated, the normal measure of damages is loss of profit.

459. Clearly, under Clause 12.3, the Claimant would be obtaining way more than its net loss of profit.

[viii] [106]-[188] of the Respondent's Reply Submissions state:

A. The issue of whether the Claimant was entitled to charge \$2 or \$4 in total for a foreign passenger was not something that was introduced by the Respondent's Financial Expert

106 This sub-point pertains to a minor issue, but since the Claimant has claimed that the Respondent was ignorant of the \$2 / \$4 issue and that the idea originated from the Respondent's Financial Expert, it is convenient to address it first.

107 The grounds for the Claimant's assertion is based on the coincidence that the Respondent's Financial Expert's witness statement was filed on the same date as the Respondent's Factual Witness' 3rd witness statement which allegedly raised the issue for the first time. This is a rather incredulous conclusion to make based on the most tenuous of links. How does the same filing date indicate that the idea originated from the Respondent's Financial Expert?

108 To back up their theory, the Claimant's solicitors then forced the hapless Mr Naseer, who had never met the Respondent's Financial Expert, let alone was aware of or privy to any discussion with the said expert, to admit to their theory.

109 Once again, the Claimant's wild theory is incorrect. The Respondent's Financial Expert had stated at [2.1] of his 1st Witness Statement that his "*scope of work is to provide my opinions to the questions posed by Aldgate Chambers LLC. A list of the questions is appended as LQS-2.*"

110 As can be seen from the list of questions at "LQS-2", **[page 9 of the Claimant's Financial Expert's 1st Witness Statement]**, the Respondent's solicitors had set out at [3.4] of the 'List of Questions for the Financial Expert Witness':

> "***The total fee per foreign passenger who arrives and departs Maldives is US $2***... *Please calculate the Claimant's loss for the [following] period[s]...*"
> (Emphasis in bold added)

111 The Respondent's Financial Expert did not come up with the idea that the total fee per foreign passenger was US $2.

112 It is also incorrect to suggest that the Respondent had not raised the issue before. The amount of damages that the Claimant is seeking in this arbitration has long been disputed. In its first Statement of Defence and Counterclaim filed on 16 July 2014, the Respondent has pleaded that:

> 112.1 "*[t]he Respondent disputes the invoices produced by the Claimant and puts the Claimant to strict proof regarding such sums*" **[39.1] RD&C.**
>
> 112.2 "*Further and / or in the alternative, the certificate issued by the "independent firm of auditors appointed out [sic] by the Company" should be set aside for the following reasons... [39.2.2] The certificate is erroneous...*" **[39.2] RD&C.**

113 It must be highlighted that at that point of time, the Claimant had not sought common law damages, but was merely relying on the independent auditor's certificate to claim its purported loss of revenue (the certificate was abandoned at the hearing). The Claimant only amended its Statement of Claim to include an alternative plea for common law damages on 20 August 2015.

B. The Law on Contractual Interpretation

114 In the recent Singapore Court of Appeal case concerning contractual interpretation (***Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd*** [2015] 5 SLR 1195 ("***Y.E.S. F&B***") **[3RBA - TAB 1]**), the Court restated the applicable principles:

> 114.1 When faced with rival meanings of certain words and phrases, a nuanced consideration of both the text as well as the context of the contract in question is crucial - [30].
>
> 114.2 "*the context cannot be utilised as an excuse by the court concerned to rewrite the terms of the contract according to its (subjective) view of what it thinks the result ought to be in the case at hand. To this end, the court must always base its decision on objective evidence... Put simply, the court must ascertain, based on all the relevant objective evidence, the intention of the parties at the time they entered into the contract*" - [32].
>
> 114.3 "*In this regard, the court should ordinarily start from the working position that the parties did not intend that the term(s) concerned were to produce an absurd result. However, this is only a starting point – and no more*" - [32].

114.4 "*although the relevant context is also important, the text ought always to be the first port of call for the court*" - [32] However, "*on the opposite end of the spectrum, the text concerned might itself be ambiguous (ie, without even considering the relevant context). In such a situation, it is clear that the relevant context will generally be of the first importance*".

114.5 "*the court is always to pay close attention to both the text and context in every case – noting that both interact with each other*". - [35]

114.6 "*the role of context ... relates only to the need to place the court in the position of the party which drafted the instrument and not the drafter's subjective intention as such*".

114.7 The guidance in ***Zurich Insurance*** **[3RBA – Tab2]** on what extrinsic evidence is admissible in aid of contractual interpretation as well as the way in which the task of interpretation is to be carried out is both comprehensive and nuanced - [39]. The Court quoted, *inter alia*, the following paragraph from *Zurich Insurance*: "*The extrinsic evidence in question is admissible so long as it is relevant, reasonably available to all the contracting parties and relates to a clear or obvious context... However, the principle of objectively ascertaining contractual intention(s) remains paramount. Thus, the extrinsic evidence must always go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon ...there should be no absolute or rigid prohibition against evidence of previous negotiations or subsequent conduct, although, in the normal case, such evidence is likely to be inadmissible for non-compliance with the requirements... the relevance of subsequent conduct remains a controversial and evolving topic that will require more extensive scrutiny by this court at a more appropriate juncture. Declarations of subjective intent remain inadmissible except for the purpose of giving meaning to terms which have been determined to be latently ambiguous.*"

114.8 Finally, at [48] & [49], the Court cited with approval Lord Clarke's statement in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 that "***[i]f there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other***".
(Emphasis added.)

C. The Relevant Text

115 To recap, the main clause at the centre of this issue is clause 5.2.1:
"*The Company is authorised by the Government to impose upon and collect levy or fee from: i. Each and every passenger using non-Maldivian passport arriving into and departing from the Republic of Maldives, a fee of USD2.00 (UNITED STATES DOLLAR TWO ONLY) per passenger via a levy or fee imposed or to be imposed by the Government to be charged on such passenger.*"

116 The key phrase is "*arriving into and departing from*". It is the Respondent's position that the phrase should be read conjunctively, i.e. every foreign passenger arriving into and departing from Maldives would pay a total of US $2. The addition of the phrase "departing

from" would prevent the Claimant from claiming in future that it was entitled to claim an additional $2 upon departure.

117 The Claimant's argument is that it should be read disjunctively. However, if it was meant to be read disjunctively, shouldn't the term "or" be used instead? I.e. each and every foreign passenger "arriving into or departing from".

118 In relation to paragraph 162 of the Claimant's Closing Submissions, if the phrase "*entering into and departing from*" is to be taken as imposing a fee on both arriving and departing passengers, then logically, Clause 12.3 of the Concession Agreement (the liquidated damages/penalty clause) would state that the Respondent would pay the Claimant, upon termination, a compensation sum equivalent to the total Charges multiplied by the projected number of passengers entering into **and** departing from Maldives.

119 Instead, Clause 12.3 states that the compensation payable is the total Charges multiplied by the projected number of passengers entering into **or** departing from the Maldives. This clearly signifies that only one charge is payable.

> 119.1 The structure used in Clause 12.3 for the arriving or departing passengers is similar to the next line regarding foreign workers or visa cards - the charges would be multiplied by the number of foreign workers **or** visa cards. According to Clause 5.2.1(iii) of the Concession Agreement, if the Government did not implement visa cards, it would have to pay based on the number of foreign workers in the country. Hence, the use of the term 'or' in Clause 12.3.
>
> 119.2 Therefore, Clause 12.3 supports the Respondent's position that Charges are only payable once, either upon arrival or departure.

120 Since the Claimant and the Respondent have taken different interpretations of the meaning of Clause 5.2.1 of the Concession Agreement, we proceed to consider the context in which the Concession Agreement was entered into. The Claimant has relied on what it billed as "extensive negotiations" between the Claimant and the Respondent before the Concession Agreement was signed (see paragraph 157 of the Claimant's Closing Submissions). While the Concession Agreement has an entire agreement clause, the extrinsic evidence relating to the context in which the agreement came about and how it was entered into is highly relevant to assist with contractual interpretation. The starting point would be the bidding process which led to the award of the MIBCS project to the Claimant. This is where we will turn our attention to.

D. The Bidding Process

121 The first document we consider for this segment would be the RFP. The RFP stated that the purpose of the MIBCS system was to enhance the border control, maximise services and monitor human trafficking and illegal movement of migrant workers **[1CHB 100]**. The RFP also identified the issues and challenges in the Maldives that required "*immediate attention*" to overcome. They were primarily related to the crime and problems caused by illegal workers/immigrants who were involved in debt bondage, human trafficking, illegal sex trade and wrongful detention, etc. **[1CHB 101]**.

122 In the RFP, the basis for which the bidders should price their bids is clearly set out:

> *"Bidders will indicate in their price bid the total amount of fees to be paid during the period of the BOT, i.e. 20 years. These fees will include all costs related to the BOT project, namely the costs of:*
> *a. Purchase of the equipment as specified in section 7*
> *b. Operation of the Facility*
> *d. Maintenance*
> *e. Costs to cover all aspects of section 6 Employers Requirements*"
> **[1CHB 127]**

123 The intention of allowing the winning bidder to impose charges / taxes was to cover all costs of the project, including operation and maintenance.

124 Furthermore, in the RFP, it is clear that the party with the lowest bid would be awarded the contract.

> *"2.31 Comparison of Bids.*
> *The MoFT shall compare all substantially responsive Bids to determine the **lowest evaluated bid**, in accordance with ITB2.29."* **[1CHB 124]**
>
> *"2.32 Award Criteria*
> *2.32.1 **The MoFT shall award the Contract to the Bidder whose offer has been determined to be the lowest evaluated bid** and is substantially responsive to the Bidding Document..."*
> (Emphasis added.) **[1CHB 125]**

125 All bidders had submitted their bids based on a 'per passenger' basis. There was no concept of charging upon arrival and then again on departure. [See Dibena's bid - 1RBD 650, OSD's/Iris' bid - 1RBD 743, Informatics' bid - 3RBD 1915 and their revised bid at 3RHB 1913]

126 As late as 21 September 2010, Informatics had revised its price bid downwards from US$1 to "*US $0.65 per passenger - **On Arrival Passengers Only***" (Emphasis in bold original) **[See 3RHB 1913]**.

127 The context of how the bid was awarded makes it clear that the Respondent's intention was for incoming tourists to be charged as low a price as possible. This was based on legitimate concerns about the impact of the imposition of taxes on foreign passengers. The Republic of Maldives is dependent on tourist arrivals for its economy and there were concerns that the increase in taxes would cause tourist arrivals to decline.

128 The concern that imposing additional fees on tourists could cause tourist arrivals to decline is well known, and coincidentally, is stated in a news article disclosed in this arbitration [*see Volume G - Bundle of GMR News Articles*, Page 3]. This article was written on 27 June 2010 after the bidders had submitted their bids, but before the Respondent had been awarded the contract. In a report on the Malé International Airport privatisation deal:

> 128.1 The opposition parties were quoted as stating that "*a Majlis amendment is necessary to raise the airport service charge from US$18 to US$25, which the government has promised to GMR*".

128,2 Further, the president of People's Alliance, Abdulla Yameen (the current President of the Republic of Maldives) was quoted in the report as having stated that "***GMR's fuel charges, airport tax and charges for flights landing at the airport could cause tourist arrivals to decline***"

128.3 The consideration how an increase in charges could lead to a decrease in tourist arrivals is important when we subsequently deal with the Claimant's absurd postulation that the Respondent would benefit from the doubling of the charges collected simply because it was entitled to a 5% of the charges that the Claimant collected.

E. The Claimant's draft unsigned financial bid shows that the parties did not contemplate payment of a fee per arrival and per departure.

129 The Claimant has sought to use a "draft" concession agreement in its attempt to explain how its $2 bid morphed into a $4 in total.

130 However, we can use the unsigned financial bid that the Claimant produced in this arbitration to further examine this issue.

Claimant's "draft" financial bid created on 25 July 2015 [3CHB 1233]	**Claimant's actual Financial Bid submitted on 20 May 2010 [2.2CHB 975]**	**Final Concession Agreement [1 CHB 22]**
USD 2 per passenger (per arrival and per departure) See also [3CHB 1229], "*the Proposed Fee seeks to recuperate the costs by charging a fee on each incoming passenger and the work visa for foreign workers*"	USD 2 per passenger See also [2.2 CHB 971], "*the Proposed Fee seeks to recuperate the costs by charging a fee on each incoming passenger and the work visa for foreign workers*"	Clause 5.2.1 *The Company is authorised by the Government to impose upon and collect levy or fee from:* *i. Each and every passenger using non-Maldivian passport arriving into and departing from the Republic of Maldives, a fee of USD2.00 (UNITED STATES DOLLAR TWO ONLY) per passenger via a levy or fee imposed or to be imposed by the Government to be charged on such passenger...*

131 It is clear what was not in the Parties' contemplation during the bidding process. The Parties did not intend to charge passengers **per arrival and per departure.**

132 Furthermore, what is clear is that if the Claimant had intended to charge per arrival and per departure in the actual Concession Agreement, it would have used the same phrase found in its "draft" financial bid – 'per passenger per arrival and per departure'. That phrase is very clear, instead of 'every passenger arriving into and departing from'.

133 It is clear that it was the parties' intentions that the terms of the financial bid would be incorporated in the Concession Agreement. The RFP specified that when submitting their

financial bids, parties had to agree to "*(f) We understand that this bid, together with your written acceptance thereof included in your notification of award, shall constitute a binding contract between us, until a formal contract is prepared and executed*". (See the RFP **[1CHB 155]**, and the incorporation of the term in the Claimant's Financial Bid **[2.2CHB 979]**).

F. The Contract drafting process / "Extensive Negotiations"

(i) There were no "Extensive Negotiations" between the Claimant and the Respondent.

134 The Claimant has claimed, for the very first time, in its Closing Submissions that after "extensive negotiations", a bargain was struck that the Claimant would charge only non-Maldivian passengers, but that they would be charged $2 upon arrival and $2 upon departure. Frankly, this amounts to evidence from the Claimant's solicitors as it was never brought up in evidence before.

135 For the following reasons, it is clear that the Claimant's story in its Closing Submissions about the alleged "extensive negotiations" and how such negotiations led to the Claimant being able to charge foreign passengers a total of $4 is clearly an afterthought:

> 135.1 When confronted with the disparities between the draft financial bid **[3CHB 1233]** that the Claimant Factual Witness introduced as evidence (which stated that the Respondent would charge $2 per passenger per arrival and per departure), and the actual financial bid **[2.2 CHB 257]** (which did not have this phrase), the Claimant's Factual Witness was cornered and could only admit that the bid was for $2 per passenger.
>
> 135.2 The Claimant's Factual Witness did not address the white elephant in the room - how the $2 bid then morphed into the $4 that the Claimant relied upon. He did not mention the "*extensive negotiations*" and neither did his Counsel re-examine him on this.
>
> 135.3 Furthermore, the Claimant's Factual Witness had claimed to have filed his 3rd Witness Statement in response to the "*new factual allegations*" in the Respondent's Factual Witness' 3rd Witness statement, which included the $2 / $4 issue. It is very telling that despite the Respondent's Factual Witness stating in the witness statement that the Claimant's bid "*had been submitted on the basis that the charge of USD$2 was meant to cover both the arrival and departure of each passenger*", the Claimant's Factual Witness never alluded to the alleged subsequent "extensive negotiations" in his 3rd Witness Statement (see paragraphs [55] to [59]).

136 This story is about the extensive negotiations is clearly made up:

> 136.1 The letter of award accepting the Claimant's bid of $2 per arriving passenger was sent on 29 September 2010 **[See 3RBD 2104]**. The Concession Agreement was signed on 17 October 2010. It is illogical that the Claimant's revenue for foreign passengers would be allowed to double within a short period of less than three weeks.

136.2 The "extensive negotiations" were not recorded by either the Claimant or the Respondent's officers.

136.3 This critical increase in charges for foreign passengers is not mentioned by any of the individuals that ACC interviewed. (We note that the Claimant has relied heavily upon certain statements, but ironically chose to criticise the interviewers as a whole.)

(ii) Objectively, there is no justification for the Claimant's claim to be able to charge foreign passengers double after Maldivian passengers were excluded.

137 It is clear from the evidence that the Respondent's officers was concerned that the charges would be considered a tax and would be prohibited under Article 97 of the Constitution (see for example Abdullah Muiz's statement at **[3RBD 2568]**). A common law principle exists – the High Court of Australia has held that where local citizens (who have the right to enter their own country) are charged for immigration clearance without the provision of additional services, this constitutes a tax - ***Air Caledonie International v The Commonwealth*** (1988) 165 CLR 462 **[3RBA – Tab 3]**. It is clearly understandable that subsequent to the award of the MIBCS project, the parties then agreed to exclude local Maldivians from the Charges. The purpose of the MIBCS system was, after all, to target illegal workers and human traffickers. Many countries exempt their local citizens from paying such fees / taxes.

138 There is no logical explanation why the Respondent would allow the Claimant to effectively double its revenue after excluding Maldivian citizens from being charged. As we show below (using 2009 figures), the parties knew that the Claimant had submitted a bid to collect from US$2 from arriving passengers, which amounted to 844,300 passengers in 2009. After subtracting the local Maldivians[viii], there would still be 729,087 foreign passenger arrivals. Why would the Respondent agree to let the Claimant claim US$2 from 729,087 foreign passengers both ways, effectively allowing them to collect 1.727 times the amount in their financial bid?

139 In fact, the effect of charging foreign passengers twice would be even more apparent, given that it was well within the parties' contemplation that tourist arrivals were projected to increase. As the parties' financial experts have calculated, the total projected revenue (charges) that could be collected by the Claimant over the remainder of the 20 years (taking into account the growth in tourism arrivals) would be either US$37,740,652 ($2) or US$58,790,178 ($4). This is a US $21 million difference in charges collected and obviously of great importance - something which that the Claimant states was a result of extensive negotiations in less than 3 weeks (but ironically, given its significance, was not recorded anywhere).

140 As we have set out earlier, the charging of fees was intended to allow the successful bidder to cover its costs of the project. The Claimant has not been able to explain the additional value or services it would provide for an extra US$ 21 million.

141 When applying contextual interpretation, it is submitted that the Tribunal must find that it does not make business common sense to conduct a tender, choose the lowest bidder and then allow the successful bidder to revise his price upwards to receive an additional US

$21 million. The Claimant's entire costs to undertake this project had to be specified under the financial bid and accounted for in the form of the charges on each passenger arrival and visa card issued. Objectively, there is simply no reason to subsequently grant the Claimant the right to earn approximately US$1 million or more each year over a 20 year period without any benefit to the Country.

142 It would have made business sense for the Charges to be based on foreign passenger arrivals only. As we know, the Claimant has been extolling the profitability of the Concession Agreement during the hearing. As the Financial Experts have calculated, the Claimant's profit for the remainder of the concession period based on a total of US$ 2 per foreign passenger is US$ 15.2 million. The projected profit makes it clear that restricting the $2 charge to each foreign passenger would not have caused the Respondent to suffer any losses.

143 At paragraph 173 of the Claimant's Closing Submissions, the Claimant offered a rather enticing argument of why the Respondent would have agreed to allow the Claimant to double the charge imposed on foreign passengers. It claims that the Respondent would have directly benefitted from the Claimant's interpretation of the charging mechanism applying for both arrivals and departures. As mentioned in earlier, this is absurd and far from the truth.

> 143.1 The Government wanted to minimise the tax/charges collected in order not to cause tourist numbers to decline.
>
> 143.2 If the Respondent was concerned about tax revenue, it could have selected the bidder whose relatively high bid combined with the relatively high royalty rate would result in the largest amount of royalty, i.e. Dibena (which bid $10 per passenger and offered a royalty of 3%, amounting to $0.30 of royalty per passenger (one way)) as compared to the Respondent's ($2 x alleged two way x 0.05% royalty, amounting to a total royalty of $0.20 for both ways).
>
> 143.3 It is sad that the Claimant's desire to benefit itself has made it assume that the Respondent would also have functioned in the same way.

144 Insofar as the Claimant is trying to rely on what has been stated in Abdullah Muiz's statement to ACC to draw the conclusion that the amount of $2 was to be charged at the point of arriving and a further $2 was to be charged at the point of departing, it must be borne in mind that Mr Muiz was not involved at the bid process stage and therefore, he would not have known that bid submitted by the Claimant was meant to be $2 in total for both arriving and departing.

> 144.1 Mr Muiz mentioned in his statement that "*in giving legal opinions, the Attorney General's Office would mainly look for Constitutional issues*" **[see 3RBD 2567]**. Mr Muiz was mainly concerned about legal issues. For example, he did not discuss an article allowing the revision of the charges that was, in his opinion, a business decision as opposed to a legal issue. **[See 2568 3RBD line 5]**
>
> 144.2 When discussing Clause 5.2.1, his sole consideration for the charges was whether they constituted a tax that would be in conflict with Article 97 of the Constitution. **[See 2568 3RBD lines 8 - 17]**

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145 Many people who took part in the contract discussions and in particular the 13 October 2010 meeting with the Claimant **[3RBD 2116]** were not even aware of the factual matrix of how the tender had been awarded to the Claimant. A prime example would be Ibrahim Afeef who admitted to ACC that he had "*not even seen the Tender document*" **[3RBD 2595]**.

146 Tying in with the later section on the dangers of using subsequent conduct to interpret a contract, Mr Muiz's statement was given on 24 October 2011 (more than a year after the Concession Agreement was signed on 17 October 2010). Most significantly, the statement was given when the $2 / $4 was a live issue and was being investigated by the ACC (contrary to the Claimant's suggestion at paragraph 177(c) of its Closing Submissions that the issue had not surfaced):

> 146.1 The DOIE had submitted a cabinet paper to the Ministry of Home Affairs on 25 April 2011 **[3CHB 2262]**, seeking an opinion on whether the Concession Agreement should be terminated **[see 3RBD 2271]**. In the paper, the DOIE created a table which indicated that $2 would be collected from the foreigners who entered Maldives and also $2 would be collected from foreigners who would leave Maldives **[see CBD 116 (English) and 3RBD 2265 (Dhivehi)]**.
>
> 146.2 Clearly, there was a chance that Mr Muiz had been influenced by the DOIE's opinion that the foreign passenger charge was $2 both ways when he gave his statement to ACC.
>
> 146.3 This was a live issue was being investigated by the ACC, which issued its report on 27 November 2011 (one month after interviewing Mr Muiz) stating that: "*Even though parts (i) and (ii) under clause 5.2.1 of the agreement states that Nexbis would claim a fee of $2 as tax and $15 for every visa card issued from every tourist entering and leaving the Maldives, the bid proposed by Nexbis stated that they would claim a fee of $2 from every tourist passenger. Therefore it is noted that Nexbis doubled the amount in contravention to what they proposed in the bid document.*" **[1RBD 150, paragraph 5.9.4.2]**.
>
> 146.4 Mr Muiz would have been aware that the ACC was investigating this issue.
>
> 146.5 Furthermore, two other individuals interviewed by ACC were not aware of any discussion of the departure fee in the meetings. Amhed Waheed's statement on 23 October 2011 **[3RBD 2562]** and Ibrahim Waheed's statement on 25 October 2011 **[3RBD 2579]**, given a day before and after Mr Muiz's statement on 24 October 2011, indicated that only the arrival fee was discussed in the meetings.
>
> 146.6 Clearly there are some problems with Mr Muiz's evidence that was given a year after the Concession Agreement was signed.

147 Even if Mr Muiz was really under the impression at the 13 October 2010 meeting that $2 was meant to be charged per arrival and per departure, the Claimant has not provided any evidence of how the $2 bid doubled and became $4. There is no evidence of this any extensive negotiation relating to the doubling of the charge on foreign passengers.

(iii) The comparison between the 'draft' concession agreement and the Actual Concession Agreement is unreliable and inconclusive

148 In light of the parties' clear intentions for the bid terms to be transferred to the Concession Agreement, it is submitted that the comparison done on the 'draft' and the actual Concession Agreement by the Claimant at paragraph 162 of its Closing Submissions is unhelpful.

149 Firstly, the Respondent is unable to ascertain the status of the 'draft' concession agreement **[at 4CHB 2364]**.

150 It is reiterated that no evidence has ever been led by the Claimant on this 'draft' or any other drafts for that matter.

151 The Claimant attributes the 'draft' as the copy that was given to Mr Abdullah Muiz to review based on various statements in the ACC Report (which it has greatly criticised). It comes to the conclusion based on the following points:

> 151.1 Ibrahim Afeef and Abdullah Waheed went to see Mr Muiz with a draft.
>
> 151.2 There is a slightly illegible handwritten note "*07/10 Afeef and Abd [illegible] Waheed visits [illegible]*" on the 'draft' at **[4CHB 2360]**.
>
> 151.3 Abdullah Muiz stated that arbitration should be in Singapore, not Malaysia.
>
> 151.4 The 'draft' provided for arbitration in Malaysia and the actual Concession Agreement provided for arbitration in Singapore.
>
> 151.5 Therefore the 'draft' was an early draft which was amended after AGO's opinion on it has been sought, and parties negotiated its terms further (see paragraph 160 of the Claimant's Closing Submissions).

152 This conclusion is based on very tenuous conjectures. How can the presence of a Malaysian arbitration clause indicate that the AG's Office had reviewed that specific document? Furthermore, whether Mr Muiz had actually met with Ibrahim Afeef and Ahmed Waheed is unclear:

> 152.1 Firstly, Mr Muiz said that it was the Controller Ilyas who came to the AG's office with the draft agreement. **[3RBD 2567]** He did not state that he met Ibrahim Afeef and Abdullah Waheed.
>
> 152.2 Ibrahim Afeef stated that he was functioning in the capacity of DOIE's lawyer **[3RBD 2593]**. This was confirmed by the Controller Ilyas who stated that "*In drafting the main parts of the agreement, advice was sought from immigrations legal counsel, Ibrahim Afeef.*" **[3CBD 2552]** Mr Muiz did not appear to know of Ibrahim Afeef's existence. Mr Muiz stated that "*I was informed that the draft was prepared and sent by the successful bidder of the Border Control project, Nexbis Ltd.* ***Since there was no lawyer working in the Immigration at that time*** *and since there was no*

such agreement among the bidding documents prepared by Immigration, I do not believe that the agreement was drafted by Immigration."

153 Further, it was not recorded in Mr Muiz's statement that he recommended arbitration in Singapore. Instead, this was attributed to Mr Muiz by Ibrahim Afeef in his statement **[3RBD 2594]**.

154 A more disturbing reason exists as to why the Tribunal should disregard Ibrahim Afeef's evidence. As set out above, the Claimant has relied on Ibrahim Afeef's statement to the ACC dated 27 October 2011 **[3RBD 2595]**. But in the cabinet paper submitted by DOIE on 25 April 2011 **[CBD 116]**, it was noted that "*The lawyer who represented the Immigration department the Deputy Director General, Mr. Ibrahim Afeef (Gulbahaaruge, B. Thulhaadhoo) during the inception of this project is now representing Nexbis. This was confirmed when Mr. Ibrahim Afeef attended as the lawyer of Nexbis for a meeting held between this department and Nexbis on March 28th, 2011.*" Ibrahim Afeef had come from advising DOIE to representing the Claimant on the same matter within 5 months after the signing of the Concession Agreement. When he gave his evidence to ACC, he was Nexbis' lawyer (something which he failed to declare). Clearly his evidence cannot be relied on.

155 In light of these doubtful circumstances and the Claimant's dubious conclusions, it is submitted that the 'draft' concession agreement cannot be relied upon.

156 Secondly, even if the 'draft' could be relied upon, the Claimant's submission that the bargain struck in the Concession Agreement was for it to only charge foreign passengers twice, is merely its subjective intention/interpretation. It is not disputed that Maldivian passengers will not be charged. What is disputed is whether the Claimant is entitled to charge foreign passengers twice.

157 Without considering the Claimant's subjective intention/interpretation, the comparison performed by the Claimant does not objectively elucidate the matter. The Respondent has already pointed out earlier that Clause 12.3 of the Concession Agreement allows the Claimant to only claim charges multiplied by passengers entering into <u>or</u> departing from the Maldives.

158 The question then goes back to what was discussed in the earlier section: is the phrase "*entering into and departing from*" to be read conjunctively or disjunctively.

159 A possible argument might be that addition of the phrase "departing from" should mean something. It is unclear how and why this phrase was introduced, but the Respondent's submission is that it is meant to be conclusive that the Claimant was only allowed to charge $2 for each passenger.

160 Therefore, such comparison does not provide any helpful insight into the parties' objective intentions.

(iv) The Claimant drafted the Concession Agreement but repeatedly denied doing so

161 It has thus far been unclear which party drafted the Concession Agreement. The Respondent's position has always been that the Claimant drafted the Concession Agreement.

162 The Claimant's Factual Witness' testimony was that the Claimant did not draft the Concession Agreement.

Transcripts, Day 1, Page 83, lines 22 to 23

Q. Did the draft come from Nexbis, "yes" or "no"?
A. No.

Transcripts, Day 1, Pages 84 to 85, starting from line 12

Q ... Just to help you, volume 3, you start at page 2567. You will see that the person who gave the statement to ACC is Abdullah Muiz. To be fair to you, I will inform you, and you can take it from me that Abdullah Muiz was the Solicitor-General at that time. Okay? This is a statement he gave. If you turn to the next two pages, page 2569, at the right at the top, Solicitor-General said: "The Attorney-General's Office was not asked to assist in a drafting of the agreement signed between the Government of Maldives and Nexbis to establish the Maldives Border Control System. I was informed that a draft was prepared and sent by the successful bidder of the border control project, Nexbis Limited." Do you see that?
A. Yes.
Q. So we have a statement from the Solicitor-General, so I have a basis to ask: it was Nexbis who prepared the draft and had forwarded it to Mr Ilyas. Is that correct or is that wrong?
A. No, that's not correct.
Q. Okay.

163 The Claimant's Opening Statement also mentioned that the Concession Agreement was "*drafted by the DoIE*" **[Transcripts Day 1, Page 20, Lines 16 to 19]**.

164 As the Claimant has stated in its Closing Submissions that the document at **[at 4CHB 2364]** is the draft concession agreement, this has shed new light into who drafted the Concession Agreement. Following the Claimant's comparison of the 'draft' concession agreement against the actual Concession Agreement, the Respondent has also performed the same comparison and have uncovered certain clues in both documents which objectively indicate that it was drafted by the Claimant:

164.1 Firstly, the document is marked "*Draft 290710*" at the top, very likely 29 July 2010. This was a time when the price bids had not even been opened by the Respondent and it would not have prepared a draft with the Claimant's name. It is slightly intriguing to see that the Claimant was so certain at that point of time that it would be awarded the tender and had started drafting the agreement between the Respondent, its potential subsidiary and itself.

164.2 Secondly, in the draft document, the definition of 'Working Day' is "*a day other than - (a) Saturdays, Sundays...*" **[4CHB 2370]**. However, Sundays are working days in the Maldives and this definition could only have been drafted by someone who was unfamiliar with the Maldivian work week. In the actual Concession Agreement, this has been changed to reflect that the Maldivian weekends are on Fridays and Saturdays **[1CHB 32]**.

164.3 Thirdly, it was stated in the draft that the governing law of the contract would be the laws of Malaysia and that parties submitted to the exclusive jurisdiction of the Malaysian Courts [**4CHB 2393**]. Furthermore, it was also stated that any arbitration was to be held in Malaysia [**4CHB 2391**]. As any person who is familiar with drafting contracts would know, these are positions normally taken by the party that drafted the contract, which would then be subject to negotiations. It is not plausible that the Respondent's officers would have chosen Malaysian courts / laws over their own legal system.

164.4 Fourthly, at [**4CHB 2392**] the '*Notice to the Company*' was filled in with the Claimant's details, while the Notice to the Respondent was left blank. Again, a party that drafted the contract would normally fill in these details.

164.5 Finally, the most surprising portion in the 'draft' is the Clause on royalty payments to the Respondent. At [**4CHB 2380**], it is specified that:
"*8.4 Royalty*
The company agree to pay to the Government a ***royalty fee amounting to 5% on project net profits declared by the Company annually*** *for the duration of the Concession Period or until such time the Government implements a corporate profit tax or GST.*" (Emphasis added.)

164.6 The position on the royalty is clearly wrong. The RFP contained a template 'Letter of Price Bid' which stated that royalty of a certain percentage was to be paid on the income [**1CHB 154**]. The Claimant's financial bid proposed that the royalty to be paid to the Respondent was 5% of the Claimant's income on a monthly basis [**2.2CHB 979**]. The Respondent's Ministry of Finance and Treasury had also recorded a similar position "*Royalties of 5% of the gross revenue per year for 20 years.*" in its letter to the DOIE, informing them that the Claimant had been awarded the MIBCS project. [**3RBD 2104**]. The Respondent's officers would never have reduced the 5% royalty on income to 5% royalty on the Claimant's project net profits.

165 Therefore, based on the five clues above, it is clear that the Claimant had drafted the contract but mysteriously chose to deny it. Two of the Respondent's ex-officers Controller Ilyas and Samee Ageel (who have been charged with corruption) claimed to have drafted the Concession Agreement and their motives for lying must be questioned. We will discuss these two individuals further below in the section on corruption.

166 Since the Claimant has raised the issue of the drafts, a question arises: did the Respondent amend any further portion of the Concession Agreement? The only documentation/record of any amendments to the Concession Agreement was for a meeting on 13 October 2010 [**3RBD 2116(Eng.) and 2106 (Dhivehi)**] where there was a discussion of amendments to the draft Concession Agreement. The record was made in both English and Dhivehi (this is because even though many of the Respondent's officers are fluent in English, it is still their second language and they are more comfortable in Dhivehi).

167 The evidence is that the Respondent did not suggest any further amendment in relation to the charges. If the Respondent had made further amendments to the Concession Agreement, it would have been recorded in both English and Dhivehi minutes.

(v) The unexplained 'draft' financial bid [3CHB 1233]

168 According to the Claimant, the parties had only come to a conclusion that the Claimant would be allowed to charge foreign passengers $2 both ways after the extensive negotiations that took place after the award of the tender to the Claimant.

169 Most intriguingly, when and why did the Claimant modify the Respondent's RFP template 'Letter of Price Bid' **[1CHB 154]** from "*per passenger*" to the phrase in its 'draft' financial bid – "*per passenger per arrival and per departure*" **[3CHB 1233]**?

170 It was stated in the RFP at paragraph 2.1.6 that "*any condition, qualification or other stipulation contained in the bid shall make it liable to rejection*". Paragraph 2.11.1 of the RFP stated that the "*MoFT will evaluate only those Bids that are received in the required formats and complete in all respects*".

171 If Claimant wanted to bid for $2 per passenger per arrival and per departure, would it not be simpler to just bid $4 per passenger as per the RFP template?

172 Why was this document disclosed by the Claimant's Factual Witness in this arbitration and why was it passed off as "*Claimant's Financial Bid Document*" dated 25 May 2010? **[See the Index to the CHB, s/n 4]**. One must wonder whether this document was simply created to support its claim that it was entitled to charge $2 both ways.

G. Subsequent conduct

173 Much have been said by the Claimant about the lack of protest from the DOIE officers with regard to the invoiced amounts which charged foreign passengers a total of $4.

174 It is important during the consideration of the subsequent conduct of the parties to note a very simple point - no charges were ever collected by the Claimant or the Respondent from any passenger. None of the parties had actually collected money and checked their rights against the Concession Agreement.

175 It is clear that the DOIE officials thought that the terms of the Concession Agreement were in accordance with the Claimant's financial bid.

> 175.1 This position was conveyed by Mohamed Ali, the Controller of Immigration, in his letter dated 1 November 2012 to the Speaker of Parliament **[3RBD 2619]**. The new Controller stated: "*The decision to take $2 as tax from every foreigner entering and leaving the Maldives and to levy a charge of $15 for every Visa Card issued was done so after the proposal made by Nexbis was studied by the Tender Evaluation Board.*"
>
> 175.2 The DOIE officers were not part of the financial evaluation. Ibrahim Afeef stated in his statement to the ACC that "*Although it was a project of Immigration, everything regarding the Project was done by Finance, as the President had asked to do all work regarding the project by a third party since it might facilitate an act of corruption if it was done by Immigration. No other work was assigned to Immigration*

apart from signing the agreement." **[3RBD 2595]**. He had also never seen the tender documents.

176 It is reiterated that the individual that signed the Concession Agreement on behalf of the Respondent, Ilyas had been quoted shortly after the Concession Agreement was signed as saying that "*a US$2 fee is to be charged from every foreigner entering the country*" **[6CHB 4255 & 4257]**.

177 As for other individuals, it is submitted that it is dangerous to rely on the subsequent conduct of individuals that (i) were not involved in the tender process and the drafting of the Concession Agreement, or (ii) only came on board at a later stage.

177.1 Individuals who were not involved in the tender process and the drafting of the Concession Agreement would not be aware of the live issues.

177.2 Individual who were not involved in the award and signing of the MIBCS project could be influenced by the 'conventional wisdom' (which may be right or wrong) that was passed down. If their subsequent conduct is relied upon, there may be the risk that the individual may have internalised any falsehood[viii] and merely stated the currently acceptable position at that point of time.

178 The Claimant makes a good point about the dangers of using subsequent conduct to interpret a contract. At [173] of the Claimant's Closing Submissions, the Claimant stated that "*[t]he overwhelming evidence is that the DOIE, as the department that conceived, consummated and carried out the MIBCS Project, had* ***invariably internalised*** *the revenue model of every foreigner paying $2 upon arrival and upon departure…*"

179 Any right minded individual who was actually part of the tender process would definitely question why the Claimant was collecting twice the amount that it bid.

180 There is an even more important reason why subsequent conduct should not be used and this was explained in ***Y.E.S. F&B*** by the Singapore Court of Appeal. It did not give subsequent conduct much weight because:
[74] "*As we pointed out to counsel during the hearing, there was not much assistance to be derived from the parties' subsequent conduct when the object of the interpretive exercise was to discern the parties' intentions at the time of entering into the contract.* ***Indeed, there are dangers in placing too much weight on such evidence because it can, with the benefit of hindsight, be shaped to suit each party's position.***"
(Emphasis added.)

181 In other words, a party would be at liberty to pick and choose the conduct that suits him. This appears to be exactly what the Claimant has done, choosing what suits its case theory and ignoring others which go against it.

182 An example would be when the Claimant claimed that the Tribunal should pay attention to ACC's interpretation as it had taken the view that the Concession Agreement had specified $4 (and recommended Controller Ilyas to be charged for conferring an undue advantage). This is one of the rare occasions where the Claimant has agreed with ACC (when it suits its case).

182.1 In any event, ACC had, in its 24 January 2011 letter **[see [7.1(ii)] of 3 RBD 2232]** stated that under Clause 12.3 the Government has to pay charges for passenger arrivals, without any mention of charges for departures. In relation to Clause 5.2.1, ACC merely repeated the wording of the clause "*every foreigner arriving and departing from Maldives a fee of 2 USD will be taken*".

182.2 The ACC report was published on 27 November 2011. By then, it had been widely propagated that the fee was $4. As mentioned above, DOIE had submitted a cabinet paper to MHA on 25 April 2011 with calculations indicating payment of a total of $4 **[CBD 116]**.

182.3 As for the reason why the PG did not charge Ilyas for conferring an advantage on the Claimant, there are a myriad of reasons why Ilyas was not charged. The Claimant postulates that the Ilyas could not have been responsive for conferring the advantage because there were many individuals involve. Another possible explanation could be that the PG was of the view that the Concession Agreement had specified $2 and Ilyas had not conferred an advantage on the Claimant. These are all mere conjectures.

H. Conclusion on the $2 / $4 issue

183 The Tribunal should not place any weight on the Claimant's story about extensive negotiations for the following reasons.

184 As the Claimant had been awarded the highest score for the Price Bids because it had submitted the lowest bid (including submitting a price of $0 for work permits and thereby receiving the full score of 10 marks for that section while the rest of the bidders received zero), it is a bit rich for the Claimant to now suggest that it was allowed to double its revenue for one of the two segments that it actually submitted a price for.

185 The Claimant has not provided any credible evidence about such extensive negotiations. None of the individuals interviewed by ACC mentioned anything about the change in the bid price of $2 to the Claimant's version of $4 in the Concession Agreement. The comparison between the draft agreement and the actual Concession Agreement is unreliable due to the weak conjunctures and inconclusive in its results.

186 Furthermore, the Claimant's story is incredible. The context of the signing of the Concession Agreement was that the Respondent had called for a RFP which specified that the lowest bidder would be selected, and had selected the Claimant based on its lowest financial bid. The potential that any imposition of charges may result in a decline in tourist arrivals was prevalent in the Respondent's mind. Clearly, allowing the Claimant to double an aspect of its price bid would be very unfair to the other bidders and against the very purpose and spirit of the tender - which was to obtain, for the Republic of Maldives, the best value for the project.

187 The Claimant has picked and chose the subsequent conduct (statements to ACC made by various individuals or submissions to cabinet, etc.) to bolster its case. Very little weight should be ascribed to these as the conduct involves individuals which (i) had a fleeting part to

play, (ii) was involved at a later stage, (iii) or was charged for corruption. Furthermore, statements were given about 5 to 12 months after the event.

188 In light of the above, we have shown how the Claimant's explanation for the unwarranted increase in fees is an afterthought, cannot be believed and is contrary to business common sense. The Claimant had submitted a bid for $2 for passenger arrivals and after excluding a small amount of Maldivians passengers, could not objectively have been allowed to double its charges for all foreign arrivals, entitling it to an extra US $21 million in profit.

[ix] [498]-[517] provide as follows:

Damages should be limited to the time the Claimant went into Administration.

498. As set out earlier, the Claimant had entered into Voluntary Administration in 30 June 2014.

499. In the event that the Tribunal finds that the Respondent had wrongfully terminated the Concession Agreement or had committed a repudiatory breach of the Concession Agreement, then it is submitted that damages should be limited to the time that the Claimant went into administration or that such a fact should be taken into account to reduce the amount of damages payable to the Claimant.

500. The basis for the submission is simple. The general principle that applies to the question of the appropriate measure of compensatory damages is found in Livingstone v Rawyards Coal Co. where Lord Blackburn defined the measure of damages as:
"that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

501. In the context of damages arising out of contract, there is an alternative way of framing the general rule. It was stated by Parke B. in Robinson v Harman as follows:

> "The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."

502. After the landmark case of *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha ("The Golden Victory")*, an additional gloss has been added to the traditional compensatory principle typically espoused by the Courts. Presently, the Courts caution against an assessment of damages that provide a windfall to the claimant. Thus, the Court held *in Flame SA v Glory Wealth Shipping Pte Ltd*

> "Thus, the object of damages is to put the innocent party in the same position, and in no better position than, that he would have been in had the contract been performed." (Emphasis ours)

503. When quantifying the damages, a line of authority starting from *The Mihalis Angelos ("The Mihalis Angelos")* and *The Golden Victory* have established the following principles:

503.1. Damages may be reduced if an event had occurred such that a contracting party would have had the option of terminating the contract

503.2. Damages may be reduced if an event would inevitably occur, and

503.3. Damages may be reduced if an event may occur.

(i) Limitation of damages if an event had occurred or would inevitably occur

504. In *The Golden Victory*, the Court dealt with a war clause that entitled the defendant-charterer to terminate the contract. As a matter of fact, the war in question did break out, entitling the defendant-charterer to terminate the contract. The majority judgement held that, events occurring post-breach would be considered in the assessment of damages. In particular, Lord Carswell cited (at [393]) Lord Macnaghten in *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426, 431 as follows:

> "Why should he listen to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him, why should he shut his eyes and grope in the dark?"

505. On the issue of whether the defendant-charterer should pay damages for the whole period from 17 December 2001 to 6 December 2005 (the earliest date for the contractual redelivery of the vessel) or to 20 March 2003 (the date which the defendant-charterer would have been entitled to terminate the contract), the Court held that the defendant-charterer should only pay damages up until 20 March 2003.

506. Thus, if at the date of breach there had been a real possibility that an event would happen terminating the contract or otherwise reducing those contractual benefits, and such event did happen, the quantum of damages will be reduced proportionately to take into account what had actually occurred.

507. Similarly, in cases where an event had not occurred, but would have inevitably occurred to terminate the contract, such events may also be taken into account in the assessment of damages. In *The Mihalis Angelos*, the defendant-charterer had the option of cancelling the contract if the vessel was not ready to load by July 20, 1965. The ship was at Hong Kong on July 17, 1965, and could not possibly have reached Haiphong (the loading port) by July 20, 1965. Only nominal damages were awarded to the plaintiff-owners in The Mihalis Angelos since the defendant-charterer in question would have been entitled to cancel the charterparty on the basis that the ship would have, inevitably, failed to arrive at the loading port by July 20.

508. As set out earlier, the Claimant had been stripped of its assets, had no revenue or trade receivables, owed directors' fees and expenses incurred on its behalf. As the Claimant's Factual Witness confirmed during cross examination [Transcripts, Day 1, Page 109, Line 18]:

> Q. So you're saying again that if I showed you earlier a letter from your counsel, if you need the reference again, 4CHB 2692.
> A. Yes.

> Q. At paragraph 6, the claimant had said to its counsel that the respondent's conduct significantly contributed to the claimant's financial impecuniosity, and the first reason given was the delay in implementing the MIBCS. Now you're saying that's not really true, that's not the reason, correct? It was more the issue of corruption floating up in the open market out there, correct?
> A. Yeah, on the basis of specific -- specifics, yes.

509. As we have established, the Respondent was not responsible for the allegations of corruption against the Claimant. These allegations were investigated by the ACC, which is an independent entity.

510. The Claimant's Factual Witness had stated that the Claimant had to go into voluntary administration to enable its parent company to settle the debts [see Transcripts, Day 2, page 160]:

> MR VERGIS: Yeah, I'll just ask a few questions. How long was the company in administration.
> A. About four months.
> Q. And what was the outcome of the administration?
> A. A scheme of arrangement was established with the creditors to deal with remaining outstanding amounts owed to them.
> Q. And was that approved?
> A. Yes.
> Q. And subsequent to that, what has become of the claimant?
> A. The claimant is, I believe, back into solvency, yes.
> Q. Okay. That is as much as we know on this issue.
> A. May I elaborate a bit more?
> Q. Yes.
> A. The other element of going into this voluntary administration is to enable the parent company, Aseana One, to be able to settle the debts of the company to its creditors. That was part of the reason why we had to go into that voluntary administration.
> ARBITRATOR: All right.
> (Emphasis added)

511. The Claimant had to do so because it had no assets or revenue to settle its liabilities. Further, the Claimant had entered into a scheme of arrangement with its creditors (see the Deed of Company Arrangement dated 23 October 2014, [6CHB 3927]), as we highlighted earlier, the parent company could not settle all debts but merely paid some and transferred the rest to a creditor's trust).

512. As the Claimant (i) had stopped paying its former Chief Financial Officer (Peter Dykes) who resigned when the Claimant was delisted on or around July 2012, (ii) became insolvent and entered into voluntary administration on 30 June 2014, and (iii) entered into an arrangement with its creditors on 23 October 2014, if the Concession Agreement was still afoot, the Respondent would have been able to terminate based on Clause 11.1.1(ii) which states:

"11.1 Default Events by Company

> 11.1.1 Events of Default
> If at any time:
> ...
> (ii) the Company goes into liquidation or a receiver is appointed over the assets of the Company or the Company makes an assignment for the benefit of or enters into an arrangement or composition with its creditors or stops payment or is unable to pay its debt;
> ...
> then the Government shall, have the right to terminate this Concession Agreement forthwith by giving notice to that effect.

513. Therefore, based on the above principles, the Respondent submits that if it is found to have breached the Concession Agreement, any damages awarded to the Claimant should be limited to 10% because the Claimant (i) had stopped payments since July 2012 and/or been declared insolvent on 30 June 2014, and (ii) had entered into an assignment with its creditors in October 2014, and would only have performed the contract for 2 years out of the 20 year term.

(ii) Limitation of damages if an event may occur

514. Further and in the alternative, it is submitted that there remained a real possibility that the Claimant would have gone into administration regardless of whether the Respondent had terminated the Concession Agreement on 5 August 2013.

515. The Court in *The Golden Victory* stated, in obiter, that damages would be reduced in the following scenario:

(1) Contingencies at the date of assessment of damages, which might have reduced or extinguished the loss, may be taken into account when assessing damages, provided it was a real possibility (including one less than 50%)

(2) Damages would be reduced proportionately with respect to the possibility of the event occurring

515.1. Lord Carswell accepted that a real possibility of an event occurring could reduce the value of a contract, and in turn, the damages recoverable. He stated as follows:

> "The damages can be assessed at the date of repudiation by valuing the chance that the contingency would occur and that the charter would be cancelled, an approach accepted by Lord Mance at para 23 of his judgment at p 543. That value might lie anywhere on the scale between extreme unlikelihood, which would give the deduction a minimal value, to virtual certainty, which would mean that it would be assessed at a figure very close to that which would be reached if one made the definite assumption that the contingency would occur."

515.2. In support of his proposition, Lord Carswell drew strength from tort authorities in loss of a chance cases:

"This approach is well known and recognised in other areas of the law. It is commonplace in the assessment of damages for personal injuries to award a sum which reflects the chance that a condition such as osteoarthritis may set in."

515.3. Lord Brown of Eaton-under-Heywood accepted that a real possibility of an event occurring (even if it were below 50%), could properly be taken into account to reduce the value of a contract, and in turn, the damages recoverable. He stated as follows:

"As Lord Denning MR said in the *Mihalis Angelos* [1971] 1 QB 164,196: "You must take into account all contingencies which might have reduced or extinguished the loss." It was hardly a novel proposition."

...

"I understand both Lord Bingham and my noble and learned friend, Lord Walker of Gestingthorpe, to accept that account should properly be taken of a contingency which would reduce the value of the contract lost even were the chance of it happening less than 50% (provided always that it was of some real and not just minimal significance)"

515.4. Lord Bingham accepted that a likely albeit not certain event, could reduce the value of a contract, and in turn, the damages recoverable. He stated as follows:

"I can readily accept that the value of a contract in the market may be reduced if terminable on an event which the market judges to be likely but not certain, but that is not what the arbitrator found to be the fact in this case."

515.5. However, Lord Bingham declined to reduce the damages however, accepting the arbitrator's finding of fact that war was "merely a possibility" at the date of assessment of damages. He stated as follows:

"By describing the prospect of war in December 2001 as "merely a possibility", the expression twice used by the arbitrator in para 59 of his reasons, the arbitrator can only have meant that it was seen as an outside chance, not affecting the marketable value of the charter at that time."

515.6. In *The Golden Victory,* Lord Walker accepted that contingencies as at the date of breach could be taken into account when assessing the damages recoverable

"In my opinion the arbitrator erred only in not following his own instinct at para 56 towards the owners' "more orthodox" approach. He concluded, wrongly in my view, that *The Seaflower* [2000] 2 Lloyd's Rep. 37 required him to look at later events as a guide to what was inevitable, rather than looking at the position (and weighing contingencies in an appropriate case) as at the date of breach."

515.7. Together with Lord Bingham, Lord Walker declined to reduce the damages however, accepting that war was a "mere possibility" at the date of assessment of damages. He stated as follows:

"In this case an objective and well-informed observer, looking at the matter in December 2001, would have thought, not only that the prospect of the war clause option becoming exercisable was not inevitable (in the sense of being predicable with confidence equal, or closely approximating, to 100%) but that it was a mere possibility carrying little or no weight in commercial terms."

515.8. Lord Scott accepted that a real possibility of an event occurring, could reduce the value of a contract, and in turn, the damages recoverable. He stated as follows:

> "If a contract for performance over a period has come to an end by reason of a repudiatory breach but might, if it had remained on foot, have terminated early on the occurrence of a particular event, the chance of that event happening must, it is agreed, be taken into account in an assessment of the damages payable for the breach."
>
> ...
>
> "If there were a real possibility that an event would happen terminated the contract, or in some way reducing the contractual benefit to which the damages claimant would, if the contract had remained on foot, have become entitled, then the quantum of damages might need, in order to reflect the extent of the chance that the possibility might materialise, to be reduced proportionately."

516. In effect, if the Tribunal finds that there was a real possibility that an event of termination was likely to occur, the damages will be reduced to the extent that the event of termination was likely to occur.

517. Therefore, based on the above principles, the Respondent submits that, further and/or in the alternative, if it is found to have breached the Concession Agreement, any damages awarded to the Claimant should be limited to 35% because of the real possibility that the Claimant may have (i) gone into administration / became insolvent, (ii) entered into an assignment with its creditors, or (iii) stopped payments soon after 5 August 2013.

[x] The Respondent's submissions are set out at [465]-[]490] of the Closing Submissions:

<u>*Alternative B*</u>

465 For 'Alternative B', the Claimant seeks "*common law damages, being loss of net profits it would have earned through the gross revenues generated through the Foreign Traveller Charges and Foreign Worker Charges*".

466 In relation to this, we explore the issue of whether the Claimant was entitled to charge a total of $2 or $4 per foreign passenger.

<u>*The Claimant had admitted that it submitted a bid for $2 per foreign passenger*</u>

467 It is uncontroversial that the Claimant had submitted a bid for $2 per foreign passenger in total for the MIBCS tender. During cross-examination, the Claimant's Factual Witness was asked :

> **[Transcripts, Day 1, Page 137,Line 12]**
> "*when Nexbis did the bid, their final bid, it was very clear that they were only going to charge $2 per passenger, not $4 for two ways, correct?*"

468 The Claimant Factual Witness admitted:

"*it appears so*".

469 The parties' intentions were clearly to charge each foreign passenger a total of $2.

Was it $2 or $4 per foreign passenger?

470 The Claimant admits submitting $2 in its tender bid, and yet it claims that the charge is $4 in the Concession Agreement. The Claimant might feign ignorance on other facts surrounding the terms of the Concession Agreement but surely not this. How did the $2 in the tender bid become the $4 that the Claimant asserts? The Claimant has failed to provide any explanation whatsoever. This must be kept in mind when examining the relevant clauses of the Concession Agreement.

471 The relevant portions of the Concession Agreement are:

471.1 "*1.1 Definitions*

...

Charges USD 2.00 (UNITED STATES DOLLAR TWO ONLY) for every passenger using a non-Maldivian passport arriving into and departing from the Republic of Maldives"

471.2 "*5.2.1 The Company is authorised by the Government to impose upon and collect levy or fee from:*
i. Each and every passenger using non-Maldivian passport arriving into and departing from the Republic of Maldives, a fee of USD2.00 (UNITED STATES DOLLAR TWO ONLY) per passenger via a levy or fee imposed or to be imposed by the Government to be charged on such passenger."

471.3 "*5.2.7 All invoices for the Charges shall be calculated in accordance with the price mechanisms set out in Appendix B.*"

471.4 Appendix B states:

"*Payment of Charges collected by the Government on behalf of the Company throughout the Concession Period shall be as follows:*
1.1 The Government shall pay the Company on the following schedule:-
1.1.1 For each and every non-Maldivian passport holder passenger arriving into and departing from the Republic of Maldives, the Government agrees to charge and collect a levy or fee for onward payment to the Company of USD2.00 (UNITED STATES DOLLAR TWO ONLY) per passenger."

472 The Claimant's Factual Witness has admitted that there is ambiguity with the term ***[Transcripts, Day 1, Page 132, Line 2]***:
ARBITRATOR: You admit there's an ambiguity, is it?
A. The language could be better, certainly.

473 It is submitted that the statement "*[e]ach and every passenger using non-Maldivian passport arriving into and departing from the Republic of Maldives*" simply was for $2 to be collected from a foreign passenger arriving into and subsequently departing from the Republic of Maldives.

The Evidence, including the surrounding circumstances

474 The original Request for Proposal issued to the bidders contained a sample Letter of Price Bid (1CHB 154) which indicated that the propose fee should be submitted based on the following: (i) per passenger, (ii) per work permit, and (iii) per visa card.

475 The Claimant submitted its Financial Bid on or around 30 May 2012. To the Proposed Fee per unit, the Claimant stated that "The proposed Fee seeks to recuperate the costs by charging a fee on each incoming passenger and the work visa for foreign workers." **[2.2CHB 971]** The proposed fee was stated would be USD2 per passenger (see **[2.2CHB 972, 975, and 978]**).

476 However, the Claimant's Factual Witness disclosed another version which indicated that the fee would be "*USD2 (UNITED STATES DOLLAR TWO) per passenger* ***(per arrival and departure)***" (see **[3CHB 1215, 1230, 1233]**) (see also **[3CHB 1230]** where another addition was made – "*Nexbis proposes the USD2 charge for each passenger* ***(per arrival and departure)***". This version was not signed. Notably, the words "*The proposed Fee seeks to recuperate the costs by charging a fee on each incoming passenger...*" was still included in the Claimant's unsigned version **[CHB 1229]**.

476.1 During cross-examination, the Claimant's Factual Witness was confronted with the discrepancy between the executed version and the unsigned version that he converted into PDF on 25 July 2015 **[see Transcripts, Day 1, Pages 130-137]**. He provided a weak answer, claiming that he "only managed to secure whatever draft" **[see Transcripts, Day 1, Page 136]**.

476.2 He was then asked "*when Nexbis did the bid, their final bid, it was very clear that they were only going to charge $2 per passenger, not $4 for two ways, correct?*" and admitted that "*it appears so*". **[see Transcripts, Day 1, Page 137, Line 12]**

477 Contemporaneous evidence show that the intention of the parties was for the charges to be $2 per passenger

477.1 At the 25th Meeting of the Tender Evaluation Board 2010, **[RBD 2009]**, it was recorded that Nexbis had "*issued pricing*" of "*Passenger Fee: USD 2*".

477.2 In the letter from the Ministry of Finance and Treasury dated 29 September 2010 to the DOIE **[RBD 2014]**, it was stated that the Claimant had submitted the best proposal and their proposal was US $2 for the passenger fee. The Claimant's price proposal (which the Claimant's Factual Witness admitted was only $2 per passenger instead of $4) was attached with the Ministry's letter.

478 As the Claimant had submitted a bid for $2, it is very strange for it to claim that the Concession Agreement provided for $4 to be collected. That has not been explained.

479 The Recitals of the Concession Agreement state:

> *"WHEREAS*
> *A. The Company has submitted a proposal via the competitive Technical and Price Bid submitted for the Maldives Immigration Border Control System Under BOT Mechanism Tender (Project No.: TEB/2010/01) to the Government to design, supply, install, deploy, support and maintain the MIBCS (as defined herein).*
>
> *B. The Government has evaluated and accepted the proposal submitted by the Company and its group being, among others, the competitive solution with the highest final scoring on technical and price bid in the said Tender, and has by a letter of award Ref: 13-K/PRV/2010/21, dated 29 September 2010 awarded the Concession (as defined herein) on a Build, Operate, Transfer (BOT) basis exclusively to the Company on the terms and conditions appearing in this Agreement."*

480 ***Chitty on Contracts**, 32nd Ed* states at (**page 1053, [13-068]**) that "*Where words in the operative part of an instrument are ambiguous, the recitals and other parts of the instrument may be used to fix the appropriate meaning of those words.*" The price (and technical) bids were clearly the basis of the Concession Agreement. It is submitted that extrinsic evidence of the price submitted by the Claimant must be considered in the interpretation of the Clause.

481 The Claimant has relied on the then Solicitor General Abdulla Muiz's statement (at **[RBD 2568]**): "*We also discussed article 5.2.1 of the agreement which states that every foreigner that arrives in Maldives will be charged $2 (two U.S. dollars), every foreigner that departs Maldives will be charged $2 (two U.S. dollars) and every visa card issued will be charged $15 (fifteen U.S. dollars).*"

482 However, it is noted that some of the witnesses interviewed by ACC had a different recollection:

482.1 Ahmed Waheed (Chief Immigration Officer) stated (at **[3RBD 2562]**) "*In the meetings, revisions to the agreement were discussed. For instance it was discussed that, **the USD $2 charge on every foreign arrival** as stipulated under 5.2.1 of the agreement can be taken after getting the approval from the parliament. **But since Abdullah Muiz** in the meeting opined that the aforementioned amount may be taken as a fee and therefore it can be charged without obtaining the approval from parliament, it was agreed to be passed*".

482.2 Ibrahim Waheed (Assistant Controller of the DOIE) stated (at **[3RBD 2579]**): "***When Abdullah Muiz questioned about the $2 levied from passengers**, the officials from finance ministry said that it is a fee and because it would be taken indirectly as part of the current airport tax, that they did not believe that it needed to be passed by parliament... **Even though the agreement stated that $2 would be charged from every foreigner entering and leaving the Maldives as the cost of the project, I noticed that the $2 charged upon arrival was the only charge that was discussed during the meetings. The $2 departure charge was not discussed.***

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483 Press reports on 24 October 2010 and 4 November 2010 from the local Maldivian news agency Haveeru Daily (see **[6CHB 4255 & 4257]**) reported that the then Controller of Immigration, Ilyas Hussein Ibrahim:

> "*noted that the government should repay the initial investment of the system which would cost about US$39 million (Rf501 million). **He said a US$2 fee is to be charged from every foreigner entering the country** and US$15 has to be paid for work visa*".

484 It should also be remembered that Ilyas Hussein Ibrahim was the individual who signed the Concession Agreement on behalf of the Respondent.

485 It is also acknowledged that certain individuals have made statements to the ACC or the Maldivian Parliament / Cabinet that Nexbis was entitled to charge $4. For instance, Abdulla Shahid stated **[3RBD 2555]**:

> "*That is the clause in the agreement between Nexbis and Maldives that states that Nexbis could charge $2 from every passenger arriving and departing from the Maldives, as the cost of the project. Therefore, after the project is established, every foreigner has to pay $2 upon arrival and $2 upon departure from the Maldives to pay a total of $4.*" However, Abdullah Shahid was not part of the contract discussions. He had stated: "*I'm not well aware of how the border control system project of the Department of Immigration and Emigration started. At the time I was not working at Immigration. I was assigned as the Controller of Immigration on 21st February 2011.*"

486 However, it is submitted that little, if no weight should be given to these statements as they were made by individuals who did not participate or did not have knowledge of the contractual discussions. As stated in ***Chitty on Contracts***, 32nd Edx, at page 1089. [13-129], "*it is not legitimate to use as an aid in the construction of the contract anything which parties said or did after it was made*".

487 Based on the above, it is submitted that the contract discussions was only focused on the Claimant's financial proposal of $2 per foreign passenger arrival. Clause 5.2.1 of the Concession Agreement was intentionally drafted by the Claimant ambiguously and so that the Claimant could then, after execution of the Concession Agreement, convince the Respondent's officers that it was $2 for arrival and $2 for departure.

488 The Claimant has argued that Clause 5.1.1 of the Concession Agreement, which requires the Respondent to provide a statement / report to the Claimant "*specifying the total number of passenger arriving into and departing the Republic of Maldives*" indicates that passenger numbers for arrivals and departures would be provided to enable the Claimant to charge for both arrivals and departures. While this is an attractive argument, Clause 5.1.1 simply reuses the phrase "*arriving into and departing*".

489 The Claimant even submitted a draft version of its financial bid that was created on 27 July 2015 with the phrase "per passenger (*per arrival and departure)*". These modifications, if undetected by the Respondent, would have devastating consequences on its case.

490 In conclusion, an exercise in the interpretation of Clause 5.2.1 and the evidence before the Tribunal, including the fact that the Claimant had submitted a bid for $2 would invariably

lead to the conclusion that a foreign passenger who arrived and departed from the Republic of Maldives would only be charged $2.

xi [106]-[188] of the Respondent's Reply Submissions state:

A. The issue of whether the Claimant was entitled to charge $2 or $4 in total for a foreign passenger was not something that was introduced by the Respondent's Financial Expert

106 This sub-point pertains to a minor issue, but since the Claimant has claimed that the Respondent was ignorant of the $2 / $4 issue and that the idea originated from the Respondent's Financial Expert, it is convenient to address it first.

107 The grounds for the Claimant's assertion is based on the coincidence that the Respondent's Financial Expert's witness statement was filed on the same date as the Respondent's Factual Witness' 3rd witness statement which allegedly raised the issue for the first time. This is a rather incredulous conclusion to make based on the most tenuous of links. How does the same filing date indicate that the idea originated from the Respondent's Financial Expert?

108 To back up their theory, the Claimant's solicitors then forced the hapless Mr Naseer, who had never met the Respondent's Financial Expert, let alone was aware of or privy to any discussion with the said expert, to admit to their theory.

109 Once again, the Claimant's wild theory is incorrect. The Respondent's Financial Expert had stated at [2.1] of his 1st Witness Statement that his "*scope of work is to provide my opinions to the questions posed by Aldgate Chambers LLC. A list of the questions is appended as LQS-2.*"

110 As can be seen from the list of questions at "LQS-2", **[page 9 of the Claimant's Financial Expert's 1st Witness Statement]**, the Respondent's solicitors had set out at [3.4] of the 'List of Questions for the Financial Expert Witness':

> "***The total fee per foreign passenger who arrives and departs Maldives is US $2***... *Please calculate the Claimant's loss for the [following] period[s]...*"
> (Emphasis in bold added)

111 The Respondent's Financial Expert did not come up with the idea that the total fee per foreign passenger was US $2.

112 It is also incorrect to suggest that the Respondent had not raised the issue before. The amount of damages that the Claimant is seeking in this arbitration has long been disputed. In its first Statement of Defence and Counterclaim filed on 16 July 2014, the Respondent has pleaded that:

> 112.1 "*[t]he Respondent disputes the invoices produced by the Claimant and puts the Claimant to strict proof regarding such sums*" **[39.1] RD&C**.

112.2 "*Further and / or in the alternative, the certificate issued by the "independent firm of auditors appointed out [sic] by the Company" should be set aside for the following reasons... [39.2.2] The certificate is erroneous...*" **[39.2] RD&C.**

113 It must be highlighted that at that point of time, the Claimant had not sought common law damages, but was merely relying on the independent auditor's certificate to claim its purported loss of revenue (the certificate was abandoned at the hearing). The Claimant only amended its Statement of Claim to include an alternative plea for common law damages on 20 August 2015.

B. The Law on Contractual Interpretation

114 In the recent Singapore Court of Appeal case concerning contractual interpretation (***Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd*** [2015] 5 SLR 1195 ("***Y.E.S. F&B***") **[3RBA - TAB 1]**), the Court restated the applicable principles:

114.1 When faced with rival meanings of certain words and phrases, a nuanced consideration of both the text as well as the context of the contract in question is crucial - [30].

114.2 "*the context cannot be utilised as an excuse by the court concerned to rewrite the terms of the contract according to its (subjective) view of what it thinks the result ought to be in the case at hand. To this end, the court must always base its decision on objective evidence... Put simply, the court must ascertain, based on all the relevant objective evidence, the intention of the parties at the time they entered into the contract*" - [32].

114.3 "*In this regard, the court should ordinarily start from the working position that the parties did not intend that the term(s) concerned were to produce an absurd result. However, this is only a starting point – and no more*" - [32].

114.4 "*although the relevant context is also important, the text ought always to be the first port of call for the court*" - [32] However, "*on the opposite end of the spectrum, the text concerned might itself be ambiguous (ie, without even considering the relevant context). In such a situation, it is clear that the relevant context will generally be of the first importance*".

114.5 "*the court is always to pay close attention to both the text and context in every case – noting that both interact with each other*". - [35]

114.6 "*the role of context ... relates only to the need to place the court in the position of the party which drafted the instrument and not the drafter's subjective intention as such*".

114.7 The guidance in ***Zurich Insurance*** **[3RBA – Tab2]** on what extrinsic evidence is admissible in aid of contractual interpretation as well as the way in which the task of interpretation is to be carried out is both comprehensive and nuanced - [39]. The Court quoted, *inter alia*, the following paragraph from *Zurich Insurance*:

"The extrinsic evidence in question is admissible so long as it is relevant, reasonably available to all the contracting parties and relates to a clear or obvious context... However, the principle of objectively ascertaining contractual intention(s) remains paramount. Thus, the extrinsic evidence must always go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon ...there should be no absolute or rigid prohibition against evidence of previous negotiations or subsequent conduct, although, in the normal case, such evidence is likely to be inadmissible for non-compliance with the requirements... the relevance of subsequent conduct remains a controversial and evolving topic that will require more extensive scrutiny by this court at a more appropriate juncture. Declarations of subjective intent remain inadmissible except for the purpose of giving meaning to terms which have been determined to be latently ambiguous."

114.8 Finally, at [48] & [49], the Court cited with approval Lord Clarke's statement in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 that "***[i]f there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other***".
(Emphasis added.)

C. The Relevant Text

115 To recap, the main clause at the centre of this issue is clause 5.2.1:
"The Company is authorised by the Government to impose upon and collect levy or fee from:
i. Each and every passenger using non-Maldivian passport arriving into and departing from the Republic of Maldives, a fee of USD2.00 (UNITED STATES DOLLAR TWO ONLY) per passenger via a levy or fee imposed or to be imposed by the Government to be charged on such passenger."

116 The key phrase is "*arriving into and departing from*". It is the Respondent's position that the phrase should be read conjunctively, i.e. every foreign passenger arriving into and departing from Maldives would pay a total of US $2. The addition of the phrase "departing from" would prevent the Claimant from claiming in future that it was entitled to claim an additional $2 upon departure.

117 The Claimant's argument is that it should be read disjunctively. However, if it was meant to be read disjunctively, shouldn't the term "or" be used instead? I.e. each and every foreign passenger "arriving into or departing from".

118 In relation to paragraph 162 of the Claimant's Closing Submissions, if the phrase "*entering into and departing from*" is to be taken as imposing a fee on both arriving and departing passengers, then logically, Clause 12.3 of the Concession Agreement (the liquidated damages/penalty clause) would state that the Respondent would pay the Claimant, upon termination, a compensation sum equivalent to the total Charges multiplied by the projected number of passengers entering into **and** departing from Maldives.

119 Instead, Clause 12.3 states that the compensation payable is the total Charges multiplied by the projected number of passengers entering into **or** departing from the Maldives. This clearly signifies that only one charge is payable.

119.1 The structure used in Clause 12.3 for the arriving or departing passengers is similar to the next line regarding foreign workers or visa cards - the charges would be multiplied by the number of foreign workers **or** visa cards. According to Clause 5.2.1(iii) of the Concession Agreement, if the Government did not implement visa cards, it would have to pay based on the number of foreign workers in the country. Hence, the use of the term 'or' in Clause 12.3.

119.2 Therefore, Clause 12.3 supports the Respondent's position that Charges are only payable once, either upon arrival or departure.

120 Since the Claimant and the Respondent have taken different interpretations of the meaning of Clause 5.2.1 of the Concession Agreement, we proceed to consider the context in which the Concession Agreement was entered into. The Claimant has relied on what it billed as "extensive negotiations" between the Claimant and the Respondent before the Concession Agreement was signed (see paragraph 157 of the Claimant's Closing Submissions). While the Concession Agreement has an entire agreement clause, the extrinsic evidence relating to the context in which the agreement came about and how it was entered into is highly relevant to assist with contractual interpretation. The starting point would be the bidding process which led to the award of the MIBCS project to the Claimant. This is where we will turn our attention to.

D. The Bidding Process

121 The first document we consider for this segment would be the RFP. The RFP stated that the purpose of the MIBCS system was to enhance the border control, maximise services and monitor human trafficking and illegal movement of migrant workers **[1CHB 100]**. The RFP also identified the issues and challenges in the Maldives that required "*immediate attention*" to overcome. They were primarily related to the crime and problems caused by illegal workers/immigrants who were involved in debt bondage, human trafficking, illegal sex trade and wrongful detention, etc. **[1CHB 101]**.

122 In the RFP, the basis for which the bidders should price their bids is clearly set out:

> "*Bidders will indicate in their price bid the total amount of fees to be paid during the period of the BOT, i.e. 20 years. These fees will include all costs related to the BOT project, namely the costs of:*
> *a. Purchase of the equipment as specified in section 7*
> *b. Operation of the Facility*
> *d. Maintenance*
> *e. Costs to cover all aspects of section 6 Employers Requirements*"
> **[1CHB 127]**

123 The intention of allowing the winning bidder to impose charges / taxes was to cover all costs of the project, including operation and maintenance.

124 Furthermore, in the RFP, it is clear that the party with the lowest bid would be awarded the contract.

> "*2.31 Comparison of Bids.*
> *The MoFT shall compare all substantially responsive Bids to determine the lowest evaluated bid, in accordance with ITB2.29.*" **[1CHB 124]**

> *"2.32 Award Criteria*
> *2.32.1* ***The MoFT shall award the Contract to the Bidder whose offer has been determined to be the lowest evaluated bid*** *and is substantially responsive to the Bidding Document..."*
> (Emphasis added.) **[1CHB 125]**

125 All bidders had submitted their bids based on a 'per passenger' basis. There was no concept of charging upon arrival and then again on departure. [See Dibena's bid - 1RBD 650, OSD's/Iris' bid - 1RBD 743, Informatics' bid - 3RBD 1915 and their revised bid at 3RHB 1913]

126 As late as 21 September 2010, Informatics had revised its price bid downwards from US$1 to "*US $0.65 per passenger* - ***On Arrival Passengers Only***" (Emphasis in bold original) **[See 3RHB 1913]**.

127 The context of how the bid was awarded makes it clear that the Respondent's intention was for incoming tourists to be charged as low a price as possible. This was based on legitimate concerns about the impact of the imposition of taxes on foreign passengers. The Republic of Maldives is dependent on tourist arrivals for its economy and there were concerns that the increase in taxes would cause tourist arrivals to decline.

128 The concern that imposing additional fees on tourists could cause tourist arrivals to decline is well known, and coincidentally, is stated in a news article disclosed in this arbitration [***see Volume G - Bundle of GMR News Articles*, Page 3**]. This article was written on 27 June 2010 after the bidders had submitted their bids, but before the Respondent had been awarded the contract. In a report on the Malé International Airport privatisation deal:

> 128.1 The opposition parties were quoted as stating that "*a Majlis amendment is necessary to raise the airport service charge from US$18 to US$25, which the government has promised to GMR*".
>
> 128,2 Further, the president of People's Alliance, Abdulla Yameen (the current President of the Republic of Maldives) was quoted in the report as having stated that "***<u>GMR's fuel charges, airport tax and charges for flights landing at the airport could cause tourist arrivals to decline</u>***"
>
> 128.3 The consideration how an increase in charges could lead to a decrease in tourist arrivals is important when we subsequently deal with the Claimant's absurd postulation that the Respondent would benefit from the doubling of the charges collected simply because it was entitled to a 5% of the charges that the Claimant collected.

E. The Claimant's draft unsigned financial bid shows that the parties did not contemplate payment of a fee per arrival and per departure.

129 The Claimant has sought to use a "draft" concession agreement in its attempt to explain how its $2 bid morphed into a $4 in total.

130 However, we can use the unsigned financial bid that the Claimant produced in this arbitration to further examine this issue.

Claimant's "draft" financial bid created on 25 July 2015 [3CHB 1233]	**Claimant's actual Financial Bid submitted on 20 May 2010 [2.2CHB 975]**	**Final Concession Agreement [1 CHB 22]**
USD 2 per passenger (per arrival and per departure) See also [3CHB 1229], "*the Proposed Fee seeks to recuperate the costs by charging a fee on each incoming passenger and the work visa for foreign workers*"	USD 2 per passenger See also [2.2 CHB 971], "*the Proposed Fee seeks to recuperate the costs by charging a fee on each incoming passenger and the work visa for foreign workers*"	Clause 5.2.1 *The Company is authorised by the Government to impose upon and collect levy or fee from:* *i. Each and every passenger using non-Maldivian passport arriving into and departing from the Republic of Maldives, a fee of USD2.00 (UNITED STATES DOLLAR TWO ONLY) per passenger via a levy or fee imposed or to be imposed by the Government to be charged on such passenger...*

131 It is clear what was **not** in the Parties' contemplation during the bidding process. The parties did not intend to charge passengers **per arrival and per departure**.

132 Furthermore, what is clear is that if the Claimant had intended to charge per arrival and per departure in the actual Concession Agreement, it would have used the same phrase found in its "draft" financial bid – 'per passenger per arrival and per departure'. That phrase is very clear, instead of 'every passenger arriving into and departing from'.

133 It is clear that it was the parties' intentions that the terms of the financial bid would be incorporated in the Concession Agreement. The RFP specified that when submitting their financial bids, parties had to agree to "*(f) We understand that this bid, together with your written acceptance thereof included in your notification of award, shall constitute a binding contract between us, until a formal contract is prepared and executed*". (See the RFP **[1CHB 155]**, and the incorporation of the term in the Claimant's Financial Bid **[2.2CHB 979]**).

F. The Contract drafting process / "Extensive Negotiations"

(i) There were no "Extensive Negotiations" between the Claimant and the Respondent.

134 The Claimant has claimed, for the very first time, in its Closing Submissions that after "extensive negotiations", a bargain was struck that the Claimant would charge only non-Maldivian passengers, but that they would be charged $2 upon arrival and $2 upon departure. Frankly, this amounts to evidence from the Claimant's solicitors as it was never brought up in evidence before.

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135 For the following reasons, it is clear that the Claimant's story in its Closing Submissions about the alleged "extensive negotiations" and how such negotiations led to the Claimant being able to charge foreign passengers a total of $4 is clearly an afterthought:

135.1 When confronted with the disparities between the draft financial bid **[3CHB 1233]** that the Claimant Factual Witness introduced as evidence (which stated that the Respondent would charge $2 per passenger per arrival and per departure), and the actual financial bid **[2.2 CHB 257]** (which did not have this phrase), the Claimant's Factual Witness was cornered and could only admit that the bid was for $2 per passenger.

135.2 The Claimant's Factual Witness did not address the white elephant in the room - how the $2 bid then morphed into the $4 that the Claimant relied upon. He did not mention the "*extensive negotiations*" and neither did his Counsel re-examine him on this.

135.3 Furthermore, the Claimant's Factual Witness had claimed to have filed his 3rd Witness Statement in response to the "*new factual allegations*" in the Respondent's Factual Witness' 3rd Witness statement, which included the $2 / $4 issue. It is very telling that despite the Respondent's Factual Witness stating in the witness statement that the Claimant's bid "*had been submitted on the basis that the charge of USD$2 was meant to cover both the arrival and departure of each passenger*", the Claimant's Factual Witness never alluded to the alleged subsequent "extensive negotiations" in his 3rd Witness Statement (see paragraphs [55] to [59]).

136 This story is about the extensive negotiations is clearly made up:

136.1 The letter of award accepting the Claimant's bid of $2 per arriving passenger was sent on 29 September 2010 **[See 3RBD 2104]**. The Concession Agreement was signed on 17 October 2010. It is illogical that the Claimant's revenue for foreign passengers would be allowed to double within a short period of less than three weeks.

136.2 The "extensive negotiations" were not recorded by either the Claimant or the Respondent's officers.

136.3 This critical increase in charges for foreign passengers is not mentioned by any of the individuals that ACC interviewed. (We note that the Claimant has relied heavily upon certain statements, but ironically chose to criticise the interviewers as a whole.)

(ii) Objectively, there is no justification for the Claimant's claim to be able to charge foreign passengers double after Maldivian passengers were excluded.

137 It is clear from the evidence that the Respondent's officers was concerned that the charges would be considered a tax and would be prohibited under Article 97 of the Constitution (see for example Abdullah Muiz's statement at **[3RBD 2568]**). A common law principle exists – the High Court of Australia has held that where local citizens (who have the right to enter their own country) are charged for immigration clearance without the provision of additional services, this constitutes a tax - ***Air Caledonie International v The***

Commonwealth (1988) 165 CLR 462 **[3RBA – Tab 3]**. It is clearly understandable that subsequent to the award of the MIBCS project, the parties then agreed to exclude local Maldivians from the Charges. The purpose of the MIBCS system was, after all, to target illegal workers and human traffickers. Many countries exempt their local citizens from paying such fees / taxes.

138 There is no logical explanation why the Respondent would allow the Claimant to effectively double its revenue after excluding Maldivian citizens from being charged. As we show below (using 2009 figures), the parties knew that the Claimant had submitted a bid to collect from US$2 from arriving passengers, which amounted to 844,300 passengers in 2009. After subtracting the local Maldivians[xi], there would still be 729,087 foreign passenger arrivals. Why would the Respondent agree to let the Claimant claim US$2 from 729,087 foreign passengers both ways, effectively allowing them to collect 1.727 times the amount in their financial bid?

139 In fact, the effect of charging foreign passengers twice would be even more apparent, given that it was well within the parties' contemplation that tourist arrivals were projected to increase. As the parties' financial experts have calculated, the total projected revenue (charges) that could be collected by the Claimant over the remainder of the 20 years (taking into account the growth in tourism arrivals) would be either US$37,740,652 ($2) or US$58,790,178 ($4). This is a US $21 million difference in charges collected and obviously of great importance - something which that the Claimant states was a result of extensive negotiations in less than 3 weeks (but ironically, given its significance, was not recorded anywhere).

140 As we have set out earlier, the charging of fees was intended to allow the successful bidder to cover its costs of the project. The Claimant has not been able to explain the additional value or services it would provide for an extra US$ 21 million.

141 When applying contextual interpretation, it is submitted that the Tribunal must find that it does not make business common sense to conduct a tender, choose the lowest bidder and then allow the successful bidder to revise his price upwards to receive an additional US $21 million. The Claimant's entire costs to undertake this project had to be specified under the financial bid and accounted for in the form of the charges on each passenger arrival and visa card issued. Objectively, there is simply no reason to subsequently grant the Claimant the right to earn approximately US$1 million or more each year over a 20 year period without any benefit to the Country.

142 It would have made business sense for the Charges to be based on foreign passenger arrivals only. As we know, the Claimant has been extolling the profitability of the Concession Agreement during the hearing. As the Financial Experts have calculated, the Claimant's profit for the remainder of the concession period based on a total of US$ 2 per foreign passenger is US$ 15.2 million. The projected profit makes it clear that restricting the $2 charge to each foreign passenger would not have caused the Respondent to suffer any losses.

143 At paragraph 173 of the Claimant's Closing Submissions, the Claimant offered a rather enticing argument of why the Respondent would have agreed to allow the Claimant to double the charge imposed on foreign passengers. It claims that the Respondent would have

directly benefitted from the Claimant's interpretation of the charging mechanism applying for both arrivals and departures. As mentioned in earlier, this is absurd and far from the truth.

143.1 The Government wanted to minimise the tax/charges collected in order not to cause tourist numbers to decline.

143.2 If the Respondent was concerned about tax revenue, it could have selected the bidder whose relatively high bid combined with the relatively high royalty rate would result in the largest amount of royalty, i.e. Dibena (which bid $10 per passenger and offered a royalty of 3%, amounting to $0.30 of royalty per passenger (one way)) as compared to the Respondent's ($2 x alleged two way x 0.05% royalty, amounting to a total royalty of $0.20 for both ways).

143.3 It is sad that the Claimant's desire to benefit itself has made it assume that the Respondent would also have functioned in the same way.

144 Insofar as the Claimant is trying to rely on what has been stated in Abdullah Muiz's statement to ACC to draw the conclusion that the amount of $2 was to be charged at the point of arriving and a further $2 was to be charged at the point of departing, it must be borne in mind that Mr Muiz was not involved at the bid process stage and therefore, he would not have known that bid submitted by the Claimant was meant to be $2 in total for both arriving and departing.

144.1 Mr Muiz mentioned in his statement that "*in giving legal opinions, the Attorney General's Office would mainly look for Constitutional issues*" **[see 3RBD 2567]**. Mr Muiz was mainly concerned about legal issues. For example, he did not discuss an article allowing the revision of the charges that was, in his opinion, a business decision as opposed to a legal issue. **[See 2568 3RBD line 5]**

144.2 When discussing Clause 5.2.1, his sole consideration for the charges was whether they constituted a tax that would be in conflict with Article 97 of the Constitution. **[See 2568 3RBD lines 8 - 17]**

145 Many people who took part in the contract discussions and in particular the 13 October 2010 meeting with the Claimant **[3RBD 2116]** were not even aware of the factual matrix of how the tender had been awarded to the Claimant. A prime example would be Ibrahim Afeef who admitted to ACC that he had "*not even seen the Tender document*" **[3RBD 2595]**.

146 Tying in with the later section on the dangers of using subsequent conduct to interpret a contract, Mr Muiz's statement was given on 24 October 2011 (more than a year after the Concession Agreement was signed on 17 October 2010). Most significantly, the statement was given when the $2 / $4 was a live issue and was being investigated by the ACC (contrary to the Claimant's suggestion at paragraph 177(c) of its Closing Submissions that the issue had not surfaced):

146.1 The DOIE had submitted a cabinet paper to the Ministry of Home Affairs on 25 April 2011 **[3CHB 2262]**, seeking an opinion on whether the Concession Agreement should be terminated **[see 3RBD 2271]**. In the paper, the DOIE created a table which indicated that $2 would be collected from the foreigners who entered Maldives and also $2 would be collected from foreigners who would leave Maldives **[see CBD 116 (English) and 3RBD 2265 (Dhivehi)]**.

146.2 Clearly, there was a chance that Mr Muiz had been influenced by the DOIE's opinion that the foreign passenger charge was $2 both ways when he gave his statement to ACC.

146.3 This was a live issue was being investigated by the ACC, which issued its report on 27 November 2011 (one month after interviewing Mr Muiz) stating that: *"Even though parts (i) and (ii) under clause 5.2.1 of the agreement states that Nexbis would claim a fee of $2 as tax and $15 for every visa card issued from every tourist entering and leaving the Maldives, the bid proposed by Nexbis stated that they would claim a fee of $2 from every tourist passenger. Therefore it is noted that Nexbis doubled the amount in contravention to what they proposed in the bid document."* **[1RBD 150, paragraph 5.9.4.2]**.

146.4 Mr Muiz would have been aware that the ACC was investigating this issue.

146.5 Furthermore, two other individuals interviewed by ACC were not aware of any discussion of the departure fee in the meetings. Amhed Waheed's statement on 23 October 2011 **[3RBD 2562]** and Ibrahim Waheed's statement on 25 October 2011 **[3RBD 2579]**, given a day before and after Mr Muiz's statement on 24 October 2011, indicated that only the arrival fee was discussed in the meetings.

146.6 Clearly there are some problems with Mr Muiz's evidence that was given a year after the Concession Agreement was signed.

147 Even if Mr Muiz was really under the impression at the 13 October 2010 meeting that $2 was meant to be charged per arrival and per departure, the Claimant has not provided any evidence of how the $2 bid doubled and became $4. There is no evidence of this any extensive negotiation relating to the doubling of the charge on foreign passengers.

(iii) The comparison between the 'draft' concession agreement and the Actual Concession Agreement is unreliable and inconclusive

148 In light of the parties' clear intentions for the bid terms to be transferred to the Concession Agreement, it is submitted that the comparison done on the 'draft' and the actual Concession Agreement by the Claimant at paragraph 162 of its Closing Submissions is unhelpful.

149 Firstly, the Respondent is unable to ascertain the status of the 'draft' concession agreement **[at 4CHB 2364]**.

150 It is reiterated that no evidence has ever been led by the Claimant on this 'draft' or any other drafts for that matter.

151 The Claimant attributes the 'draft' as the copy that was given to Mr Abdullah Muiz to review based on various statements in the ACC Report (which it has greatly criticised). It comes to the conclusion based on the following points:

151.1 Ibrahim Afeef and Abdullah Waheed went to see Mr Muiz with a draft.

151.2 There is a slightly illegible handwritten note "*07/10 Afeef and Abd [illegible] Waheed visits [illegible]*" on the 'draft' at **[4CHB 2360]**.

151.3 Abdullah Muiz stated that arbitration should be in Singapore, not Malaysia.

151.4 The 'draft' provided for arbitration in Malaysia and the actual Concession Agreement provided for arbitration in Singapore.

151.5 Therefore the 'draft' was an early draft which was amended after AGO's opinion on it has been sought, and parties negotiated its terms further (see paragraph 160 of the Claimant's Closing Submissions).

152 This conclusion is based on very tenuous conjectures. How can the presence of a Malaysian arbitration clause indicate that the AG's Office had reviewed that specific document? Furthermore, whether Mr Muiz had actually met with Ibrahim Afeef and Ahmed Waheed is unclear:

152.1 Firstly, Mr Muiz said that it was the Controller Ilyas who came to the AG's office with the draft agreement. **[3RBD 2567]** He did not state that he met Ibrahim Afeef and Abdullah Waheed.

152.2 Ibrahim Afeef stated that he was functioning in the capacity of DOIE's lawyer **[3RBD 2593]**. This was confirmed by the Controller Ilyas who stated that "*In drafting the main parts of the agreement, advice was sought from immigrations legal counsel, Ibrahim Afeef.*" **[3CBD 2552]** Mr Muiz did not appear to know of Ibrahim Afeef's existence. Mr Muiz stated that "*I was informed that the draft was prepared and sent by the successful bidder of the Border Control project, Nexbis Ltd.* ***Since there was no lawyer working in the Immigration at that time*** *and since there was no such agreement among the bidding documents prepared by Immigration, I do not believe that the agreement was drafted by Immigration.*"

153 Further, it was not recorded in Mr Muiz's statement that he recommended arbitration in Singapore. Instead, this was attributed to Mr Muiz by Ibrahim Afeef in his statement **[3RBD 2594]**.

154 A more disturbing reason exists as to why the Tribunal should disregard Ibrahim Afeef's evidence. As set out above, the Claimant has relied on Ibrahim Afeef's statement to the ACC dated 27 October 2011 **[3RBD 2595]**. But in the cabinet paper submitted by DOIE on 25 April 2011 **[CBD 116]**, it was noted that "*The lawyer who represented the Immigration department the Deputy Director General, Mr. Ibrahim Afeef (Gulbahaaruge, B. Thulhaadhoo) during the inception of this project is now representing Nexbis. This was confirmed when Mr. Ibrahim Afeef attended as the lawyer of Nexbis for a meeting held between this department and Nexbis on March 28th, 2011.*" Ibrahim Afeef had come from

advising DOIE to representing the Claimant on the same matter within 5 months after the signing of the Concession Agreement. When he gave his evidence to ACC, he was Nexbis' lawyer (something which he failed to declare). Clearly his evidence cannot be relied on.

155 In light of these doubtful circumstances and the Claimant's dubious conclusions, it is submitted that the 'draft' concession agreement cannot be relied upon.

156 Secondly, even if the 'draft' could be relied upon, the Claimant's submission that the bargain struck in the Concession Agreement was for it to only charge foreign passengers twice, is merely its subjective intention/interpretation. It is not disputed that Maldivian passengers will not be charged. What is disputed is whether the Claimant is entitled to charge foreign passengers twice.

157 Without considering the Claimant's subjective intention/interpretation, the comparison performed by the Claimant does not objectively elucidate the matter. The Respondent has already pointed out earlier that Clause 12.3 of the Concession Agreement allows the Claimant to only claim charges multiplied by passengers entering into <u>or</u> departing from the Maldives.

158 The question then goes back to what was discussed in the earlier section: is the phrase "*entering into and departing from*" to be read conjunctively or disjunctively.

159 A possible argument might be that addition of the phrase "departing from" should mean something. It is unclear how and why this phrase was introduced, but the Respondent's submission is that it is meant to be conclusive that the Claimant was only allowed to charge $2 for each passenger.

160 Therefore, such comparison does not provide any helpful insight into the parties' objective intentions.

(iv) The Claimant drafted the Concession Agreement but repeatedly denied doing so

161 It has thus far been unclear which party drafted the Concession Agreement. The Respondent's position has always been that the Claimant drafted the Concession Agreement.

162 The Claimant's Factual Witness' testimony was that the Claimant did not draft the Concession Agreement.

> <u>**Transcripts, Day 1, Page 83, lines 22 to 23**</u>
>
> *Q. Did the draft come from Nexbis, "yes" or "no"?*
> *A. No.*
>
> <u>**Transcripts, Day 1, Pages 84 to 85, starting from line 12**</u>
>
> *Q ... Just to help you, volume 3, you start at page 2567. You will see that the person who gave the statement to ACC is Abdullah Muiz. To be fair to you, I will inform you, and you can take it from me that Abdullah Muiz was the Solicitor-General at that time. Okay? This is a statement he gave. If you turn to the next two pages, page 2569, at the right at the top, Solicitor-General said: "The Attorney-General's Office*

was not asked to assist in a drafting of the agreement signed between the Government of Maldives and Nexbis to establish the Maldives Border Control System. I was informed that a draft was prepared and sent by the successful bidder of the border control project, Nexbis Limited." Do you see that?
A. Yes.
Q. So we have a statement from the Solicitor-General, so I have a basis to ask: it was Nexbis who prepared the draft and had forwarded it to Mr Ilyas. Is that correct or is that wrong?
A. No, that's not correct.
Q. Okay.

163 The Claimant's Opening Statement also mentioned that the Concession Agreement was "*drafted by the DoIE*" **[Transcripts Day 1, Page 20, Lines 16 to 19]**.

164 As the Claimant has stated in its Closing Submissions that the document at **[at 4CHB 2364]** is the draft concession agreement, this has shed new light into who drafted the Concession Agreement. Following the Claimant's comparison of the 'draft' concession agreement against the actual Concession Agreement, the Respondent has also performed the same comparison and have uncovered certain clues in both documents which objectively indicate that it was drafted by the Claimant:

164.1 Firstly, the document is marked "*Draft 290710*" at the top, very likely 29 July 2010. This was a time when the price bids had not even been opened by the Respondent and it would not have prepared a draft with the Claimant's name. It is slightly intriguing to see that the Claimant was so certain at that point of time that it would be awarded the tender and had started drafting the agreement between the Respondent, its potential subsidiary and itself.

164.2 Secondly, in the draft document, the definition of 'Working Day' is "*a day other than - (a) Saturdays, Sundays...*" **[4CHB 2370]**. However, Sundays are working days in the Maldives and this definition could only have been drafted by someone who was unfamiliar with the Maldivian work week. In the actual Concession Agreement, this has been changed to reflect that the Maldivian weekends are on Fridays and Saturdays **[1CHB 32]**.

164.3 Thirdly, it was stated in the draft that the governing law of the contract would be the laws of Malaysia and that parties submitted to the exclusive jurisdiction of the Malaysian Courts **[4CHB 2393]**. Furthermore, it was also stated that any arbitration was to be held in Malaysia **[4CHB 2391]**. As any person who is familiar with drafting contracts would know, these are positions normally taken by the party that drafted the contract, which would then be subject to negotiations. It is not plausible that the Respondent's officers would have chosen Malaysian courts / laws over their own legal system.

164.4 Fourthly, at **[4CHB 2392]** the '*Notice to the Company*' was filled in with the Claimant's details, while the Notice to the Respondent was left blank. Again, a party that drafted the contract would normally fill in these details.

164.5 Finally, the most surprising portion in the 'draft' is the Clause on royalty payments to the Respondent. At **[4CHB 2380]**, it is specified that:
"*8.4 Royalty*
The company agree to pay to the Government a ***royalty fee amounting to 5% on project net profits declared by the Company annually*** *for the duration of the Concession Period or until such time the Government implements a corporate profit tax or GST.*" (Emphasis added.)

164.6 The position on the royalty is clearly wrong. The RFP contained a template 'Letter of Price Bid' which stated that royalty of a certain percentage was to be paid on the income **[1CHB 154]**. The Claimant's financial bid proposed that the royalty to be paid to the Respondent was 5% of the Claimant's income on a monthly basis **[2.2CHB 979]**. The Respondent's Ministry of Finance and Treasury had also recorded a similar position "*Royalties of 5% of the gross revenue per year for 20 years.*" in its letter to the DOIE, informing them that the Claimant had been awarded the MIBCS project. **[3RBD 2104]**. The Respondent's officers would never have reduced the 5% royalty on income to 5% royalty on the Claimant's project net profits.

165 Therefore, based on the five clues above, it is clear that the Claimant had drafted the contract but mysteriously chose to deny it. Two of the Respondent's ex-officers Controller Ilyas and Samee Ageel (who have been charged with corruption) claimed to have drafted the Concession Agreement and their motives for lying must be questioned. We will discuss these two individuals further below in the section on corruption.
166 Since the Claimant has raised the issue of the drafts, a question arises: did the Respondent amend any further portion of the Concession Agreement? The only documentation/record of any amendments to the Concession Agreement was for a meeting on 13 October 2010 **[3RBD 2116(Eng.) and 2106 (Dhivehi)]** where there was a discussion of amendments to the draft Concession Agreement. The record was made in both English and Dhivehi (this is because even though many of the Respondent's officers are fluent in English, it is still their second language and they are more comfortable in Dhivehi).

167 The evidence is that the Respondent did not suggest any further amendment in relation to the charges. If the Respondent had made further amendments to the Concession Agreement, it would have been recorded in both English and Dhivehi minutes.

(v) The unexplained 'draft' financial bid [3CHB 1233]

168 According to the Claimant, the parties had only come to a conclusion that the Claimant would be allowed to charge foreign passengers $2 both ways after the extensive negotiations that took place after the award of the tender to the Claimant.

169 Most intriguingly, when and why did the Claimant modify the Respondent's RFP template 'Letter of Price Bid' **[1CHB 154]** from "*per passenger*" to the phrase in its 'draft' financial bid – "*per passenger per arrival and per departure*" **[3CHB 1233]**?

170 It was stated in the RFP at paragraph 2.1.6 that "*any condition, qualification or other stipulation contained in the bid shall make it liable to rejection*". Paragraph 2.11.1 of the RFP stated that the "*MoFT will evaluate only those Bids that are received in the required formats and complete in all respects*".

171 If Claimant wanted to bid for $2 per passenger per arrival and per departure, would it not be simpler to just bid $4 per passenger as per the RFP template?

172 Why was this document disclosed by the Claimant's Factual Witness in this arbitration and why was it passed off as "*Claimant's Financial Bid Document*" dated 25 May 2010? **[See the Index to the CHB, s/n 4]**. One must wonder whether this document was simply created to support its claim that it was entitled to charge $2 both ways.

G. Subsequent conduct

173 Much have been said by the Claimant about the lack of protest from the DOIE officers with regard to the invoiced amounts which charged foreign passengers a total of $4.

174 It is important during the consideration of the subsequent conduct of the parties to note a very simple point - no charges were ever collected by the Claimant or the Respondent from any passenger. None of the parties had actually collected money and checked their rights against the Concession Agreement.

175 It is clear that the DOIE officials thought that the terms of the Concession Agreement were in accordance with the Claimant's financial bid.

> 175.1 This position was conveyed by Mohamed Ali, the Controller of Immigration, in his letter dated 1 November 2012 to the Speaker of Parliament **[3RBD 2619]**. The new Controller stated: "*The decision to take $2 as tax from every foreigner entering and leaving the Maldives and to levy a charge of $15 for every Visa Card issued* <u>*was done so after the proposal made by Nexbis was studied by the Tender Evaluation Board*</u>."
>
> 175.2 The DOIE officers were not part of the financial evaluation. Ibrahim Afeef stated in his statement to the ACC that "*Although it was a project of Immigration, everything regarding the Project was done by Finance, as the President had asked to do all work regarding the project by a third party since it might facilitate an act of corruption if it was done by Immigration. No other work was assigned to Immigration apart from signing the agreement.*" **[3RBD 2595]**. He had also never seen the tender documents.

176 It is reiterated that the individual that signed the Concession Agreement on behalf of the Respondent, Ilyas had been quoted shortly after the Concession Agreement was signed as saying that "*a US$2 fee is to be charged from every foreigner entering the country*" **[6CHB 4255 & 4257]**.

177 As for other individuals, it is submitted that it is dangerous to rely on the subsequent conduct of individuals that (i) were not involved in the tender process and the drafting of the Concession Agreement, or (ii) only came on board at a later stage.

> 177.1 Individuals who were not involved in the tender process and the drafting of the Concession Agreement would not be aware of the live issues.

177.2 Individual who were not involved in the award and signing of the MIBCS project could be influenced by the 'conventional wisdom' (which may be right or wrong) that was passed down. If their subsequent conduct is relied upon, there may be the risk that the individual may have internalised any falsehood[xi] and merely stated the currently acceptable position at that point of time.

178 The Claimant makes a good point about the dangers of using subsequent conduct to interpret a contract. At [173] of the Claimant's Closing Submissions, the Claimant stated that "*[t]he overwhelming evidence is that the DOIE, as the department that conceived, consummated and carried out the MIBCS Project, had* ***invariably internalised*** *the revenue model of every foreigner paying $2 upon arrival and upon departure…*"

179 Any right minded individual who was actually part of the tender process would definitely question why the Claimant was collecting twice the amount that it bid.

180 There is an even more important reason why subsequent conduct should not be used and this was explained in ***Y.E.S. F&B*** by the Singapore Court of Appeal. It did not give subsequent conduct much weight because:
[74] "*As we pointed out to counsel during the hearing, there was not much assistance to be derived from the parties' subsequent conduct when the object of the interpretive exercise was to discern the parties' intentions at the time of entering into the contract.* ***Indeed, there are dangers in placing too much weight on such evidence because it can, with the benefit of hindsight, be shaped to suit each party's position.***"
(Emphasis added.)
181 In other words, a party would be at liberty to pick and choose the conduct that suits him. This appears to be exactly what the Claimant has done, choosing what suits its case theory and ignoring others which go against it.

182 An example would be when the Claimant claimed that the Tribunal should pay attention to ACC's interpretation as it had taken the view that the Concession Agreement had specified $4 (and recommended Controller Ilyas to be charged for conferring an undue advantage). This is one of the rare occasions where the Claimant has agreed with ACC (when it suits its case).

182.1 In any event, ACC had, in its 24 January 2011 letter **[see [7.1(ii)] of 3 RBD 2232]** stated that under Clause 12.3 the Government has to pay charges for passenger arrivals, without any mention of charges for departures. In relation to Clause 5.2.1, ACC merely repeated the wording of the clause "*every foreigner arriving and departing from Maldives a fee of 2 USD will be taken*".

182.2 The ACC report was published on 27 November 2011. By then, it had been widely propagated that the fee was $4. As mentioned above, DOIE had submitted a cabinet paper to MHA on 25 April 2011 with calculations indicating payment of a total of $4 **[CBD 116]**.

182.3 As for the reason why the PG did not charge Ilyas for conferring an advantage on the Claimant, there are a myriad of reasons why Ilyas was not charged. The Claimant postulates that the Ilyas could not have been responsive for conferring the advantage because there were many individuals involve. Another possible explanation could be that the PG was of the view that the Concession Agreement had specified $2 and Ilyas had not conferred an advantage on the Claimant. These are all mere conjectures.

H. Conclusion on the $2 / $4 issue

183 The Tribunal should not place any weight on the Claimant's story about extensive negotiations for the following reasons.

184 As the Claimant had been awarded the highest score for the Price Bids because it had submitted the lowest bid (including submitting a price of $0 for work permits and thereby receiving the full score of 10 marks for that section while the rest of the bidders received zero), it is a bit rich for the Claimant to now suggest that it was allowed to double its revenue for one of the two segments that it actually submitted a price for.

185 The Claimant has not provided any credible evidence about such extensive negotiations. None of the individuals interviewed by ACC mentioned anything about the change in the bid price of $2 to the Claimant's version of $4 in the Concession Agreement. The comparison between the draft agreement and the actual Concession Agreement is unreliable due to the weak conjunctures and inconclusive in its results.

186 Furthermore, the Claimant's story is incredible. The context of the signing of the Concession Agreement was that the Respondent had called for a RFP which specified that the lowest bidder would be selected, and had selected the Claimant based on its lowest financial bid. The potential that any imposition of charges may result in a decline in tourist arrivals was prevalent in the Respondent's mind. Clearly, allowing the Claimant to double an aspect of its price bid would be very unfair to the other bidders and against the very purpose and spirit of the tender - which was to obtain, for the Republic of Maldives, the best value for the project.

187 The Claimant has picked and chose the subsequent conduct (statements to ACC made by various individuals or submissions to cabinet, etc.) to bolster its case. Very little weight should be ascribed to these as the conduct involves individuals which (i) had a fleeting part to play, (ii) was involved at a later stage, (iii) or was charged for corruption. Furthermore, statements were given about 5 to 12 months after the event.

188 In light of the above, we have shown how the Claimant's explanation for the unwarranted increase in fees is an afterthought, cannot be believed and is contrary to business common sense. The Claimant had submitted a bid for $2 for passenger arrivals and after excluding a small amount of Maldivians passengers, could not objectively have been allowed to double its charges for all foreign arrivals, entitling it to an extra US $21 million in profit.

[xii] [] The Court said at [2007] 3 SLR(R) 357, [2007] SGCA 22.

The effect of an entire agreement clause was essentially a matter of contractual interpretation and necessarily depended upon its precise wording and context. Generally, such clauses were conducive to certainty as they defined and confined the parties' rights and obligations within the four corners of the written document, thereby precluding any attempt to qualify or supplement the document by reference to pre-contractual representations. However, in so far as contracts were not interpreted in a vacuum, objective facts could potentially assist in the interpretation of ambiguous terms. Entire agreement clauses would usually not prevent a court from justifiably adopting a contextual approach in contract interpretation. Such clauses had little bearing on textual or interpretative controversies as to the meaning of particular words or terms in contracts: at [25] and [41].

xiii **The Concession Agreement is tainted by corruption**

10 The Concession Agreement is voidable as it is tainted with corruption. Under Maldivian Law, it is deemed to be corruption if a government employee gives an undue advantage to a third party and there need not be any benefit that flows to the person who confers such undue advantage.

11 [See text reproduced in the Award]

12 The President's Office Directive No. 2009/49 ("**President's Office Directive**") sets out the guidelines to be followed in development projects (such as that of the border control system). The proper procedure as set out by the President's Office Directive was not adhered to in the bidding process.

13 In particular, pursuant to the President's Office Directive, approval would have to be obtained from either the National Planning Council ("**NPC**") or the Cabinet before proceeding with the project.

14 In the absence of the approval for such changes, the Request For Proposal ("**RFP**") could not deviate from what had been initially approved by the NPC. However, although approval was obtained for the initial proposal from the NPC, changes were made to the initial proposal that did not obtain the clearance from the NPC or the Cabinet, therefore, contravening section 12 and section 13 of the Prevention and Prohibition of Corruption Act 2000 ("**PPCA 2000**").

14A. MoFT released an invitation for Expressions of Interest ("**E.O.I**") on or around 13 January 2010, with four (4) categories which potential bidders would be assessed on. The Claimant was one of these interested parties and submitted its E.O.I for the MIBCS on or around 10 February 2010.

14B. However, during the evaluations of the E.O.Is, an additional category of "Capacity building", which was not previously listed in the invitation was included as a criteria for evaluation. The Claimant obtained the highest marks in this category, which enabled it to obtain higher marks and secure a higher position in the evaluation of the E.O.Is.

15 Bidding for the MIBCS opened on or around 30 May 2010. Based on the bids submitted, a technical evaluation and financial evaluation were carried out. Marks were given on the basis that the overall highest scorer would win the bid for the MIBCS project. The technical and financial evaluations were to be calculated and evaluated using the methodologies set out in the RFP. In particular, clauses 3.1 and 6.16 of the RFP set out the

percentage of each component in which the technical and financial evaluations were to be considered, respectively.

16 However, the technical and financial evaluations were carried out in a manner which contravened Maldivian Law, in particular section 8 of the Public Finance Regulations 2009 (**"PFR 2009"**) and section 12 and section 13(a) of the PPCA 2000. Section 8.01 of the PFR 2009 sets out the principles that must be followed when procuring goods and services for the State. These include the requirements for transparency and public knowledge at section 8.01(b) of the PFR 2009 and the requirement that equal opportunity must be given to competent bidders in order to ensure a competitive bidding process at section 8.01(c) of the PFR 2009.

17 The relevant sections of the PPCA 2000 are set out below:

> ***"PPCA 2000***
> *The offence of obtaining undue advantage by government employees*
>
> *12(a) It is an offence for an employee of Government or a Government venture to use position or influence from position, to gain or confer an undue advantage pertaining to a task or connected to a task being carried out by the agency or place of his employment.*
>
> *12(b) A person who commits an offence stated in subsection (a) above shall be punishable with imprisonment, banishment or house arrest not exceeding 3 years.*
>
> *The offence of acting in a manner which precludes an advantage to the public or the State where a benefit exists*
>
> *13(a) It is an offence for any government employee to act in a manner that precludes the public or state from attaining advantage of anything the public or state could have benefitted from, or to act in a manner that diminishes the benefits that could have been attained, or diverts the benefits or a part of the benefits to the employee or the employee's wife or husband.*
>
> *13(b) A person who commits an offence stated in subsection (a) above shall be punishable with imprisonment, banishment or house arrest not exceeding 5 years."*
>
> (Emphasis added)

18-24 [See texts reproduced in the Award] As to the technical evaluation:

[xiv] [210]-[232] read:

232. The Claimant's case is airtight. There is no escaping the fact that the CA was a valid, enforceable contract, the Claimant performed its obligations under the CA, and that it was the Respondent that repudiated the CA because it wanted to resile from what it later considered a bad bargain. The Respondent has no real defence to the Claimant's case.

211. That however has not stopped the Respondent from concocting disingenuous defences and counterclaims.

212. As we show below, the Respondent's witnesses' admissions are fatal to a number of the Respondent's pleaded defences and counterclaims.

213. Another factor which speaks to the falsity of the Respondent's pleaded case is the evidence which it chose to put forward to prove its case, or rather, the lack thereof.

214. Although many members of the Maldivian government were involved in the MIBCS project in one way or another, the Respondent chose to put forward a single factual witness, Mr Naseer, who was almost completely uninvolved in the MIBCS project. He was not a "witness" in any sense of the word, given that he did not in fact witness any material event first-hand. It was almost as if the Respondent wanted to hide behind Mr Naseer's curtain of ignorance, afraid of the concessions that the Claimant may gain from true witnesses to the facts of the case.

215. Further, Mr Naseer was not a credible or reliable witness. He claimed that he drafted his witness statement himself, in the Maldivian language, with inputs from a team of people and with help for the translation of the witness statement. However, when questioned, he betrayed that he knew very little of the contents of his own witness statements, or the exhibits to them. On the stand, he also contradicted the evidence in his witness statement several times.

216. It appears that Mr Naseer was put forward as a witness to defend a testimony that was not his own. The true makers of the witness statement were not called, and their veracity remained untested. Given this, all of Mr Naseer's witness statements should be treated circumspectly.

217. Finally, the majority of the Respondent's case was supported by evidence gleaned by the ACC and assertions made in the ACC Report. Mr Naseer stated that he had prepared the witness statement based on the ACC Report.

218. First, it is unclear why the DoIE is basing its evidence in this case on the ACC Report. After all, the ACC is a separate and independent institution from the executive arm of the Respondent's Government. Further, the DoIE and the ACC were opposing parties in the Maldivian civil cases where the ACC attempted to seek orders preventing the performance of the CA. The about-turn in the DoIE's position is puzzling.

219. Second, it is submitted that little reliance should be placed on the ACC Report given that (a) the makers of the ACC Report were not called; and (b) the evidence suggests that the ACC Report is unreliable.

A. The Respondent failed to call relevant witnesses to prove its case

220. The Respondent could have called any number of witnesses to prove its case in these arbitral proceedings. A list of the Respondent's dramatis personae involved the MIBCS project in some way can be found at Annex 2. As can be seen from the list, at least 38 people from various bodies of the government of Maldives were involved in some significant way in

the MIBCS project. The Respondent could have called some of them to testify in these proceedings.

221. Instead, the Respondent chose to call Mr Naseer who admittedly was not involved in any part of the MIBCS project and who could not give any first-hand evidence.

222. Mr Naseer admitted during the hearing that he was not involved in any step of the MIBCS project, including the following:-

a. The proposal submitted by the DOIE to the NPC;
b. The Respondent's publication of the Invitation for Expressions of Interest;
c. The preparation of the RFP, or its submission to the four shortlisted bidders;
d. The tender evaluation of the bids;
e. The decision to award the MIBCS project to Nexbis
f. The preparation of the Concession Agreement;
g. The implementation of the MIBCS project;
h. The project steering committee that oversaw the implementation of the MIBCS; and
i. The repudiation of the Concession Agreement on 5 August 2013.
- See Transcripts, Day 3, p. 71-73.

223. Yet he was put forward as the Respondent's sole factual witness to testify on these issues.

224. The Respondent's choice of witness is suspect, given the number of people who would have been compellable, and far better placed to give evidence.

225. Mr Naseer could offer no explanation on behalf of the Respondent as to why people who were far better informed than he were not called to give evidence.

226. A former Attorney General of the Respondent, one Aishath Azima Shakoor, had stated to the press that she would play a role in the "Nexbis and GMR cases" and "will lead the international arbitration": 6 CHB 4288. She may have been able to shed light on a variety of issues, including the AGO's opinion on the enforceability of the CA. However, she did not come forward as a witness.

227. Mohamed Nazim, the Minister of Defence and National Security at that time who signed the Termination Letter would also have been able to give first-hand evidence on the reasons for the termination of the CA. He too was not put forward as a witness.

228. Mr Naseer admitted that the was not aware why Aishath Azima Shakoor or Mohamed Nazim were not put forward as witnesses when they would have been far more involved in the termination of the CA that Mr Naseer: Transcripts, Day 4, p. 108-110.

229. The DoIE officials who were part of the PSC would have been able to give relevant evidence on the Claimant's performance of the CA, and verify whether the data centre which contained the passenger information was sitting in DoIE's offices in the Maldives. However they were not called as witnesses, and Mr Naseer admitted that he does not know why this was the case: Transcripts, Day 4, p. 62 to p. 65, line 9.

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230. The inference is that the Respondent did not want its evidence to be tested. If persons with actual knowledge of the circumstances of the case were tendered as witnesses, on cross-examination, the Respondent's assertions in this case would have tumbled like a house of cards. Therefore, the Respondent chose to put up a witness who did not have any personal knowledge of the facts, so that when questioned, the witness could simply state that he is repeating facts which he understood from his colleagues and cannot say anything more.

231. The Respondent's hesitance to have its evidence tested speaks volumes on its confidence in its own case.

232. It is submitted that this Tribunal should, in the circumstances, draw an adverse inference against the Respondent for failing to call relevant witnesses to prove its case.

[xv] [199]-[205] read:

The evidence against the Controller

199. It is the Respondent's case that the Controller's actions similarly constituted corruption under Section 12(a) of the PPCA.

200. The Controller was part of the team that had evaluated the First Technical Evaluation. As a result of accepting the twenty nine scholarships which the Claimant had proposed that it would provide, it was found that the team had considered a component which it should not have. Therefore, the First Technical Evaluation, which had awarded the Claimant the highest marks, was considered to be invalid.

201. Thereafter, the Controller continued to show preference to the Claimant and went out of his way to ensure that the Claimant would be awarded the Concession Agreement, by removing from its path officials who had been involved in the MIBCS project but were not in favour of the Claimant. This can be seen in the two following occasions:

[Statement of Adam Naseer, 3RBD, Tab 3, Page 2573, Annex 61 of the ACC Report]

> "I shared all the information with the government entities because the government will have to pay a large sum of money for this project, I believe that the citizen of Maldives must gain a profit from this and there must be a solution to the problems of foreign workers which is a crisis in Maldives. As I kept informing the government, Ilyas Hussain Ibrahim who was the Controller at that moment openly disapproved about that matter. Ilyas Hussain Ibrahim openly and repeatedly asked me not to say things (criticize) about the project and that the project was not of any concern to me. After few days thereafter, I found out that this project was awarded to a Malaysian company called Nexbis Limited. Nexbis Company did not state an exact price for the project."

(Emphasis added.)

[Statement of Ibrahim Waheed, 3RBD, Tab 3, Page 2580-1, Annex 61 of the ACC Report]

"In the meeting, I discussed about bringing some changes to the proposal made by Nexbis and to add some components to the agreement. As such, asked them to request Nexbis to include the technical specifications of the hardware and software. While I was giving information at the meeting, Ilyas Hussein contacted me by phone and asked me to come back to the office. After I returned to work, he removed all IT related responsibilities from me and told me not to criticize any IT related issues and to just come to work after that. As I remember, it was a Thursday. The border control systems agreement was signed on 17th September 2010 after the previous allocated signing date was pushed forward. When the agreement was signed, the amendments discussed with the AG's Office and Finance was not incorporated into the agreement. After I was sidelined from IT related work, Chief Immigration Officer Ahmed Waheed was assigned as the project's officer.

...

In summary, I can say that, by making an RFP that's different from the proposal submitted to NPC, and because things such as the scholarships which were in the bid were not included in the agreement, and while no amendments were made to the agreement as per the AG's advice, and as I was stripped of my title when I advocated to change some aspects of the project, and also as the agreement was signed way before it was previously set to be signed, I am lead to believe that these were things so in fear of losing some unfair advantages or improper benefits that some people stood to gain."

(Emphasis added.)

202. The Controller had even gone so far as to claim that he had drafted the Concession Agreement [3RBD, Tab 3, Page 2552]. He stated that "[t]he draft agreement was not one presented by Nexbis. I created the original of the draft by making reference to previous agreements". This is plainly untrue, given that even the official who had been on the same team as him for the First Technical Evaluation had stated that it was the Claimant that had drafted the Concession Agreement and the Controller then handed a copy of this to him:

[Statement of Abdullah Waheed, 3RBD, Tab 3, page 2538, Annex 61 of the ACC Report]

"Draft of the agreement was prepared and submitted by Nexbis. Nexbis even contacted finance ministry regarding the draft of the agreement. I was given a copy of the draft agreement by Ilyas Hussein Ibrahim."

203. This is further backed up by the following statement by Ilyas' successor, speaking of the capabilities of the DOIE at that point in time:

[Statement of Abdullah Shahid, 3RBD, Tab 3, page 2558, Annex 61 of the ACC Report]

"I believe that the agreement between the Maldivian Government and Nexbis, to hand over the project to Nexbis, was also drafted by Nexbis. At that time, there would not have been anyone at immigration capable of drafting an agreement in English to that standard."

204. Lastly, Ilyas had led a team of DOIE officials, consisting of Ibrahim Ashraf and Ahmed Naseem, to have a meeting with the Claimant while the bidding process was

underway and sometime around February 2010. This was confirmed by Mr Ibrahim Naseer during cross examination, who stated that Mr Ahmed Naseem himself had told him that he had met with the Claimant in Malaysia.

Transcripts, Day 3, 7 October 2015, page 120, lines 1 to 15
Q. You said, "I heard from my colleagues". Can you tell the tribunal, please, who are these colleagues that told you this?
A. I would say this --
Q. Yes?
A. Ahmed Nazim (sic), one of the colleague who was there at the meeting.
Q. Yes?
A. Who went to the -- who went to Malaysia and he told me.
Q. What did he tell you?
A. He said he heard -- he met with them.
Q. With who?
A. With the Nexbis.
Q. With the Nexbis?
A. Yes.

205. For the reasons set out above, the Respondent humbly submits that the Controller had shown a preference to the Claimant and conferred upon it an undue advantage by ensuring that the Claimant would win the bidding process. He had also used his position to remove officials from their posts where he felt that they might jeopardize the signing of the Concession Agreement.

[xvi] [131]-[145] read:

The Second technical evaluation
131. The circumstances of Saamee Ageel's involvement in the Second Technical Evaluation are dubious.

132. In the wake of the First Technical Evaluation being cancelled, Saamee Ageel cobbled together a second team which would purportedly evaluate the technical bids for a second time. Although it was within his duty and job scope to make such arrangements, what is striking is that the team was put together informally without even telling them that their work would be used as part of the Second Technical Evaluation.

133. This is reflected in Faaiq Umar's statement to the ACC, dated 14 March 2011 [3RBD, Tab 3, Page 2507]; Mohamed Naaiz's statement to the ACC, dated 18 May 2011 [3RBD, Tab 3, Page 2545]; and Mohamed Faisal's statement to the ACC, dated 18 May 2011 [3RBD, Tab 3, Page 2541], all of which say that no formal request was given to them to conduct the Second Technical Evaluation. Instead, they had received a phone call merely asking them to discuss a tender or give a technical opinion on a technical bid. Faaiq Umar had identified the person who called him to be Saamee Ageel [3RBD,Tab 3, page 2507].

134. Not only is it clear from the statements that they were given short preparation time to analyze the bids, it is also puzzling that Mohamed Naaiz himself stated [at 3RBD, Tab 3, Page 2545] that "our technical opinion was not a technical evaluation".

135. Despite the above, a dubious evaluation sheet purporting to be scores for the Second Technical Evaluation was then presented [4CHB, Tab 134 at page 2714], in which the scores set out in the report for the "Second Technical Evaluation" were adopted and furthermore, the remaining sections were evaluated. This Second Technical Evaluation reflected the Claimant as being the overall winner of the technical evaluation.

136. It is the Respondent's case that one of the suspicious circumstances surrounding this Second Technical Evaluation was that it was unclear exactly who had carried out the evaluation of the remaining portions of the Second Technical Evaluation.

137. The evaluation sheet itself attributes the additional marks being scored by the Tender Evaluation Section. The authenticity of this evaluation sheet has not been disputed by the Claimant. Given that the section was one which Saamee Ageel was heading, it is therefore likely that these scores were in fact given by him, or at least, that he had been involved in the awarding of the scores.

138. This is in fact backed up by Ahmed Jinah Ibrahim and Saamee Ageel himself, both of whom were from the Tender Evaluation Section:

[Statement of Ahmed Jinah Ibrahim, 3RBD, Tab 3, Page 2512, Annex 61 of the ACC Report]

> "Therefore, this Bid, for a second time, was evaluated by a team established by the Ministry of Finance and Treasury. The said team, in carrying out the evaluation looked into three (3) aspects out of the six (6) main aspects; which include "Service Response" or the "B.O.T. solution"; "Installation" and "Implementation Details and Training". I believe that the said Team looked into only the aforementioned 3 (three) aspects and chose to forgo the remaining three (3), because the former three (3) is associated with the technicalities, and the remaining three (3) involved (Bidders' Profile, Reference and Experience and Supplement Information); whereby the latter aspects are areas which, even the Tender Evaluation Section could assess. As such, the latter aspects had been assessed by the Tender Evaluation Section."

(Emphasis added.)

[Statement of Saamee Ageel, 3RBD, Tab 3, page 2516, Annex 61 of the ACC Report]

> "Therefore, a second evaluation was conducted by a team that was formed by the Minister of Finance and Treasury. The second team formed to conduct the technical evaluation evaluated only 3 parts out of the main 6 mentioned in the R.F.P. as parts to be evaluated. They were Service Response or B.O.T Solution, Installation and Implementation Details and Training. I believe that the reason why the team evaluated only 3 parts is because they did not have enough time and those 3 parts were the technically important elements. Also the rest of the 3 (bidder's profile, reference and experience, supplemental information) could be evaluated by the tender. They were in fact, evaluated by the Tender Evaluation Section. The Minister of Finance and Treasury had also advised that the evaluation and the awarding of marks for the above mentioned 3 parts, would be sufficient to determine the technical part of the entire bid and therefore, the second team completed their evaluation."

(Emphasis added.)

139. There are two problems with Saamee Ageel's statement here. First, it is clear that the second team did not even consider that they were giving an evaluation but had merely given a technical opinion. This can be seen in how what they had done was render a report on the technical evaluation setting out some of their findings, as opposed to filling up an evaluation sheet and signing off on it like the E.O.I evaluations and the First Technical Evaluation.

140. Next Saamee Ageel says that only three parts of the bids were "evaluated" by the second team and goes on to give two contradictory reasons for this: (i) the rest of the three could be evaluated by the Tender Evaluation Section; and (ii) the Minister of Finance and Treasury had advised that only three categories would be sufficient to determine the technical part of the entire bid.

141. It is clear that the second reason was without merit given that the remaining three components had to be evaluated anyway and was eventually done so by the Tender Evaluation Section, headed by Saamee Ageel:

> "The technical evaluation was done for a second time by technical experts on request by the former Minister, after there were some suspicions about the first evaluation that was done by a team of the Department of Immigration and Emigration. This second team formed by the Minister, consisted of individuals that held high positions in the Government and were independent experts who worked in this field. I do not think that the documents will say that the team was formed by the Minister. The team did not finish the entire technical evaluation of the project because they could not give enough time due to their busy schedules. However, they did say that they would finish the most important parts or components of the work they were assigned. I think that they evaluated only the "BOT" solution's component. Therefore they only evaluated 40% out of the total 60%. The rest of the 20% were evaluated by the Tender Section. Therefore I believe that I, as the head of the section, should be responsible for the 20% that was evaluated by the Tender Evaluation Section." [See 3RBD, Tab 3, Page 2600]

142. It is no wonder that the documents do not reflect that the Minister had formed the team (as stated by Saamee Ageel in the extract above) since, as Faaiq Umar had stated, it was Saamee Ageel who was the one. Saamee Ageel's statement is therefore contradictory and shows that he has much to hide.

143. Thereafter, as noted by a member of the Tender Evaluation Board, Zeeniya Ahmed Haamid, "the second technical evaluation made was presented to the Board by the secretariat of the Board Mr Saamee Ageel" [3RBD, Tab 3, page 2583]. The tender evaluation board then approved the marks awarded for this evaluation.

144. Could Saamee Ageel and/or the Tender Evaluation Section have done this evaluation? The answer must be no, looking at the clear demarcation of the job scope as stated by Saamee Ageel, when in reference to the E.O.I evaluations, where he states [3RBD, Tab 3, Page 2515]:

"It is in the hands of the technical evaluators to see if the parties are technically eligible for the project, during technical evaluation."

145. It is submitted that the same should apply for the technical evaluations and even more so, given that this involved an in depth security of the bid documents that had been submitted by the interested parties which would have many technical specifics. Furthermore, paragraph 1.6.3.5 of the ACC Report [1RBD, Tab 3, page 300] had stated that one of the reasons for the need to conduct the Second Technical Evaluation was that the team which conducted the First Technical Evaluation did not have experience from the area of Information Technology. The Tender Evaluation Section similarly, did not possess such experience. While it may be argued that the more technical aspects were covered by the team comprising of Faaiq Umar, Mohamed Naaiz and Mohamed Faisal, the other components evaluated by the Tender Evaluation Section were that of the bidder's profile and experience. These too, had to be considered with the appropriate Information Technology background.

[xvii] [64]-[97] read

i. Singapore law

64. Under Singapore law, the law applicable to the CA, there is no general doctrine that the contract can be set aside for being "tainted with corruption". Under Singapore law:-

a. A contract can be avoided for "illegality" (whether at common law or statutory) or for being in contravention of public policy; and

b. A principal can avoid a contract where it was procured through the bribery of its agent.

65. The common thread in these doctrines is that the person against whom the contract is sought to be avoided must have been culpable in some way, such that the Court will not lend its assistance to such a party.

66. The Singapore law position on the defence of illegality and public policy was recently elucidated in the Court of Appeal case Ting Siew May v Boon Lay Choo & Anor [2014] SGCA 28.

67. The starting point of this defence is that "it is founded in general principles of policy… The principle of public policy is this: ex dolo malo non oritur actio. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If… the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the Court says that he has no right to be assisted… because they will not lend their aid to such a plaintiff.": Ting Siew May at [23] , quoting with approval Holman v Johnson (1775) 1 Cowp 341. (Emphasis ours)

68. The law of illegality and public policy has traditionally been divided into two broad areas: (i) statutory illegality; and (ii) illegality at common law. The former raises issues of whether a contract is prohibited by a particular statutory provision, and involves ascertaining the legislative intent of that provision. The latter raises issues of whether or not the existing

heads of public policy can be extended, and if so, in what manner: Ting Siew May at [27] to [28].

a) Common law illegality and public policy

69. There are several heads of public policy which are well established in common law. The general view is that these heads of public policy will not be extended: Phang, The Law of Contract in Singapore, [13.060] to [13.064. The established heads of public policy have been set out in Phang, The Law of Contract in Singapore at [13.065] to [13.113]. One such established head pertains to contracts that are liable to corrupt public life (see [13.110]). This head related to instances pertaining to the buying, selling or procuring of public offices and titles. Contracts falling under this category must pertain to public administration and involve national funds. Another established head pertain to contracts to commit a crime, tort or fraud (see [13.092].

70. Contracts that are entered into with the object of committing an illegal act will also be unenforceable at common law. "The application of this principle depends upon proof of the intent, at the time the contract was made, to break the law; if the intent is mutual the contract is not enforceable at all, and, if unilateral, it is unenforceable at the suit of the party who is proved to have it": Ting Siew May at [42] to [43]. (Emphasis ours)

b) Express statutory illegality

71. Where contracts of a specific type are expressly declared to be illegal by a particular statute, the contract is rendered void and unenforceable from its very inception or formation: Halsbury Laws of Singapore, Contract Law, at [80.260].

72. There do not appear to be any statutes in Singapore which expressly state that contracts entered into by government employees which confers an undue advantage on a third party are illegal.

c) Implied statutory illegality

73. As stated by the learned editors of Halsbury Laws of Singapore, Contract Law at [80.264, "most contraventions of statutory provisions or regulations carry an accompanying criminal penalty, but that a criminal penalty per se does not settle the issue with regard to the (civil) status of the contract in question. In this regard, the further (and crucial) question has to be asked: is the object of the statute or provision thereof merely to prohibit the conduct (in which case the criminal penalty would be deemed to constitute a sufficient sanction) or is the object of the statute to additionally prohibit the very contract itself? If it is in fact the latter, then the contract itself is impliedly prohibited..."

74. There do not appear to be any statutes in Singapore which have as its object the prohibition of contracts entered into by government employees which confer undue advantage on a third party.

d) Contracts procured by bribery

75. Under Singapore agency law, where a contract is entered into by an agent under the influence of bribery, or, to the knowledge of the other contracting party, in violation of his duties to his principle, the contract will be voidable by the principal.

76. In PT International Nickel Indonesia v General Trading Corp (M) Sdn Bhd [1977 – 1978] SLR(R) 58 , the Singapore Court of Appeal, in the context of a summary judgment application, considered what would be the contractual implications if the defendant-appellant was able to prove its allegations that the plaintiff-respondent had procured its 35 contracts with the appellant by bribery.

77. The Court of Appeal held at [13] and [23] that:-

> "Every contract made or act done by an agent under the influence of bribery, or, to the knowledge of the other contracting party, in violation of his duty to his principal, is voidable by the principal"

...

> "It is clear law that the contract between the briber and the recipient of the bribe is an illegal contract and it cannot form the basis of a claim before the courts."
> (Emphasis added)

78. In other words, to avoid the CA vis-à-vis the Claimant, the Respondent must show either:-

a. That the Claimant bribed its government officials, which were its agents; or
b. The government officials were violating their duties to it, and this was known to the Claimant.

79. There is no principle in Singapore law that a principal may avoid a contract where an agent has, unknown to the third party, conferred an undue advantage on the third party, by failing to follow its own internal procedures.

ii. Maldivian Law

80. As stated at [277] to [282] CCS:-
a. The Respondent's Maldivian Law expert confirmed that there is no Maldivian case where a contract was declared void solely on the ground that there was a breach of section 12 of the PPCA;
b. The Respondent's Maldivian law expert was also of the view that the government cannot terminate a contract just because one of its government servant had committed an act of corruption;
c. He also accepted that the government cannot terminate a contract just because its own internal processes were not followed; and
d. The Respondent's AGO had opined that lapses in internal procedure would result in the sanction of the government official responsible for that lapse, but is not sufficient basis to terminate a contract.

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81. It therefore appears that under Maldivian contract law, a contract entered into by a government official in breach of section 12 of the PPCA is not per se voidable on that basis.

82. In the RCS, the Respondent has not addressed its own expert's fatal admissions that under Maldivian contract law, a contract will not be avoided on the basis that a government official breached section 12 of the PPCA in awarding the contract to a third party.

83. What is significant, however, is that the PPCA itself makes a distinction between the offences of "bribery" and that of conferring an "undue advantage". The offence of conferring an undue advantage means something other than bribery. The offences from sections 2 to 11 pertained to bribery, and the offences under section 12 and 13 pertained to the conferment of an undue advantage, which did not amount to bribery. There propositions were accepted by Mr Siraj: Transcripts, Day 6, p. 34-40. It is therefore clear that under Maldivian law at least, the term "corruption" was used as a convenient shorthand to encompass both the offences of bribery and the conferment of undue advantage (which is something other than bribery): Transcripts, Day 6, p. 30, 40-42.

iii. Transnational Public Policy

84. The Respondent has made the following broad sweeping statement at [99] to [112] RCS:-

a. Corruption is internationally abhorred and vigorously denounced. Corruption is an international evil that is contrary to good morals and to an international public policy common to the community of nations.

b. Corruption does not only encompass bribery, but "encompasses all situations where "agents and public officers break the confidence entrusted in them.": Hwang, M and Lim, K., Corruption in Arbitration – Law and Reality ;

c. Transnational public policies and mandatory laws should apply in international arbitrations, notwithstanding the governing law of the contract. These mandatory laws include law, the respect for which is regarded as crucial for safeguarding public interest.

d. Applying transnational public policy, the Tribunal in World Duty Free v Kenya found that claims based on contracts or contracts obtained by corruption cannot be upheld.

85. In making its submission, the Respondent completely failed to address the critical issue of what exactly "corruption", or the "break of confidence entrusted in agents and public officers" or "laws crucial for safeguarding public interests" mean under transnational public policy. Specifically, the Respondent completely failed to address whether under transnational public policy, one contracting party can avoid an agreement vis-à-vis the other contracting party, based on its own lapses in internal procedure which may amount to a breach of law by its own government official, but in which the other contracting party was not involved in any manner whatsoever.

86. As we show below (based on the authorities cited by the Respondent), even under transnational public policy, a contract that was not procured by bribery and which did not involve wrongdoing on the part of the Claimant, cannot be set aside by the Respondent.

87. The starting point is that an arbitral tribunal would normally rely upon the substantive law of the contract chosen by the parties based upon the principle of party autonomy, except

to the extent that it violates "generally accepted international norms.": Raouf, How Should International Arbitrators Tackle Corruption Issues? at [22].

88. In unpacking what these "generally accepted international norms" are, Hwang, M. and Lim, K. refer to the United Nations Convention Against Corruption ("UNCAC") and state that "international consensus on a broad definition of both public and private sector corruption can nevertheless be found in Arts 15, 16 and 21 of the [UNCAC]... Article 15(a) of the UNCAC (which applies to the bribery of both national and foreign public officials by virtue of Art 16(1) of the UNCAC) defines corruption in the public sector by the payer of a bribe as the act of (1) 'intentionally', (2) 'promis[ing], offering or giving', (3) 'to... a [national or foreign] public official', (4) 'directly or indirectly', (5) 'of an undue advantage', (6) 'for the official himself or herself or another entity', (7) 'in order that the official act or refrain from acting in the exercise of his or her official duties'. Corruption by the recipient of a public sector bribe is similarly defined under Art 15(b) as the mirror image of the bribe payer's corrupt act... Corruption on the private sector by the payer and recipient of a bribe in Art 21 closely tracks the same linguistic formulae used in Article 15(a) and 15(b)...": 2 RBA, Vol 1, Tab 3, p. 55

89. The learned authors went on to state that "outright bribery aimed at subverting state official's proper discharge of their duties is clearly a violation of transnational public policy... However, laws prohibiting intermediary agreements which contemplate the exercise of influence over government officials do not reflect transnational public policy, given the significant differences between jurisdictions regarding the propriety of such agreements...": [2RBA, Vol 1, Tab 3, p. 75]

90. Bribery is clearly against transnational public policy. The same cannot be said of the unilateral conferment of undue advantage on a third party by a government official, in the absence of the giving of a bribe or any corrupt act by the said third party.

91. As shown above, laws on which jurisdictions differ significantly cannot amount to transnational public policy. Even if the conferment of an undue advantage on a third party is defined as 'corruption' in Maldivian law, it does not amount to corruption in transnational public policy, given the lack of international consensus that such conduct amounts to corruption. In any event, as stated above, the term "corruption" is used in Maldivian law only as a convenient shorthand to encompass all the offiences under the PPCA, in contradistinction to the specific offence of bribery.

92. Finally, the Respondent cannot rely upon World Duty Free v Kenya to assert that corruption, howsoever it may choose to define it, will have the effect of avoiding a contract. World Duty Free concerned a case where the claimant investor had paid the President of Kenya a bribe of US$2 million to obtain a contract. (Under Maldivian law, this would have amounted to "The offence of offering and accepting bribery in relation to a task undertaken by the government" under section 2 of the PPCA.)

93. The tribunal avoided the contract on the basis that the contract was obtained by bribery, which it held was contrary to international public policy. This is apparent from the decision of the tribunal, where it stated:-

"... this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States, or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or contracts obtained by corruption cannot be upheld by this Arbitral Tribunal." (at [157]) (Emphasis ours)

94. By the term "corruption", the tribunal was evidently referring to bribery.

95. The second reason given by the tribunal therein for avoiding the contract was that under the public policy of both England (governing law of the contract) and Kenya (place where contract was to be performed), the claimant would not have been permitted to maintain any of its pleaded claims on the ground of ex turpi causa non oritur actio, which rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal or immoral conduct: at [158] to [165].

96. A survey of the authorities cited by the Respondent on transnational public policy therefore shows that:-

a. A contract will only be avoided vis-à-vis the Claimant if the Claimant obtained the contract by bribery; and
b. The Tribunal would not assist the Claimant to enforce the contract only when it was guilty of an illegal or immoral act.

97. There is no authority for the proposition that under transnational public policy, contracts tainted with anything short of an active act of corruption by the claimant, will be avoided.

[xviii] Transcripts, Day 1, Page 83, lines 22 to 23

Q. Did the draft come from Nexbis, "yes" or "no"?
A. No.

Transcripts, Day 1, Pages 84 to 85, starting from line 12

Q ... Just to help you, volume 3, you start at page 2567. You will see that the person who gave the statement to ACC is Abdullah Muiz. To be fair to you, I will inform you, and you can take it from me that Abdullah Muiz was the Solicitor-General at that time. Okay? This is a statement he gave. If you turn to the next two pages, page 2569, at the right at the top, Solicitor-General said: "The Attorney-General's Office was not asked to assist in a drafting of the agreement signed between the Government of Maldives and Nexbis to establish the Maldives Border Control System. I was informed that a draft was prepared and sent by the successful bidder of the border control project, Nexbis Limited." Do you see that?
A. Yes.
Q. So we have a statement from the Solicitor-General, so I have a basis to ask: it was Nexbis who prepared the draft and had forwarded it to Mr Ilyas. Is that correct or is that wrong?
A. No, that's not correct.
Q. Okay.