IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC(I) 12

Suit No 7 of 2020

Between

DyStar Global Holdings (Singapore) Pte Ltd

… *Plaintiff*

And

(1) Kiri Industries Ltd
(2) Manishkumar Pravinchandra Kiri

… *Defendants*

JUDGMENT

[*Res Judicata*] — [Issue estoppel]
[Abuse of Process] — [*Henderson v Henderson* doctrine] — [Extended doctrine of *res judicata*]
[Contract] — [Contractual terms] — [Enforceability]
[Contract] — [Formation] — [Certainty of terms]
[Contract] — [Breach]

TABLE OF CONTENTS

DyStar Global Holdings (Singapore) Pte Ltd
v
Kiri Industries Ltd and another

[2021] SGHC(I) 12

Singapore International Commercial Court — Suit No 7 of 2020
Anselmo Reyes IJ
5–9 April 2021

24 September 2021 Judgment reserved.

Anselmo Reyes IJ:

Introduction

1 This is the trial of the Counterclaim (the "**Counterclaim**") of the first defendant ("**Kiri**") in SIC/S 7/2020 ("**SIC 7**") against the plaintiff (DyStar Global Holdings (Singapore) Pte Ltd ("**DyStar**")). The second defendant in SIC 7, Mr Manishkumar Pravinchandra Kiri ("**Mr Kiri**") is not involved in the Counterclaim. The Counterclaim arises from Clause 7.2 ("**Clause 7.2**") of the Share Subscription and Shareholders Agreement ("**SSSA**") dated 31 January 2010 between (among others) Kiri and DyStar. Clause 7.2 stipulates:

> ... [DyStar] shall procure that Zhejiang Longsheng Group Co, Ltd and its Affiliates and [Kiri] shall be the preferred suppliers of all goods and services in connection with textile chemicals, dyestuffs and dyes to the DyStar companies and business that form part of the DyStar Assets.

2 DyStar is a joint venture between Kiri (2,623,354 shares (about 37.57%)) on the one hand and Senda International Capital Limited ("**Senda"**) (4,359,520 shares (about 62.43%)) and Well Prospering Limited ("**WPL**") (1 share) on the other. Senda and WPL are wholly owned by Zhejiang Longsheng Group Co Ltd ("**Longsheng**"). Longsheng, like Kiri, is in the business of dye chemicals. Senda acts on Longsheng's instructions. The terms regulating the parties' joint venture are to be found (among other documents) in the SSSA. This judgment will also refer to a joint venture in India between Kiri and WPL called Lonsen-Kiri Chemical Industries Limited ("**Lonsen-Kiri**") in which Kiri holds 40% and WPL 60% of the shares.

3 The present action is part of a series of actions involving DyStar and Kiri before the Singapore International Commercial Court ("**SICC**"). In SIC/S 3/2017 ("**SIC 3**") DyStar alleged (among other matters) that Kiri:

(a) had breached Clause 15.1(a) (a non-compete term), Clause 15.1(b) (a non-solicitation term) and Clause 17 (a confidentiality term) of the SSSA;

(b) had conspired against DyStar; and

(c) owed €1.7 million in process technology development fees and S$443,813 in audit costs to DyStar.

4 In SIC/S 4/2017 ("**SIC 4**") Kiri alleged that, through Senda as majority shareholder in DyStar, Longsheng had engaged in acts which were oppressive of Kiri's interest as minority shareholder in DyStar. DyStar was joined as a party to SIC 4 to be bound by the SICC's findings in that action. SIC 3 and SIC 4 were consolidated and heard together. In SIC 3 the SICC dismissed most of DyStar's allegations but held that Kiri had breached Clauses 15.1(a) and (b)

in connection with one customer. On appeal, the Court of Appeal held that Kiri had also breached Clauses 15.1(a) and (b) in respect of two other customers. In SIC 4 the SICC found that Longsheng had acted oppressively and ordered that Senda buy out Kiri's minority interest at a valuation to be assessed. The SICC directed that the valuation be as at the date of its judgment (3 July 2018): see *DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Ltd and others and another suit* [2018] 5 SLR 1. Senda's appeal against the buy-out order was dismissed. On 15 June 2021, after further court hearings (including another appeal), the SICC determined that for the purposes of its buy-out order Kiri's shares should be valued at US$481.6 million as at 3 July 2018: see *Kiri Industries Ltd v Senda International Capital Ltd and another* [2021] SGHC(I) 6. The latter valuation is now under appeal.

5 In SIC 7, DyStar has claimed against Kiri for further breaches of Clauses 15.1(a) and (b) of the SSSA. Kiri responded with the Counterclaim. DyStar's claim was later settled between the parties, leaving only the Counterclaim to be heard. In the Counterclaim, Kiri contrasts the position in 2010 and 2011 with that from 2012 onwards. In 2010 and 2011, Kiri says that DyStar complied with Clause 7.2 by showing preferential treatment to Kiri. Thus, DyStar regularly sent Kiri open orders for raw materials and intermediates. DyStar regularly asked Kiri for price lists of finished dyes and informed Kiri whenever it needed specific raw materials or intermediates. DyStar provided Kiri with samples of DyStar's standard dyes for Kiri to develop and produce such dyes for DyStar. DyStar shared information with Kiri about DyStar's target prices and the prices at which dyes were being offered to DyStar by other suppliers, thereby giving Kiri the opportunity to match or improve upon those prices. But, from 2012, Kiri alleges that, contrary to Clause 7.2, DyStar steadily reduced its purchases of dyes, raw materials and intermediates from

Kiri. DyStar (Kiri complains) stopped sending Kiri open orders for raw materials and intermediates. DyStar (Kiri adds) gradually ceased to share information regarding its prices, denying Kiri the chance to match or better DyStar's target prices or the prices quoted by DyStar's other suppliers. In 2015 DyStar completely stopped asking for Kiri's price lists. Accordingly, the Counterclaim seeks damages from DyStar for the breach of Clause 7.2. DyStar counters that there is nothing in the Counterclaim. First, according to DyStar, the Counterclaim is barred by issue estoppel. Second, the Counterclaim constitutes an abuse of process under the extended doctrine of *res judicata*. Third, Clause 7.2 was merely "aspirational". It did not give rise to any contractual obligation. Fourth, even if Clause 7.2 is enforceable, DyStar was justified in reducing its purchases from Kiri and did not breach Clause 7.2. Finally, DyStar says that Kiri is entitled to no damages or at best purely nominal damages.

6 Both parties say that, if successful, they should have their costs of SIC 7.

Discussion

Issue 1: Is the Counterclaim barred by issue estoppel?

7 In SIC 4, Kiri alleged (among other matters) that DyStar was in breach of Clause 7.2 and Longsheng had procured such breach. Kiri claimed that such conduct constituted oppressive and unfairly prejudicial conduct to Kiri. More specifically, Kiri framed the issue thus:

> Whether DyStar had failed and/or refused to purchase/procure supplies from Kiri (and whether this was at the direction of the Longsheng directors) in breach of the [SSSA] and Kiri has not been treated as preferred supplier of DyStar, and whether any of the aforesaid constituted an act of oppression …

8 The SICC held that the evidence was insufficient to prove a breach of Clause 7.2, much less establish that Longsheng had procured any such breach. In support of its case then, Kiri relied heavily on an email of 4 January 2016 to Ms Vera Huang ("**Ms Huang**") (DyStar's head of global procurement) in which Dr Monika Singh ("**Dr Singh**") (DyStar's Associate Director of Global Procurement (Dyes Category) & Regional Procurement Head (South Asia)) stated that she "understood from Luo [that is, Mr Luo Shixin ("**Mr Luo**"), Manager of Lonsen-Kiri]" that DyStar was "not allowed to place [orders] on Kiri". But the SICC was unable to conclude on that evidence in SIC 4 that Longsheng had imposed a prohibition on DyStar placing orders with Kiri. Even if there had been a policy to that effect, it was unclear whether the rationale for the policy was because "it was thought genuinely, but erroneously, that Kiri orders should be routed through Lonsen-Kiri" or because (as Ms Huang maintained in SIC 4) there were "concerns with the quality or prices of Kiri's products". Nor was the evidence before the SICC enough to establish that the reduction over time in orders placed by DyStar with Kiri was due to Longsheng's instigation. The SICC therefore rejected the breach of Clause 7.2 as a ground for minority oppression on Longsheng's part.

9 DyStar now argues that, the breach of Clause 7.2 having been raised in SIC 4, such issue must be *res judicata* and cannot be re-litigated. According to DyStar, the four requirements for issue estoppel are met in this case. First, the SICC's judgment in SIC 4 is a conclusive determination of the issue. Second. there can be no doubt that the SICC was acting as a court of competent jurisdiction in coming to its decision in SIC 4. Third, the parties to SIC 4 and the present action are the same. While it is true that DyStar had been joined as a nominal defendant to SIC 4, DyStar should be considered as having been involved in SIC 4 as Senda's privy. This is because Senda has majority control

over DyStar. Kiri's allegation in SIC 4 of a breach of Clause 7.2 was "primarily directed" at DyStar and it was logically necessary to decide that issue as between DyStar and Kiri, before dealing with the allegation that Senda had acted oppressively by procuring DyStar to breach Clause 7.2.

10 I am not persuaded by Dystar's arguments.

11 The judgment in SIC 4 cannot be characterised as "a declaration or determination of a party's liability and/or his rights or obligations leaving nothing else to be judicially determined" (*Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 at [28]). The SICC concluded in SIC 4 that the evidence of a breach of Clause 7.2 was inconclusive. The SICC left the question of whether there had been a breach of Clause 7.2 open. It was unnecessary to go further. Given the indeterminate nature of the evidence adduced on the incidental question (whether there had been a breach by DyStar of Clause 7.2), the main question (whether Senda had caused DyStar to breach Clause 7.2) simply fell away. There was consequently no *res judicata* in SIC 4 on the issue whether Clause 7.2 had been breached. As Chua Lee Ming J observed in *Griffin Real Estate Investment Holdings Pte Ltd (in liquidation) v ERC Unicampus Pte Ltd* [2019] 5 SLR 105 at [24], "[o]nly determinations which are necessary for the decision, and fundamental to it, will create an issue estoppel".

Issue 2: Is the Counterclaim an abuse of process under extended res judicata?

12 On 27 April 2019, Kiri commenced a similar action to the Counterclaim against DyStar in India. On 22 September 2020, the Indian action was withdrawn after DyStar's lawyers applied for an anti-suit injunction on the ground of duplicity with the Counterclaim.

13 Citing *Gazprom Export LLC v DDI Holdings Limited and others* [2020] EWHC 303 (Comm), DyStar submits that the Counterclaim is an abuse of process under the extended doctrine of *res judicata*. This is because Kiri could have mounted a counterclaim against DyStar for breach of Clause 7.2 in SIC 3. Since Kiri was alleging in SIC 4 that DyStar was in breach of Clause 7.2, it was incumbent on Kiri to have mirrored that allegation in SIC 3 by counterclaiming that DyStar was in breach of Clause 7.2. Kiri having failed to do so, based on *Henderson v Henderson* [1843–60] All ER Rep 378 at 381–382, this court should not allow Kiri to litigate what it ought to have litigated previously. To permit Kiri to maintain the Counterclaim would constitute an "unjust harassment" of DyStar and be an abuse of process, especially since an action similar to the Counterclaim had been brought in India.

14 I disagree.

15 In *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 59E to 60A, Lord Millet observed of the plaintiff Mr Johnson:

> In *Brisbane City Council v Attorney General for Queensland* [1979] AC 411, 425 Lord Wilberforce, giving the advice of the Judicial Committee of the Privy Council, explained that the true basis of the rule in *Henderson v Henderson* 3 Hare 100 is abuse of process and observed that it "ought only to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation". There is, therefore, only one question to be considered in the present case: whether it was oppressive or otherwise an abuse of the process of the court for Mr Johnson to bring his own proceedings against the firm when he could have brought them as part of or at the same time as the company's action. This question must be determined as at the time when Mr Johnson brought the present proceedings and in the light of everything that had then happened. There is, of course, no doubt that Mr Johnson could have brought his action as part of or at the same time as the company's action. But it does not at all follow that he *should* have done so or that his failure to do so renders the present action oppressive to the firm or an abuse of the process of the court. As May LJ observed

> in *Manson v Vooght* [1999] BPIR 376, 387, it may in a particular case be sensible to advance claims separately. In so far as the so-called rule in *Henderson v Henderson* suggests that there is a presumption against the bringing of successive actions, I consider that it is a distortion of the true position. The burden should always rest upon the defendant to establish that it is oppressive or an abuse of process for him to be subjected to the second action.

There is thus no rule against a party pursuing distinct causes of action in different proceedings. It is not enough for DyStar to say that Kiri could have brought the Counterclaim in SIC 3. DyStar must additionally show that it was an abuse for Kiri: (a) not to have done so, (b) only subsequently to have brought a claim for breach of Clause 7.2 in India, and (c) only thereafter to have pursued the Counterclaim in Singapore.

16 On the facts, I am unable to discern abuse. The breach of Clause 7.2 is a different question from the breach of the SSSA's non-compete, non-solicitation and confidentiality clauses relied on by DyStar in SIC 3. There was accordingly no obligation on Kiri to raise the breach of Clause 7.2 as a counterclaim in SIC 3. It is true that Kiri alleged the breach of Clause 7.2 in SIC 4. But that was merely as an ancillary issue to establishing oppressive conduct on Senda's part. SIC 4 left the question of the breach of Clause 7.2 unresolved, so there could not have been a *res judicata* on that matter. It remained open to Kiri to sue DyStar in India (as it did) for the breach of Clause 7.2. When DyStar started SIC 7 in Singapore, Kiri withdrew the Indian proceedings and pursued the Counterclaim in Singapore instead. While Kiri might be faulted for not withdrawing its Indian action earlier, that is a matter which can be (and has been) dealt with through an appropriate costs order of the Indian court. In those premises, the bringing of the Counterclaim can hardly be characterised as "harassment" or (in the words of *Gazprom* at [37(i)]) as

"manifestly unfair" to DyStar and as "bringing the administration of justice into disrepute".

Issue 3: Is Clause 7.2 enforceable?

17 DyStar submits that Clause 7.2 is too vague to be enforceable. In particular, the expression "preferred supplier" in Clause 7.2 does not specify how preferential treatment is to be shown to Longsheng (and its affiliates) or Kiri. There are many possibilities as to what "preferred supplier" could mean since preference can be shown in various ways and degrees. DyStar therefore contends that Clause 7.2 cannot be construed in any sensible fashion, especially when DyStar operates in more than 50 countries and purchases products from more than 1,500 approved suppliers worldwide. Clause 7.2 (DyStar reasons) is so ambiguous and encompasses so many permutations of preferred supplier arrangements, that it must merely have been "aspirational".

18 DyStar bolsters its argument by highlighting what DyStar says are inconsistent constructions of Clause 7.2 advanced by Kiri at different times. First, the Counterclaim pleaded that DyStar was to procure DyStar to purchase supplies from Longsheng (and its affiliates) and Kiri in preference to any other supplier. This meant (the Counterclaim explained) that, whenever DyStar intended to purchase supplies, it should have procured that such purchases were made from Longsheng (and its affiliates) and Kiri. At the very least, DyStar should have given Longsheng (and its affiliates) and Kiri an opportunity to quote or tender for the provision of the relevant supplies. Second, in Amendment No 2 to the Counterclaim, Kiri suggested that Clause 7.2 meant that "where [DyStar] intended to purchase [supplies], [DyStar] would give both Longsheng (and its affiliates) and Kiri an opportunity to quote and/or tender for the provision of such [supplies] in priority to any other suppliers." Third, in his

evidence-in-chief, Mr Kiri (Kiri's Managing Director) argued that "Kiri should be treated as a preferred supplier of DyStar for raw materials and dye intermediates depending on the requirements of DyStar's production plants worldwide". Fourth, in cross-examination, Mr Kiri limited the scope of Clause 7.2 to DyStar affording an opportunity to Kiri to quote or tender, in priority to all other suppliers, for goods which Kiri could geographically, commercially, and practically provide. Kiri's ever-changing constructions of Clause 7.2 (DyStar submits) demonstrates the uncertainty inherent in Clause 7.2.

19 Nor is it possible (DyStar submits) to infer from the factual matrix how the parties intended Clause 7.2 to be read. There were no discussions between Senda and Kiri over the meaning of "preferred supplier" in Clause 7.2. Mr Kiri would not even have been aware that there was a preferred supplier provision in the SSSA as he was simply "presented with a signature paper" which he signed on the understanding that the SSSA would reflect the clauses contained in a previously circulated Term Sheet. But the Term Sheet did not include a preferred supplier clause or refer to a preferred supplier arrangement. There was no prior consultation with the management of DyStar Textilfarben GmbH and DyStar Textilfarben GmbH & Co Deutschland KG (the old DyStar), whose assets the joint venture would be acquiring, on how a preferred supplier arrangement might be implemented. Under the SSSA, DyStar would be controlled by Longsheng and Kiri as the new shareholders and board members of DyStar. Therefore, it was unnecessary to decide beforehand in the SSSA how they should accord preferential treatment to themselves. In any case, the old DyStar (the company whose assets DyStar would be acquiring) was insolvent. It had been one of the world's largest dye companies with subsidiaries in 22 countries, 19 production facilities in 13 countries and agencies in some 50 countries. Any restructuring and cost-cutting by the joint venture upon obtaining

control of the old DyStar's assets would not have been straightforward. Where it was unknown precisely what cost-cutting and restructuring measures the joint venture company would need to carry out, the parties to the SSSA could not have intended to tie DyStar's hand by requiring that it prefer Longsheng (and its affiliates) and Kiri. Instead, precisely how (if at all) Clause 7.2 was to be given effect, must have been left for the new Board to decide upon acquisition of the old DyStar's assets.

20 In my view, Clause 7.2 gives rise to an enforceable obligation.

21 In its natural and ordinary meaning the words "shall procure" in Clause 7.2 impose a positive obligation on DyStar to bring about an outcome, namely, that Longsheng (and its affiliates) and DyStar are treated as "preferred suppliers of all goods and services in connection with textile chemicals, dyestuffs and dyes". This does not mean (and Kiri does not contend) that DyStar should place the interests of Longsheng (and its affiliates and DyStar) above its own. DyStar would enjoy a wide discretion in its purchasing decisions under Clause 7.2 in light (as Mr Kiri accepted) of geographical, commercial, and practical considerations. For example, obviously, where Longsheng's or Kiri's prices were uncompetitive, DyStar would be free to purchase from other suppliers.

22 The mere fact that there are many ways of preferring a supplier does not render the obligation under Clause 7.2 so vague and uncertain as to be unworkable. The court will not shy away from determining parties' intentions simply because a clause is capable of different interpretations. See, for example, Moore-Bick JA in *Whitecap Leisure Ltd v John H Rundle Ltd* [2008] 2 Lloyd's Rep 216 at [21]: "The conclusion that a contractual provision is so uncertain that it is incapable of being given a meaning of any kind is one which the courts

have always been reluctant to accept, since they recognise that the very fact that it was included demonstrates that the parties intended it to have some effect." To my mind, Clause 7.2 denotes a minimum obligation on DyStar's part to afford Longsheng (and its affiliates) and Kiri with a reasonable opportunity to quote prices or tender for the supply of textile chemicals, dyestuffs, and dyes to DyStar. Everything else being equal (for example, where Kiri's quality, prices, and reliability are at least on a par with other suppliers), DyStar should prefer Kiri to those other suppliers.

23 DyStar refers to various constructions of Clause 7.2 being put forward by Kiri. I do not find the readings of Clause 7.2 highlighted by DyStar to be substantively different from each other. Clause 7.2 instead imposes a tolerably clear obligation on DyStar as described in the previous paragraph. Further, there is no need to imply any terms to make sense of the provision. Nor am I persuaded that the absence of discussions over specific SSSA terms, including Clause 7.2, is pertinent. Absent misrepresentation or other vitiating factors, commercial parties are bound by the terms of agreements that they have signed, even if they did not read the contract before signing or have any idea what they were signing: in similar regard, see the Court of Appeal's decision in *Broadley Construction Pte Ltd v Alacran Design Pte Ltd* [2018] 2 SLR 110, which clarified that a plaintiff would not ordinarily be held to be induced by a misrepresentation if the express contractual terms, read and signed, contradict or correct the representor's misrepresentation. Here, the Term Sheet was not intended to be an exhaustive summary of the parties' agreement and, as the parties were due to sign the SSSA shortly after the Term Sheet's circulation, it is unsurprising that not all terms agreed or to be agreed between the parties were in the Term Sheet. It is common ground that the SSSA was drafted and signed in urgent circumstances. As for the submission that the parties left matters to

the new board, even if (which I doubt) that was so, such thinking would not preclude the parties from agreeing a bottom line in Clause 7.2 regarding the minimum preferential treatment to be accorded by DyStar. Longsheng and Kiri would have wished to obtain written commitments from DyStar before investing in DyStar.

Issue 4: Did DyStar breach Clause 7.2?

24 For the purposes of the analysis here, it will be convenient to consider the situations in respect of (a) raw materials and intermediates and (b) finished dyes.

Sub-issue (a): Raw materials and intermediates

25 The last purchase order for raw materials and dye intermediates which DyStar placed with Kiri was on 22 November 2011. Kiri complains that DyStar failed to treat it as a preferred supplier by no longer sending open orders for raw materials and intermediates from 3 February 2012. Kiri contends that it ought to have been provided with the continued opportunity to quote for the supply to DyStar of raw materials and intermediates in the way that Kiri had done in 2010 and 2011. The issues between the parties are:

(a) whether Clause 7.2 obliged DyStar to give Kiri an opportunity to supply raw materials and intermediates even if such goods had to be sourced by Kiri from third parties (as opposed to being manufactured in Kiri's own plants); and

(b) whether, after closure or sale of DyStar's Brunsbüttel, Leverkusen and Cilegon plants (respectively, "**Brunsbüttel**", "**Leverkusen**" and "**Cilegon**") DyStar still required the raw materials

and intermediates which it had purchased from Kiri for those three plants in 2010 and 2011.

26 Kiri submits that it ought to have been provided with the chance to quote for the supply of raw materials and intermediates despite having to source the goods from third parties. Kiri accepts that more than half of the total quantities of raw materials and intermediates which it sold to DyStar in 2010 and 2011 were traded goods purchased by Kiri from Indian suppliers. Kiri further accepts that its room to manoeuvre would be more constrained on traded or on-sold goods. But Kiri says that these considerations should not have affected DyStar's obligation under Clause 7.2 to treat Kiri as a preferred supplier. In the past, DyStar had sent open orders to Kiri for raw materials and intermediates that Kiri sourced from third parties. Kiri maintains that it could have offered DyStar competitive prices on traded goods manufactured by others instead of at Kiri's plants. Kiri adds that it could have produced some of the intermediates which it sourced from other suppliers in 2010 and 2011, depending on the availability of the relevant raw materials and the margin which Kiri would earn.

27 On the closure or sale of Brunsbüttel, Leverkusen and Cilegon, Kiri submits that the requirements for raw materials and intermediates of those plants were transferred to other DyStar plants. Kiri reasons that it could have fulfilled the needs of those other plants and in any event should have been afforded with the opportunity to do so. Kiri observes that three DyStar plants purchase raw materials and intermediates from Indian suppliers to this day. The plants are DyStar Indonesia Gabus ("**Gabus**"), DyStar Japan Omuta ("**Omuta**") and DyStar India Ankleshwar ("**Ankleshwar**"). Two other DyStar plants, one in Nanjing ("**Nanjing**") and the other in Wuxi ("**Wuxi**"), closed down in 2018 and 2019 respectively. Kiri notes that, as illustrative of this capability, it provided Gabus with raw materials and intermediates for Wo Pa Pan dyes, disperse dyes,

finished dyes, and performance chemicals in 2010 and 2011, although the goods so supplied were from third parties.

28 Kiri says that DyStar's reasons for not preferring Kiri for the supply of raw materials and intermediates to Gabus, Omuta and Ankleshwar are unconvincing. Although there was a board decision in July 2011 to reduce DyStar's inventory levels, Kiri says that this was only for the short term, not permanently. DyStar's total purchases of raw materials and intermediates remained about the same between 2010 and 2020. DyStar alleged corruption among Kiri staff in 2011 as a reason for not ordering raw materials and intermediates from Kiri. But Kiri submits that there is no evidence of corruption at Kiri in 2011. On Gabus, DyStar referred to complaints by Paragon Industries ("**Paragon**") and Ashu Organics & Rupa Organics ("**Rupa**"), both suppliers of Kiri, that they had not been paid by Kiri. However, the allegations of non-payment are vague and unsubstantiated. The complaints from Paragon and Rupa were isolated incidents, constituting a tiny fraction of Kiri's sales to DyStar. The amount of INR 4.5 million (approximately US$60,000), which Kiri is said to have owed Rupa in December 2011, is miniscule by comparison with Kiri's total sales of about US$10.34 million in raw materials and intermediates to DyStar in 2011. In relation to Gabus, DyStar also claimed to have received fewer and less attractive offers from Kiri towards the end of 2011. But (Kiri counters) this only related to two requisitions from DyStar in October and December 2011 respectively. Kiri's poor response (if at all) to these requisitions would thus likewise have been isolated incidents and could not have justified DyStar cutting off Kiri as a preferred supplier. DyStar complained that Kiri failed to see through two orders (one for 2,000kg and the other for 2,700kg to be delivered in December 2011 and January 2012 respectively) for Gabus. But the quantities pale in significance against the total volume of raw materials and

intermediates which Kiri sold to DyStar in 2010 and 2011. DyStar contended that Kiri failed to respond to four open orders from DyStar. But Kiri has produced emails indicating that it responded to the same. Even supposing that Kiri had failed to respond to the four open orders, that would not justify a halt to the sending of open orders.

29 If Clause 7.2 required DyStar to treat Kiri as a preferred supplier of raw materials and intermediates not produced by Kiri, I would accept that DyStar's reasons summarised in [28] above could not by themselves justify cutting off Kiri. However, I do not think that Clause 7.2 imposed such an obligation. If Kiri was not producing the relevant raw materials or intermediates, it would have to source them from third parties and offer the goods to DyStar at a mark-up. On those premises, it would not be reasonable to expect DyStar to obtain the goods through Kiri as middleman. It would have been more conducive to DyStar's commercial and practical interests to obtain the materials directly from Kiri's suppliers. As Kiri accepts, Clause 7.2 did not mean that DyStar had to prefer Kiri's commercial interests over DyStar's own. Clause 7.2 allowed a margin of discretion to DyStar to act reasonably in its commercial interest. Nor am I able to infer from the fact that in 2010 and 2011 DyStar submitted open orders for raw materials and intermediates to Kiri that Clause 7.2 imposed an obligation on DyStar to continue sending open orders of a similar nature to Kiri. In 2010 and 2011, while there was still a spirit of cooperation (and acrimony had not yet set in) between Kiri and Longsheng, DyStar may well have acted in a manner that went beyond what Clause 7.2 required. But, as DyStar has cautioned, the court must be wary about using subsequent conduct to construe the scope of the obligation in Clause 7.2. Mr Kiri conceded that, in relation to traded goods, Kiri's room to manoeuvre was circumscribed by the need to have a profit margin. But he suggested that Kiri may have been able to produce some

of the goods itself, subject to the availability of raw materials and market conditions, allowing Kiri to make a net profit margin of at least 10 percent (that is, a gross profit margin of between 15 to 20 percent). However, this was a vague and unsubstantiated assertion. I do not think that it detracts from the thrust of DyStar's submission.

30 My other difficulty with Kiri's case on raw materials and intermediates relates to Brunsbüttel, Leverkusen and Cilegon. Kiri suggests that the production from those plants was transferred to Gabus, Omuta and Ankleshwar. Kiri bases this allegation on a production transfer schedule issued in July 2010. But Mr Peter Euschen ("**Mr Euschen**") (now DyStar's Global Head of Engineering & HSE [Health, Safety & Environment]) gave evidence that the document was an early version which "simply sets out a schedule for the transfer of production from the Brunsbüttel and Leverkusen plants to other plants such as Nanjing, Omuta, Gabus, and so forth". Mr Euschen was one of the authors of the production transfer schedule and was personally involved in the transfer of know-how from DyStar's German plants from 2010 to August 2013. He confirmed that the raw materials and intermediates which the Brunsbüttel and Leverkusen plants originally needed were no longer required by DyStar following the sale or closure of those plants. More specifically, Mr Euschen deposed that:

> 9. The 6 types of raw materials and intermediates which DyStar purchased from Kiri for the Leverkusen plant were no longer required because:
>
> (a) for 3 of the raw materials and intermediates, the related finished goods were cancelled; and
>
> (b) for the other 3 raw materials and intermediates, the related synthesis/finished goods were transferred to Lonsen-Kiri.

> 10. The 19 types of raw materials and intermediates which DyStar purchased from Kiri for the Brunsbüttel plant were no longer required because:
>
> (a) for 15 of the raw materials and intermediates, the related synthesis/finished goods were transferred to Lonsen-Kiri;
>
> (b) for 1 of the raw material/intermediate, the related finished good was cancelled;
>
> (c) for 2 of the raw materials and intermediates, the related finished goods were outsourced; and
>
> (d) for 1 particular raw material intermediate (i.e. metanilic acid) the related synthesis product was transferred to the Gabus plant, but DyStar used a different raw material/intermediate (i.e. imino pyrazolic acid) to produce the related synthesis product.

31 Kiri argues that little weight should be ascribed to Mr Euschen's evidence because he was only involved in the "technical aspect" of the transfer and not personally involved in deciding what raw materials the DyStar plants should purchase. Kiri observes that, because Mr Euschen's evidence was based on his review of records taken from DyStar's SAP [System Application and Product in Processing] platform ("**SAP**"), this casts doubt on the reliability of his evidence. Kiri points out that, asked in relation to Brunsbüttel to whom the finished goods for two of the raw materials and intermediates had been outsourced, Mr Euschen was unable to say. Kiri finally notes a difference of opinion between Mr Euschen and Mr Kiri on whether, apart from reactive dyes, H-acid can be used to produce other finished dyes.

32 However, Mr Euschen was an appropriate person to give evidence on the production transfer from Brunsbüttel, his former boss (Mr Gerald Talhoff) having left DyStar in December 2019. As for Mr Euschen's reliance on SAP, it would be unrealistic some ten years after the event to expect him to recall details about which raw materials or intermediate goods were transferred to whom without consulting SAP. Nor do I think that Mr Euschen's inability to

say, after so many years, to whom certain finished goods were outsourced or his difference of opinion with Mr Kiri on H-acid undermines the thrust of Mr Euschen's testimony. I therefore accept Mr Euschen's evidence on Brunsbüttel and Leverkusen. Since products previously required for Brunsbüttel or Leverkusen were no longer needed, it follows DyStar did not breach any preferred supplier obligation in connection with those products.

33 As for Cilegon, at a meeting on 28 and 29 July 2010, DyStar's board (including Mr Kiri) decided that Cilegon should be closed as soon as possible, and its production of reactive dyes should be transferred to Lonsen-Kiri. The thinking (according to Ms Huang) was to transfer production from high-cost sites in Germany (Brunsbüttel and Leverkusen) and Indonesia (Cilegon) into one low-cost site at Lonsen-Kiri for economies of scale and thereby maximise savings. Consequently, the entire production of Remazol reactive dyes at Cilegon was transferred to Lonsen-Kiri. Cilegon plant was a high-cost site because raw materials and intermediates had to be shipped to Indonesia from abroad for Cilegon to produce reactive dyes before onward shipping to customers. This substantially increased production costs for reactive dyes at Cilegon.

34 The foregoing is sufficient to deal with Kiri's points on Sub-Issue (a) of Issue 4. But, for completeness, I will briefly comment on the use of raw materials and intermediates at Wuxi, Nanjing, Ankleshwar, Gabus and Omuta. The comments are based on the evidence of Ms Huang as supported by data from SAP. I accept Ms Huang's evidence on the matters summarised below.

35 Wuxi produced various dyes, including disperse, vat, and reactive dyes. Wuxi sourced most of its raw materials and intermediates (61.1% by invoice value in 2014; 91.7% in 2020) from Mainland Chinese suppliers. It obtained

roughly 20% of raw materials and intermediates from a US supplier, which was the only one able to provide a special agent for DyStar's disperse dye production. Wuxi generally did not buy raw materials and intermediates from Indian suppliers to avoid incurring additional costs (such as VAT and import duty) and logistical problems. Wuxi only bought raw materials and intermediates from Indian suppliers if the products were not readily available in China. Wuxi's purchases from Indian suppliers therefor constituted a small percentage of its total purchases (between 0% (2011, 2012, 2015, and 2016) and 6.2% (2019)). Kiri does not produce the disperse dye raw materials that Wuxi bought from Indian suppliers.

36 Nanjing was in a similar position to Wuxi. It sourced between 86.5% (2018) and 98.5% (2010) of its raw materials and intermediates from Mainland Chinese suppliers. It generally did not buy raw materials and intermediates from Indian suppliers to avoid additional costs and logistical issues. It only bought raw materials and intermediates from Indian suppliers that were not readily available in Mainland China. Its purchases from Indian suppliers ranged between 0.3% (2010) and 7.7% (2011) of its total purchase values. Kiri does not produce the raw materials which Nanjing purchased from Indian suppliers between 2010 and 2018.

37 Ankleshwar blends and re-labels finished goods and produces auxiliary chemicals used in the dyeing process. It mainly purchases textile and performance chemicals. Although it sources most of its raw materials and intermediates from Indian suppliers, Kiri does not produce the relevant raw materials and intermediates.

38 Gabus is one of DyStar's main production plants for disperse dyes and Wo Pa Pan dyes. Gabus purchased a small portion of raw materials and

intermediates from Kiri in 2010 and 2011. None of those raw materials and intermediates were produced by Kiri. Some of the alleged reasons for Gabus no longer placing orders for raw materials and intermediates with Kiri have been discussed in [28] above. At present, Gabus sources about half of its raw materials and intermediates from suppliers in Indonesia and China, about 20% to 30% from Indian suppliers, and the remainder from suppliers in other countries. Kiri does not produce the raw materials and intermediates used by Gabus.

39 Omuta is one of DyStar's main production plants for disperse dyes. Between 2010 and 2011, Omuta purchased a disperse dye intermediate (p-aminobenzoic acid methyl ester (also known as MDG ester)) from Kiri. The intermediate had been obtained by Kiri from Rupa. Due to Kiri's non-payment of Rupa's previous supplies, Rupa no longer wanted to deal with Kiri. Thus, from 2012, Omuta began buying MDG ester directly from Rupa. The non-payment issue has been mentioned in [28] above. Omuta sources more than 80% of its raw materials and intermediates from suppliers in Japan and China. From 2016 to 2020, between 10% and 15% of Omuta's raw materials and intermediates purchases were from Indian suppliers.

Sub-issue (b): Finished dyes

40 Kiri complains that DyStar failed to treat Kiri as a preferred supplier of finished dyes from September 2012, when Kiri's sales to DyStar did not recover despite Kiri having cleared a backlog of unfulfilled orders arising from problems with its spray dryer. Kiri surmises that, although DyStar only stopped its requests for Kiri's price lists in August 2015, DyStar must have decided well before then to cease treating Kiri as a preferred supplier.

41 DyStar accepts that, from the latter part of 2012, it drastically reduced and later ceased its purchases of finished dyes from Kiri. But DyStar submits that this was due to concerns over Kiri's high prices and reliability as a supplier. DyStar says that it therefore had valid commercial justifications for reducing and ultimately ceasing its purchase orders with Kiri. DyStar observes that, concurrently, there was a joint effort among DyStar, Longsheng and Kiri to build up Lonsen-Kiri (in place of Kiri) as a major supplier of reactive dyes to DyStar.

(1) DyStar's case

42 On Kiri's lack of dependability as a supplier, DyStar stresses several matters.

43 First, between March and December 2011, there were complaints from customers in various countries regarding the quality of the reactive dyes supplied by Kiri. DyStar had never received so many complaints concerning a single supplier over a span of several months. While the quantities complained of were small in comparison to the total quantity of dyes supplied by Kiri, from DyStar's perspective the damage to DyStar's reputation was potentially significant. DyStar instanced its business with Fountain Set which dropped markedly after the complaints. DyStar had just managed to regain its business with Fountain Set (a large manufacturer of circular knitted fabrics), only to encounter a setback because of problems with Kiri's supply.

44 Second, the position was exacerbated by a nine-month disruption from January to September 2012 due to problems with the spray dryer in Kiri's plant.

45 Third, Kiri's financial problems from 2012 to 2015 contributed to Kiri's supply difficulties. Kiri's financial statements recorded losses of INR 7,257.33

lakhs (US$10,160,262) in FY 2011/2012 and INR 19,860.38 lakhs (US$27,804,532) in FY 2012/2013. Kiri's financial statement for FY 2012/2013 noted that Kiri's operations had been affected by a lack of working capital. In SIC 4 Mr Kiri himself deposed that it was not until between March 2014 and December 2015 that Kiri resolved its financial situation. Kiri's financial difficulties led to Kiri repeatedly seeking support from DyStar, by holding out for more favourable payment terms, insisting on new orders being placed before delivering pending orders, and seeking price revisions on old orders. For instance, in an email of 6 March 2012, Dr Helmling of DyStar referred to the US$1 million of support provided to Kiri by DyStar being used up and Kiri requesting an additional US$2 million. By an email dated 22 March 2012, Kiri asked DyStar to place new orders, stating that Kiri's "request for the 200 MT is extremely critical for [Kiri] to BREAK EVEN" and Kiri needed "support on these orders RIGHT NOW to sustain the ongoing supplies".

46 Fourth, DyStar criticises the way Kiri handled purchase orders placed by DyStar in response to a request for support made by Kiri in November 2012. Kiri asked DyStar to place new orders. Despite misgivings over the reliability of Kiri's supply, between December 2012 and January 2013, DyStar agreed. It issued purchase orders for 503MT of dyes. About half of the orders were delivered. However, by email of 30 April 2013, Kiri requested a 30% increase in price for the remaining deliveries. DyStar refused. By email of 13 May 2013, Kiri stated that it would fulfil the pending orders at previously agreed prices, if DyStar placed further orders for 744MT. By email of 14 May 2013, DyStar rejected Kiri's proposal, commenting that it:

> [w]ould like to highlight the following important points regarding the existing pending orders.
>
> A. All the purchase orders were issued during Dec 2012 and Jan 2013, after a firm commitment regarding

> the deliveries, from Mr Alok and yourself during the meeting in our office at Mumbai.
>
> B. The product list was also selected from your side.
>
> C. Despite all the odds, our procurement team convinced the top management to release the purchase orders.
>
> D. Due to the issuance of the orders on Kiri Industries, PO for these products were not placed with alternate suppliers.
>
> E. Preferred payment terms were agreed against the normal credit terms of 90 days with alternative suppliers.
>
> F. Delayed as well as non-deliveries had in turn, huge impact on DyStar's image with its end customers.
>
> G. Despite repeated reminders and e mails, no feedback/response on the pss [purchases?] since more than 8 weeks.
>
> H. All the other suppliers are delivering against the existing purchase orders without any change in the terms and conditions.
>
> The entire DyStar world is complaining to the procurement team about the delayed/no-delivered situation of the pending purchase orders because products/quantities are committed to the end customers based on the PO placed on you. This has not only lead to possible loss in business, but also affected the credibility of DyStar in the marketplace.
>
> Considering all the above points, you are once again requested to execute the pending PO by submitting pss promptly, without co-relating the new proposal….

47 Ms Huang was so incensed about Kiri's conduct that she reported to DyStar's then CEO Mr Dobrowolski on 17 June 2013:

> Regarding the 500 tons strategic PO we placed to Kiri end of 2012, to refresh your memory, Kiri still hold on deliveries unless we place additional 744 tons POs at higher prices.
>
> This is totally not acceptable, therefore in the forthcoming meeting Krish and Walter set up with Kiri, we will deliver the message clearly that if Kiri can not deliver the cargo at agreed prices, we will cancal [*sic*] all remaining pending POs and treat

> Kiri as unreliable supplier thus no New PO will be placed to them in future.
>
> Pls support the decision of the communication here. Tks.

48 By email of the same day, Mr Dobrowolski replied: "Vera, no problem." Ms Huang then asked Mr Dobrowolski to raise the matter at forthcoming meetings with Mr Kiri in Baroda. On 12 July 2013 Kiri suggested that it could fulfil 195MT of the pending orders based on old prices on condition that DyStar placed an additional 829MT of orders with Kiri. Eventually, by an email dated 19 August 2013, Kiri cancelled the remaining pending orders. Ms Huang says that the foregoing incident was the straw that broke the camel's back and led to DyStar regarding Kiri as an unreliable supplier and ceasing to place significant orders for finished dyes with Kiri thereafter.

49 On building up Lonsen-Kiri as a supplier, DyStar says that, by comparison with Kiri, Lonsen-Kiri had better quality, stability, and management efficiency. Given Kiri's unreliability as a supplier in 2012, it was natural for DyStar to develop Lonsen-Kiri as a supplier in place of Kiri. There was nothing secretive (DyStar claims) about the development of Lonsen-Kiri as a major supplier of DyStar. On the contrary, Longsheng and Kiri cooperated with each other to build up Lonsen-Kiri as a major supplier of dyes to DyStar. Longsheng and Kiri invested substantially in Lonsen-Kiri to increase its manufacturing capacity from 10,000MTA in 2009 to Lonsen-Kiri's present 25,000MTA. Dye production was transferred from Cilegon and Brunsbüttel to Lonsen-Kiri as part of this joint initiative. In this connection, the minutes of DyStar's board meetings show that the board (including Mr Kiri) regarded Lonsen-Kiri as an important supplier of reactive dyes to DyStar and devoted considerable attention to growing Lonsen-Kiri's business with DyStar. Mr Kiri accepted that he had written to DyStar in his capacity as Lonsen-Kiri's managing director to provide details of Lonsen-Kiri's improved production and

had informed DyStar that he would ramp up dye production at Lonsen-Kiri to meet DyStar's sales targets. As a result, with Kiri's acquiescence, Lonsen-Kiri became DyStar's single largest customer, with 80 to 85% of the reactive dyes sold by Lonsen-Kiri going to DyStar.

(2) Kiri's case

50 Kiri contends that there was no correlation between its financial problems and supply difficulties in 2012. Its Annual Report for FY 2011/2012 only shows a decrease in revenue of 6.86%. As for the emails from Kiri linking support from DyStar with Kiri's survival, Mr Kiri explained that, due to the steep rise in the cost of raw materials in April 2013, Kiri would make a loss on the relevant orders unless DyStar helped Kiri out. In any event, by September 2012, there had been a drop in pending orders with Kiri. Kiri was clearing its backlog of unfulfilled orders from DyStar and even able to process some orders before their delivery dates.

51 Kiri accepts that, in November 2012, it sought DyStar's support for new orders. As a result, DyStar placed orders with Kiri in December 2012 and January 2013 for 503MT of dyes. The prices for these orders had been re-worked by Kiri to match DyStar's target prices and were lower than the prices offered by Lonsen-Kiri. Given the increase in raw material prices in April 2013, Kiri asked DyStar for an upwards price revision on pending orders (about 249MT). This having been refused, Kiri asked that DyStar place orders for an additional 744MT to compensate for the rise in prices. This led Ms Huang to email Mr Dobrowolski on 17 June 2013 as mentioned in [47] above. Despite this, according to Mr Kiri, Mr Dobrowolski later told Mr Kiri that he understood that Kiri's request for a price revision was due to the increase in raw material prices. Mr Dobrowolski is said to have assured Mr Kiri that DyStar would place

more orders with Kiri. Kiri consequently submits that Ms Huang's belief that Mr Dobrowolski supported her hard-line towards Kiri conflicts with what Mr Dobrowolski told Mr Kiri. Ms Huang's evidence is also contradicted (Kiri argues) by the fact that thereafter, until 10 September 2014, DyStar continued to purchase dyes from Kiri that DyStar could not obtain from Lonsen-Kiri or other suppliers. In August 2013 Kiri proposed the cancellation of pending orders of about 169MT. The cancellation (Kiri maintains) was mutually agreed between DyStar and Kiri.

52 Kiri accuses DyStar of being hypocritical and capricious in its treatment of Kiri over alleged supply issues. This is because DyStar experienced similar, if not worse, supply issues with Lonsen-Kiri and a supplier known as Colourtex. In August 2012 Lonsen-Kiri had overdue orders of 2,400MT with DyStar. This was more than the quantity of pending orders with Kiri for any month in 2012. Lonsen-Kiri's delays persisted into 2013. In May and June 2013, Lonsen-Kiri's overdue orders were 950MT and 1,313MT respectively. Despite this, Lonsen-Kiri's sales of reactive dyes to DyStar was US$57.34 million in 2013 in comparison to Kiri's sales of US$1.36 million. There were similar delays by Colourtex in meeting DyStar's orders. In an email of 12 April 2013 Mr Luo requested a price revision for 977MT of orders which DyStar had placed at the end of the first quarter of 2013, otherwise Lonsen-Kiri (Luo wrote) would face a huge loss. DyStar (Kiri says) compensated Lonsen-Kiri but refused Kiri's similar request for compensation. Colourtex, too, asked for a price revision in October 2014 because of an increase in raw material prices. Colourtex threatened to cancel DyStar's orders if there was no revision. DyStar acceded to Colourtex' demand. Despite the foregoing, Lonsen-Kiri and Colourtex continue to be major suppliers of DyStar.

53 Kiri highlights an incident in late 2015 involving a dye known as Reactive Turquoise Blue ("**RTB**").

54 Kiri offered to supply RTB from a new factory to DyStar. DyStar asked Kiri to supply a sample of RTB 21 133% and another of RTB 21 266% for testing. In November 2015 DyStar's tests indicated that Kiri's samples were of C1 quality (that is, on a scale of A to C, with A being the required quality). There were also problems with colour strength. DyStar needed colour strength to be within a range of 100% plus or minus 2.5%. Kiri's RTB 266% sample had a strength exhaust and cold pad bench ("**CPB**") of 87% and 86% respectively, while Kiri's RTB 133% sample had a strength exhaust and CPB of 127.44% and 120%. Kiri responded by asserting that the test samples may have been mislabelled. Kiri asked for a re-test. In December 2015 DyStar conducted a second test on fresh samples from Kiri. The samples were found to be of C quality. The RTB 266% sample had a strength exhaust and CPB of 81% and 82% respectively, while the RTB 133% sample had a strength exhaust and CPB of 123% and 121% respectively. The solubility and stability of the samples were also unacceptable, the RTB 133% sample having leftover residue and the RTB 266% being not filtrable.

55 Kiri then asked DyStar to provide its standard samples for the relevant dye. DyStar replied that, as a matter of standard practice, it did not provide standard samples to suppliers whose product had failed DyStar's testing requirements and whose production of a dye had not yet been approved. Kiri later offered to supply DyStar with RTB at INR 205 *per* kg CAD (cash against documents). DyStar rejected the offer as it was higher than quotes from DyStar's existing approved suppliers. On 31 December 2015 Kiri of its own initiative sent a third batch of samples of RTB 133%. DyStar, however, refused to test this third batch on the basis that it was not DyStar's practice to do so after

a supplier failed testing. On 2 January 2016 Kiri offered to supply RTB at INR 175 *per* kg CAD. It again requested that its third batch of samples be tested. DyStar replied that Kiri had always given DyStar payment terms of 90 days from date of invoice. DyStar additionally informed Kiri that its pricing of RTB was still outside DyStar's target price and further testing was not possible. Kiri revised its price to INR 165 *per* kg with payment 90 days from date of invoice. Kiri's price being competitive, Dr Singh who had been handling the matter on DyStar's behalf sought advice from Ms Huang. Dr Singh was concerned about the consistency of Kiri's quality and the sustainability of its low price in the long term. Ms Huang agreed with those concerns and told Dr Singh to purchase RTB from other suppliers.

56 Upon learning of the decision Mr Kiri telephoned Dr Singh for an explanation. Dr Singh replied by email the next day:

> Sorry for the delay in reverting back.
>
> Based on our yesterday discussion, would like to reconfirm that there is no other intention behind holding the development work of Reactive Bule 21.
>
> Since DyStar has its quality standard and purchasing team follows the normal process in terms of alternative source development and we do not have any preference except consistent quality and good service with competitive cost, which is the key.
>
> As mentioned yesterday we have 6 approved suppliers for this product hence as per process, if we have many available suppliers for a product, we positioned it as "tactical profit" in our material positioning sheet, which means we can leverage already with existing suppliers in terms of price and volume.
>
> In this case, as said there is no necessity defined to develop alternative source or we just keep it as "low priority".

57 Kiri submits that, in the RTB incident, DyStar breached its Clause 7.2 obligation in two ways. First, DyStar failed to provide Kiri with a standard sample of RTB. Kiri notes that DyStar's procurement manuals do not prohibit

the provision of standard samples to prospective suppliers. DyStar in fact had provided numerous standard samples to Kiri shortly after the SSSA was executed. Kiri also refers to DyStar Turkey having sent samples of several Remazol dyes in 2015 to enable Kiri to match DyStar's products. Second, DyStar refused to test Kiri's RTB samples for a third time, especially given that Kiri's samples were wrongly labelled at first.

58 Kiri highlights the following passage from Dr Singh's examination which (Kiri says) reflects the true position in relation to DyStar's testing of samples.

COURT:	You didn't send the RTB standard to Kiri. Without the standard, how could you expect Kiri, as a supplier, to match the strength and shade of the standard?
A:	This is the normal practice for all the suppliers. When we receive the first set of samples and we test against the DyStar standards, we get a report, the product is stronger or weaker. Most of the time stronger/weaker, sometimes very close and then we share the test report to the suppliers that this is the findings of your submitted samples. Based on that, the supplier adjusts his strength based on our findings which we reported.
COURT:	Right. So the supplier has to guess how best to meet the standard on the basis of the test result; is that right, Dr Singh?
A:	Suppose the strength is 80 per cent against the DyStar standard and we share the test report. So supplier knows that he has to upgrade the product by 20 per cent before he sends the next sample. If it is stronger, then supplier -- suppose the strength is 120 per cent against DyStar's standard, then the supplier knows he has to cut the strength by 20 per cent before he sends the next set of samples to DyStar for testing.
COURT:	Normally, you say that only one testing is given to a supplier, not two?

A: Yes.

COURT: How would the supplier know what the standard is without at least having one test result back?

A: We test twice.

COURT: You test twice normally --

A: Yes, so -- normally --

COURT: -- or only in certain cases?

A: No, for every cases we test twice, because first is just the sample which they have a quality which they send for us to testing because we don't give the standards. So first we test what they are offering, then we share the test report of our lab finding. Based on that, the supplier cut some -- most of the suppliers are very close in the second test results and then we decide whether he is capable or not for going further for this product.

COURT: So there may be further tests --

A: Yes, yes.

COURT: -- because the supplier may be close --

A: Yes.

COURT: -- but not quite there?

A: Most of the time they are quite there because it is just cutting or upgrading the product, the strength.

COURT: But there may be further tests?

A: Yes. We have to send the sample for our eco-testing like banned amines and all those things, heavy metals and everything.

COURT: Right. Would I be right in thinking, then, from your evidence that usually -- usually -- there will be at least two tests --

A: Yes.

COURT: Because it is difficult for a supplier to hit it right in the dark --

A: Yes.

COURT: -- without knowing a test result; is that right?

A: Yes.

59 On DyStar's allegation that there were quality issues with Kiri's products, Kiri points out that there were two complaints from Fountain Set in March and April 2011 regarding the supply of dyes to Fountain Set sites in China. The total quantity of affected dyes was 125kg and arose from the same batch of dyes. There was a complaint from Fountain Set Sri Lanka in July 2011. The complaint related to 5,000kg of dyes. There was a complaint from a DyStar customer in Hong Kong in June 2011 pertaining to Kiri's supply of Remazol Navy RGB 150%. But only 50kgs of dyes were found to be unusable. There was a complaint from a customer in Turkey in December 2011 regarding Kiri's supply of Remazol Brilliant Red 3BS. This related to 1,500kg of dyes. There was a shortfall of 35kg of Reactive Orange 107 Crude delivered by Kiri in September 2012. Kiri took steps to make up the shortfall the next day after being notified by DyStar. Kiri supplied 5,432,315kg of dyes having a sales value of US$18.17 million to DyStar in 2011. Seen in that perspective, the foregoing complaints were minimal. The complaints were ultimately resolved by Kiri paying compensation or making up the shortfall in delivery.

60 Although DyStar suggested that Kiri did not respond to DyStar's requests for Kiri's price lists from November 2014 to July 2015, Kiri disputes this and has produced what it says were its email responses.

61 Finally, Kiri firmly denies that it was ever party to an understanding or strategy that DyStar should favour Lonsen-Kiri as opposed to Kiri as a supplier of dyes. Kiri contends that the absence of such understanding emerges from Kiri's efforts to increase its sales to DyStar from 2012. For instance, at a meeting in November 2012, Kiri requested that DyStar purchase from Kiri 40% of the

goods which DyStar was purchasing from other suppliers. Mr Kiri informed DyStar at around the same time that Kiri would match the prices offered by Lonsen-Kiri. Kiri reasons that, contrary to there being the alleged understanding, from DyStar's own emails, DyStar still intended to purchase dyes from Kiri. For instance, in an email of 20 March 2012, DyStar wrote that it was "working hard to support [Kiri] as discussed" and it "look[ed] promising to support [Kiri] with further pending orders to be switched to CAD (we target another 1 Mio USD)". In an email of 30 March 2012, DyStar affirmed that it was "willing to support Kiri" and that Kiri was DyStar's "preferred option". In an internal email of 15 June 2012, DyStar stated that "Kiri is not yet stable at all but we should start to consider placing orders to Kiri for items where LS-Kiri is still struggling and or items where we foresee problems @ LS-Kiri or other 3rd party supplier due to raw material limitations". In an internal email of August 2012, DyStar stated that it "would like to get a total (existing global orders included) of 577 tons with a value of 2.084 Mio USD from Kiri".

(3) Analysis

62 I am not persuaded by Kiri's submissions.

63 DyStar saw a need in 2012 to develop alternative dye sources to Kiri. This was necessary to safeguard DyStar's supply of its products to customers on a timely basis and at an acceptable price and quality. The need for alternative sources arose from Kiri's high prices at the time and Kiri's inability to provide a reliable supply of dyes in the nine months from January to September 2012. This inability was due in no small part to the fact that Kiri was experiencing sprayer problems at its plant.

64 As DyStar points out, Dr Helmling visited DyStar's major suppliers, Lonsen-Kiri, and Kiri in March and April 2012. He thereafter recommended that no new orders be placed with Kiri for the time being. The reasons for this appear from an email dated 26 August 2012 from Mr Dobrowolski to Kiri:

> The prices from Kiri are still above the market for many products. Most important is that the backlog with DyStar needs to be worked down quickly to restore the confidence with sales area managers. Right now, it is zero and we can only restore it with timely deliveries arriving at customers. This will take 3 months if you ship the backlog at the end of the month. You would need to give us some pointers why we should take the risk to place further orders with Kiri at higher prices.

DyStar thus put a hold on orders with Kiri in or about October 2012.

65 Nevertheless, DyStar gave Kiri an opportunity to supply 503MT of reactive dyes in December 2012 for the coming quarter as recounted above. Unfortunately, Kiri's execution of this order was far from smooth. As a condition for maintaining its previously quoted prices, Kiri requested an upwards price revision or, when that was refused, new orders. Kiri's conduct did not inspire DyStar with confidence in Kiri's ability to hold to quoted prices and maintain a reliable supply. This should have been Kiri's chance to mount a comeback after its supply problems over much of 2012. It was an opportunity to demonstrate that Kiri could be counted on to deliver finished dyes in timely fashion at previously agreed prices. The whole incident instead led to exasperation on DyStar's part and prompted DyStar (acting through Ms Huang as supported by Mr Dobrowolski) to regard Kiri as an unreliable supplier. I note Mr Kiri's evidence on what he was told by Mr Dobrowolski. But, in the absence of any internal DyStar document evidencing that (whatever he may have said to Mr Kiri out of courtesy or for whatever reason) Mr Dobrowolski countermanded his support of Ms Huang, the reality appears to be that Mr Dobrowolski fully agreed with Ms Huang's decision on the matter. Thereafter, virtually no

purchase orders were placed with Kiri. DyStar would place the occasional order with Kiri in the succeeding months. But those were ostensibly out of necessity; they were largely for products that could not be sourced elsewhere (including from Lonsen-Kiri). Kiri has drawn attention to emails from DyStar between March and August 2012 as evidence that DyStar "still intended to purchase dyes from Kiri". But, as DyStar points out, those emails were sent when DyStar was still prepared to give Kiri a chance despite doubts over Kiri's reliability as a supplier.

66 I am unable to find that DyStar, in conducting itself as described in [65] above, acted uncommercially. DyStar afforded Kiri with a reasonable opportunity to compete with its other suppliers. For DyStar's November and December 2012 orders, Kiri had deliberately quoted prices which were lower than those offered by Lonsen-Kiri (see [51] above). The problem was that, having quoted such competitive prices, Kiri did not stick to them but instead persisted in demands for a price revision or compensation with further orders. It is true that, due to the surge in prices in the second quarter of 2013, Kiri would sustain a significant loss on the orders. But Clause 7.2 did not oblige DyStar to revise prices upwards or compensate Kiri for losses due to market volatility. Clause 7.2 does not guarantee Kiri a profit on its transactions with DyStar. While possibly harsh on Kiri given the market conditions at the time, I do not think that DyStar can be faulted in concluding, by reason of Kiri's handling of the November and December 2012 orders, that Kiri could not be depended on to stick to quoted prices and deliver pursuant to its contractual commitments.

67 It is conceivable that Kiri's capability as a supplier improved, in terms of price and reliability, in the years following 2013. I accept, for instance, DyStar's case that a reason (among others) for Kiri's supply difficulties was its financial difficulties. But Mr Kiri deposed in SIC 4 that Kiri overcame its

financial troubles between March 2014 and December 2015 (see [45] above). Further, in his evidence-in-chief for these proceedings, Mr Kiri alluded to Kiri setting up a new manufacturing plant for disperse dyes in 2016. These suggest an improvement in Kiri's fortunes towards the end of 2015. It might consequently be argued that, while it was reasonable for DyStar to regard Kiri as an unreliable supplier in 2013 and cease placing orders with Kiri from 2013 for that reason, Clause 7.2 obliged DyStar from time to time to ascertain whether Kiri's supply capabilities had improved over time and (if so) to resume placing orders with Kiri. But this potential aspect of Clause 7.2 was neither pleaded nor was it explored at trial. In particular, it was never put to any of DyStar's witnesses that, however commercially justified DyStar may have been in acting as it did in 2013, over the next few years, DyStar failed: (a) to check whether Kiri's ability to supply finished dyes at competitive prices had improved and (b) (to the extent there was a change for the better) to resume regular (as opposed to sporadic) dealing with Kiri as a supplier. I am therefore unable to conclude on the evidence before me that DyStar's decision to stop placing orders with Kiri from 2013 ought to have been reviewed and (possibly) rescinded at a later stage.

68 Kiri has relied on DyStar's treatment of Lonsen-Kiri and Colourtex in support of its argument that a nine-month disruption in supply cannot be a valid reason for ceasing to place orders. However, the situations of Lonsen-Kiri and Colourtex are distinguishable. In the last days of March 2013, DyStar placed an order for 977MT with Lonsen-Kiri. This was a strategic order, intended to take advantage of Lonsen-Kiri's first quarter prices just before the anticipated higher second quarter prices came into effect. Lonsen-Kiri's first quarter prices for 2013 should thus have applied to these orders. But Mr Luo emailed DyStar on 26 April 2013 expressing reluctance to accept the orders at those prices,

unless Lonsen-Kiri provided compensation. Nonetheless, according to Mr Luo's evidence (which I accept), Lonsen-Kiri finally accepted the orders at first quarter prices without insisting on compensation. In Colourtex' case, there were wider considerations which left DyStar with little option. Colourtex was a major supplier for DyStar of various dyes. It was also one of DyStar's major competitors. DyStar contemplated legal action against Colourtex for threatening not to carry out the orders which the latter had accepted. But DyStar concluded that such action would be too risky for its business and possibly result in Colourtex stopping its supply of products to DyStar (such as press cakes and acid dyes) with detrimental consequences to DyStar's operations. DyStar requested Mr Kiri to see if Colourtex would back down. But that did not work. Ultimately, DyStar made the commercial decision to accede to Colourtex' request. Accordingly, I do not think that it follows from this that, by reason of Clause 7.2, DyStar was obliged to give Kiri a price increase merely because it was forced to agree one with Colourtex.

69 On RTB, I agree with DyStar that Clause 7.2 does not expressly or impliedly oblige DyStar to provide Kiri with standard samples. It may well have been that, from time-to-time, DyStar as a matter of goodwill provided such samples to Kiri. But I do not think that it can be inferred from that alone that Clause 7.2 is to be construed as requiring that DyStar consistently provide standard samples whenever asked to do so by Kiri, contrary to DyStar's usual practice. DyStar had valid reasons for such usual practice of not providing standard samples. Dr Singh stated:

> The rationale for this [practice] is simple: these standard samples contain trade sensitive information on the specifications of DyStar's products, and some of DyStar's suppliers such as Kiri and Colourtex are also its direct competitors. If DyStar were to distribute its standard samples freely, these suppliers can easily obtain confidential

> information and know how relating to DyStar's specific products and reverse engineer or copy them.

70 According to Dr Singh, DyStar normally tests samples provided by would-be suppliers at least twice. That is what happened in relation to Kiri's RTB. Kiri has asserted that its initial RTB samples were mislabelled. If there had been mislabelling of samples, such carelessness would hardly inspire confidence in Kiri's reliability. But it is far from apparent that the samples had been mislabelled. Nor was it explained at trial how any mislabelling would have made a real difference to the outcome of the first test. In any event, the colour strength results of the first and second tests of Kiri's RTB samples were similar. Dr Singh conceded that, when the results are close to DyStar's standard, DyStar may carry out more than two sample tests. But neither set of test results for Kiri's RTB samples came close to meeting DyStar's benchmarks. Dr Singh also said that a supplier should be able to work out, from an initial set of test results, by how much to upgrade a product. But Kiri does not seem to have worked on substantially upgrading its product based on the initial test results (even if from mislabelled samples), as the two sets of RTB samples yielded similar test results. Clause 7.2 obliges DyStar to afford Kiri with a reasonable chance to quote prices or tender for the supply of dyes to DyStar. Everything else being equal, DyStar should then prefer Kiri. But the RTB incident is not that situation. Kiri had an opportunity to prove that its RTB samples met DyStar's standards. But the results were well off the mark.

71 Mr Kiri is adamant that he informed DyStar in November 2012 that Kiri could match the prices offered by Lonsen-Kiri and that the prices would "form a baseline from which Kiri could further negotiate even lower prices with DyStar". In evidence, Mr Kiri recalled that Kiri had offered DyStar a 2% discount on Kiri's prices with 30 days payment terms (in exchange for a shorter

credit term than DyStar's average of 45 to 60 days). But DyStar's experiences canvassed above, in relation to Kiri's pricing of the November and December 2012 orders, cast serious doubt on whether Kiri would have been able to stick to any low prices quoted, especially at a time when it (Kiri) was going through financial difficulty.

72 Over the course of these proceedings, there has been considerable argument between the parties on whether Kiri was or was not privy to an understanding or strategy to build up Lonsen-Kiri (as opposed to Kiri) as a supplier of dyes to DyStar. Given the discussion in this section, I do not think that it matters very much whether Kiri was privy to such understanding or strategy. In my view, it suffices to find that, in his dual roles as DyStar director and Lonsen-Kiri's managing director, Mr Kiri must have been aware that Lonsen-Kiri's production was being ramped up to enable Lonsen-Kiri to become a major supplier to DyStar. Kiri would have realised that there was some urgency for the ramp-up in 2012 as Kiri was then facing sprinkler issues which were causing serious supply backlogs. Mr Kiri repeatedly asserted that Kiri could compete with and even better Lonsen-Kiri's prices. Competition between Kiri and Lonsen-Kiri would inevitably have placed Mr Kiri in a position of conflict of interest due to his twin roles as director of DyStar and Lonsen-Kiri. But, as the resolution of such conflict has not been an issue in these proceedings, I say no more about the same. The more pertinent point is that already made in [71] above, namely, that DyStar would have had justifiable doubts over Kiri's ability to stick to any low prices quoted in a bid to undercut Lonsen-Kiri.

Conclusion on Issue 4

73 Kiri's claims of a breach of Clause 7.2 fail and should be dismissed.

Issue 5: What (if any) damages is Kiri entitled to receive?

74 It follows from my conclusion on Issue 4 that Kiri is not entitled to damages. For completeness, I will briefly comment on Kiri's claim for damages on the premise that I am wrong in my conclusion on Issue 4.

75 Kiri accepts that its claims against DyStar before 27 December 2013 (that is, six years before the start of these proceedings) are time-barred. But Kiri submits that its pleaded breach of Clause 7.2 should be characterised as a continuous breach which goes beyond 27 December 2013 and potentially carrying on to the present. Subject to [76] and [77] below, I am prepared to accept that, in so far as valid, the breaches pleaded would be continuing breaches.

76 Kiri's claims here were not raised in SIC 4. Kiri submits that the outcome in SIC 4 does not impact on the calculation of damages in these proceedings, because SIC 4 is a separate and distinct proceeding and the buy-out order in SIC 4 is supposed to remedy Senda's oppression of Kiri. Thus, Kiri should be able to claim damages here going beyond the valuation dated 3 July 2018 determined in SIC 4. I am unable to agree. The decision in SIC 4 supposes a clean break between Kiri and Senda as joint venture partners from 3 July 2018. The joint venture between Kiri and Senda must be presumed to have ended on 3 July 2018 with Senda buying out Kiri's interest in DyStar on that date. Clause 7.2 would therefore cease to apply from 3 July 2018 with Longsheng (through Senda and WPL) being regarded as DyStar's beneficial owner from that date. It is true that Senda has yet to pay for Kiri's shares at the valuation ordered by the SICC and there is an appeal against the SICC's valuation. Senda has further intimated that it may not have the financial resources to pay the valuation. But,

in the event of non-payment by Senda, Kiri's remedy would lie through the enforcement of the SICC's buy-out order to the extent upheld on appeal.

77 Kiri says that, to deal with any concerns arising from the buy-out order in SIC 4, I can apply a discount of 37.57% (representing Kiri's shareholding in DyStar) to Kiri's calculation of damages from 27 December 2013 to 3 July 2018. I am also unable to agree. The consequence of Clause 7.2 ceasing to bite from 3 July 2018 is that Kiri's claim for damages should be limited to that date. Kiri should therefore only be entitled to damages for the period from 27 December 2013 to 3 July 2018 (a period of four and a half years).

78 Kiri suggests that, save for Levafix dyes which Kiri does not produce, if Kiri had been given the opportunity, it could have sold to DyStar some 50% of the reactive dyes which the latter purchased from Lonsen-Kiri (collectively, the "**1st reactive dye category**"). Kiri accordingly claims 50% of the value of Lonsen-Kiri's total reactive dye sales (save for Levafix dyes) to DyStar from 27 December 2013 to 31 December 2020. In my view, the 50% posited is too high. Notwithstanding Mr Kiri's assertions (see [71] above), there is little evidence that Kiri would reliably have been able to supply dyes at competitive prices to DyStar in lieu of Lonsen-Kiri. Further, on the evidence, at best Kiri would only have been able to supply about a third of the types of reactive dyes supplied by Lonsen-Kiri. I am unable to accept Kiri's untested assertion (made after the evidentiary hearing) that it would have been able to produce other types of reactive dyes. Based on its sales to other customers, Kiri posits that it would have earned margins of between 16.3% to 21.3% from sales to DyStar. Here I accept DyStar's submission that the margin should be 15.5% (that is, the gross margin of 16.9% put forward by Mr Kiri in his affidavit evidence, albeit adjusted downwards by 1.4% to account for variable costs). There is no dispute between the parties that gross (as opposed to net) margins should be used. Kiri

argues that costs would not have remained the same from 2014 to date but would have fluctuated over time due to changes in raw materials, utilities, and other inputs. Kiri also suggests that reactive and direct dyes would have different gross margins over the period from 2014 to 2020. Whether costs and profits margins would have varied over time for different products and (if so) to what degree was not really explored at trial. I am therefore unable to accept Kiri's contentions in such respect. Given that Kiri would have indirectly benefitted from Lonsen-Kiri's sales of dyes to DyStar, Kiri is prepared to discount the foregoing amount by 40% (representing Kiri's shareholding in Lonsen-Kiri). I believe that there should be such a discount. Finally on the 1st reactive dye category, any entitlement to damages on Kiri's part should be limited to the period from 27 December 2013 to 3 July 2018.

79 Kiri contends that, had it been given the opportunity, it could have provided to DyStar a certain proportion of the reactive dyes which DyStar purchased from other suppliers (collectively, the "**2nd reactive dye category**"). This claim has two components. First, in respect of reactive dyes listed in Exhibits PB 24–25 produced at the trial, Kiri posits that it could have supplied some 33% based on a weighted average of DyStar's purchases from Kiri of relevant dyes in 2010 and 2011 compared with DyStar's purchases from Kiri and third-party suppliers of the same dyes over the same period. Second, in respect of reactive dyes listed in Annex A of a letter dated 30 April 2021 from Kiri's to DyStar's solicitors, Kiri puts forward an average weighted reference proportion of 1.4%. This proportion is said by Kiri to be based on DyStar's purchases from Kiri of the relevant reactive dyes in 2010 and 2011 compared with DyStar's total purchases of all dyes over the same period. On the first component, for the reasons canvassed in the discussion on Issue 4, I am far from convinced that Kiri could reliably have supplied 33% of the relevant reactive

dyes at competitive prices. I agree with DyStar that any attempt to calculate a proportion for the first component will inevitably involve a degree of arbitrariness. If necessary to come up with a proportion for the first component, I suspect that DyStar's fallback proposal of a 1-in-7 chance (14.3%) would be closer to the mark. That percentage is based on an extrapolation from the RTB incident in which DyStar had six approved suppliers (not counting Kiri) for the relevant dye. The second component was only raised by Kiri after the close of evidence at trial. As a result, as DyStar emphasises, there is scant evidence of DyStar's purchases of the relevant dyes from Kiri or from other Indian suppliers between 2010 and 2020. There is further scant evidence that DyStar purchased the reactive dyes in question from other Indian suppliers between 2014 and 2020. It seems to me far too late for Kiri to be belatedly advancing a claim for the second component in closing submissions. The claim should have been signalled and articulated well before trial. For the reasons mentioned in [77] and [78] above, Kiri's margin for the 2nd reactive dye category should be 15.5% and damages should be confined to the period from 27 December 2013 to 3 July 2018.

80 On direct dyes, Kiri calculates its losses by reference to an average weighted proportion (19%) of Sirius Black VSF h/c that it sold to DyStar in 2010–2011 as compared to DyStar's total purchases of direct dyes in those years. Here, similar considerations to those already discussed above would apply. I prefer DyStar's suggested proportion of 14.3%, although I accept that any figure would involve an element of arbitrariness. Kiri's gross profit margin should be 15.5% and the period for damages should only be from 27 December 2013 to 3 July 2018.

81 On raw materials and intermediates, Kiri claims 50% of the weighted average proportion on DyStar's purchases of raw materials and intermediates

from Kiri in 2010–2011, albeit adjusted to take account of variable selling and distribution expenses. For its calculations, Kiri has used an average gross margin of 12.7%. In my view, Kiri would have suffered no (or only a negligible) loss of a chance in relation to raw materials and intermediates. This follows from my findings in [30] to [33] above relating to the consequences of the closure and sale of Brunsbüttel, Leverkusen and Cilegon. On Wuxi, Nanjing, Ankleshwar, Gabus and Omuta, it is unlikely that Kiri as middleman would have been able to provide, at competitive prices, the raw materials and intermediates which those plants sourced from foreign suppliers: see [35] to [39] above. In any event, the period for any damages should only be from 27 December 2013 to 3 July 2018.

82 Kiri seeks pre-judgment interest on any damages awarded. I would have refused such interest on the ground of Kiri's delay in bringing the Counterclaim. Kiri could have (but did not) bring its action in 2015 when it commenced SIC 4 or as a counterclaim against DyStar in SIC 3.

Issue 6: Costs

83 As to the incidence of costs, DyStar having substantially prevailed on the Counterclaim, it should have its costs of the same. It is correct that DyStar did not succeed on every issue. However, the issues being intertwined, especially as to the proper construction of Clause 7.2, this does not seem to me to be an appropriate case for apportioning costs among the different issues. I note in passing that DyStar made an offer to settle Kiri's Counterclaim on 25 March 2021 for US$30,000.

84 On quantum, when transferring the present proceedings (including DyStar's Claim) to the SICC, the Deputy Registrar ordered on 11 August 2020 that the costs of the entire action be dealt with as follows:

(a) Order 59 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("**ROC**") and Appendix G ("**Appendix G**") to the Supreme Court Practice Directions shall apply to the assessment of the costs of the proceedings before transfer to the SICC ("**pre-transfer costs**").

(b) The costs of the proceedings following transfer to the SICC ("**post-transfer costs**") are to be assessed in accordance with O 110 r 46 ROC.

(c) In accordance with O 110 r 12(5) ROC, after transfer to the SICC, the parties will continue to pay the hearing and court fees payable in the General Division of the High Court (the "**High Court**").

It bears mention that while the Deputy Registrar's transfer order was made on 11 August 2020, the parties agree that the suit was effectively transferred to the SICC on 26 August 2020. The latter is the day after Kiri filed its final application (HC/RA 198/2020) to the High Court (and not the SICC) in respect of SIC 7. All applications that followed were filed to the SICC. While I express my doubts as to the correctness of the parties' agreed position (as the filing of HC/RA 198/2020 does not change the fact that the transfer order was made on 11 August 2020), I regard the difference in dates to be inconsequential as regards the quantum of costs. There is no prejudice to either party, since both appear content to accept 26 August 2020 as the transfer date.

85 The parties were asked to provide cost submissions on the assumption that they were successful on the Counterclaim.

86 On pre-transfer costs (that is, costs for the period from 27 December 2019 to 25 August 2020), each party submitted that, if successful, it should have an uplift on the guidance amounts in Appendix G. This accords with the approach to pre-transfer costs propounded by the Court of Appeal in *CBX and another v CBZ and others* [2021] SGCA(I) 4 ("*CBX*") at [34]. In *CBX*, Judith Prakash JCA explained that the complexity of a dispute would be "a factor to be taken into account when *deciding whether to give an up-lift* on the pre-transfer costs [calculated based on Appendix G]" [emphasis added]. Adopting such an approach, DyStar asked for costs of S$38,000, Kiri for S$45,110. I agree with the parties that the complexities of dealing with the Counterclaim are such that an uplift from the guideline in Appendix G is warranted. The Counterclaim strikes me as a case in which the amount of preparation required from each party would be roughly similar, although Kiri may have had to do a little more work as the burden of proof on the Counterclaim rested with it. It therefore appears to me that the S$38,000 sought by DyStar is justified and proportionate given the Counterclaim's nature. I award S$38,000 in pre-transfer costs to DyStar.

87 As for post-transfer costs, both parties were of the view (and I agree) that, again given the nature of the Counterclaim, the guidelines in Appendix G were of little assistance in assessing the successful party's reasonable costs as mandated by O 110 r 46 ROC. The parties' consensus comports with Prakash JCA's decision in *CBX*, which clarified the default non-applicability of Appendix G to post-transfer proceedings. Indeed, O 110 r 46(6) ROC expressly excludes the O 59 ROC costs regime applicable to proceedings in the High Court (under which Appendix G applies generally). Whether Appendix G plays a role in the assessment of post-transfer costs "will depend on the circumstances of the case": *CBX* at [28]. As explained, I do not think that the present

circumstances, specifically the nature of the Counterclaim, warrant reference to Appendix G. DyStar sought S$1,024,000, while Kiri asked for S$1,359,642.50. Again, given that both parties had to do roughly similar amounts of heavy lifting in relation to the Counterclaim (for instance, in the case of DyStar's lawyers, in obtaining, organising, and making sense of data obtained from SAP in response to Kiri's numerous requests for information), DyStar's costs of S$1,024,000 seem reasonable. I award S$1,024,000 in post-transfer costs to DyStar.

88 Finally, by way of disbursements, DyStar sought S$75,856.41, while Kiri asked for S$68,205.50, INR 1,492,335 (S$27,215.14), and US$7,608.91 (S$10,291.55) (that is, S$105,712.19 in total). In the context of Kiri's disbursements, the amount sought by DyStar appears reasonable. I award S$75,856.41 for disbursements to DyStar.

89 The total costs awarded to DyStar add up to S$1,137,856.41 (all-in).

Conclusion

90 The Counterclaim is dismissed. Kiri is to pay DyStar's costs of S$1,137,856.41 (all-in) on the Counterclaim.

Anselmo Reyes
International Judge

Jimmy Yim Wing Kuen SC, Lee Soong Yan, Kevin, Eunice Lau Guan Ting, Lim Joe Jee and Chloe Shobhana Ajit (Drew & Napier LLC) for the plaintiff;
Dhillon Dinesh Singh, Loong Tse Chuan, Margaret Joan Ling Wei Wei, Dhivya Rajendra Naidu and Chee Yi Wen, Serene (Allen & Gledhill LLP) for the defendants.
