**IN THE GENERAL DIVISION OF**
**THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[2025] SGHC 28**

Originating Application No 963 of 2024

Between

(1) India Glycols Ltd
(2) IGL Chem International USA LLC
(3) Dharmesh Mehta

… *Claimants*

And

Texan Minerals and Chemicals LLC

… *Defendant*

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# JUDGMENT

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[Arbitration — Award — Recourse against award — Setting aside — Breach of natural justice]
[Arbitration — Award — Recourse against award — Setting aside — Excess of jurisdiction]

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# India Glycols Ltd and others
# v
# Texan Minerals and Chemicals LLC

**[2025] SGHC 28**

General Division of the High Court— Originating Application No 963 of 2024
Kristy Tan JC
6, 13 January 2025

21 February 2025 Judgment reserved.

**Kristy Tan JC:**

## Introduction

1 HC/OA 963/2024 ("OA 963") is an application for the partial setting aside of an award dated 19 June 2024 (the "Award") made in an arbitration (the "Arbitration") presided over by a sole arbitrator (the "Tribunal").

2 The three claimants in OA 963, India Glycols Limited ("IGL"), IGL Chem International USA LLC ("ICI") and Mr Dharmesh Mehta ("Dharmesh"), were the respondents in the Arbitration. I shall refer to them collectively as the "Respondents".

3 The defendant in OA 963, Texan Minerals and Chemicals LLC, was the claimant in the Arbitration ("Texan" or the "Claimant").

4 In OA 963, the Respondents seek an order setting aside the part of the Award which held that the Claimant was entitled to damages from the Respondents. The Respondents rely on (a) s 24(*b*) of the International Arbitration Act 1994 (2020 Rev Ed) (the "IAA") and Art 34(2)(*a*)(ii) of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law") in contending that there was a breach of natural justice in connection with the making of the impugned part of the Award ("Ground 1");[1] and (b) Art 34(2)(*a*)(iii) of the Model Law in contending that the impugned part of the Award contains decisions on matters beyond the scope of the submission to arbitration ("Ground 2").[2]

5 Having considered the parties' evidence and submissions, I find that there is no basis for setting aside the impugned part of the Award on Ground 1. However, I am satisfied that there is basis for setting aside the part of the Award holding that Texan is entitled to damages *from ICI and Dharmesh* on Ground 2, and I make the appropriate order at [100] below. To avoid doubt, no part of the Award against IGL is set aside. The reasons for my decision follow.

## Facts

### *Background to the dispute*

6 Texan is a company based in Houston, Texas specialising in "the international wholesale and supply chain of importing and exporting industrial products".[3]

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1 Written Submissions of the claimants in OA 963 dated 31 December 2024 ("OA 963-CWS") at paras 17(a)–(b), 18 and 19–43.

2 OA 963-CWS at paras 17(c) and 44–56.

3 Affidavit of Mani Palani filed on behalf of the defendant in OA 963 on 13 November 2024 ("OA 963-Defendant's Affidavit") at para 7.

7 IGL is an India-incorporated company in the business of manufacturing various chemicals.[4] ICI, a company incorporated in Texas, is a wholly-owned subsidiary of IGL and supports IGL in marketing and distributing chemicals to its customers based in the United States of America (the "US") and neighbouring countries.[5] Dharmesh is a director and board member of ICI.[6]

8 Between September 2020 and March 2021, Texan placed purchase orders with ICI for hand sanitisers, which were manufactured by IGL in India and shipped directly to Texan. These purchase orders were satisfied by the delivery of ten bulk containers of hand sanitiser to Texan between November 2020 and May 2021 (the "Bulk Containers"). Invoices were issued to and paid by Texan in respect of the Bulk Containers.[7]

9 On 23 February 2021, Texan and IGL executed a Manufacturer Representation Agreement (the "MRA"), pursuant to which IGL nominated Texan to be the exclusive distributor of its hand sanitiser products in North America.[8] Clause 4.8 of the MRA contained a stipulation that:[9]

> MANUFACTURER [*ie,* IGL] shall maintain a Robust quality assurance program including GMP as required by USA FDA. …

10 After the execution of the MRA, Texan placed several purchase orders for IGL's hand sanitisers packaged in retail containers (the "Retail Containers").

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4 Affidavit of Ankur Jain filed on behalf of the claimants in OA 963 on 19 September 2024 ("OA 963-Claimants' Affidavit") at para 6.

5 OA 963-Claimants' Affidavit at para 7.

6 OA 963-Claimants' Affidavit at para 8.

7 OA 963-Claimants' Affidavit at paras 11 and 12.

8 OA 963-Claimants' Affidavit at para 13 and pp 179–182.

9 OA 963-Claimants' Affidavit at p 180.

Sometime around June 2021, having taken delivery of the Retail Containers, Texan raised certain issues with the quality of the hand sanitiser products. Texan did not make payment on the invoices raised in respect of the Retail Containers, which were for the total sum of US$127,698.20.[10]

11 On 3 May 2022, Texan (through its legal counsel) issued a letter to IGL alleging that the hand sanitisers had not been manufactured and packaged in compliance with the US Food and Drug Administration's (the "FDA") current Good Manufacturing Practices ("cGMP") and that IGL had breached the terms of the MRA. Texan demanded that IGL cancel the invoices for the Retail Containers and demanded payment of US$1,050,000 as reimbursement for its expenses.[11]

12 On 1 March 2023, Texan, IGL, ICI and Dharmesh executed an arbitration agreement (the "Arbitration Agreement"), pursuant to which the parties agreed to resolve all disputes arising out of and in connection with the sale of IGL's hand sanitiser products to Texan by way of an arbitration administered by the Singapore International Arbitration Centre.[12] On 16 March 2023, Texan commenced the Arbitration against IGL, ICI and Dharmesh.[13]

***The Arbitration***

13 In the Arbitration, Texan pleaded the following claims:

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10 OA 963-Claimants' Affidavit at paras 13–15.

11 OA 963-Claimants' Affidavit at para 16.

12 OA 963-Claimants' Affidavit at para 17 and pp 184–195.

13 OA 963-Claimants' Affidavit at para 18.

(a) the "Respondents breached" their promise to take back the Retail Containers (the "Product Return Agreement");[14]

(b) the "Respondents misrepresented" various matters to Texan which induced Texan to purchase the hand sanitiser products;[15]

(c) "[ICI] breached the purchase orders between it and Texan";[16]

(d) "*IGL* breached" various clauses in the MRA, including cl 4.8 [emphasis added];[17]

(e) the "Respondents [were] liable" for breach of an "[e]xpress" "pre-contractual warranty" arising from alleged representations that, *inter alia*, IGL had established facilities and operations that complied with global good manufacturing practices;[18] and

(f) the "Respondents also violated" implied warranties in "the MRA and purchase orders" as to the quality and fitness for purpose of the products pursuant to the "Sale of Goods Act 1979".[19]

14 Texan pleaded the relief it sought as follows:[20]

> Texan seeks to enforce Respondents' promises to take back the sanitizer product, as well as an award of the direct and consequential damages Texan sustained as a result of Respondents' breaches of their promises to take back the product. Texan also seeks an award against Respondents for

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14 OA 963-Claimants' Affidavit at p 204: Texan's Original Statement of Claim in the Arbitration dated 7 September 2023 ("SOC") at p 8, section III.A.

15 OA 963-Claimants' Affidavit at pp 204–206: SOC at pp 8–10, section III.B.

16 OA 963-Claimants' Affidavit at p 207: SOC at p 11, section III.C.1.

17 OA 963-Claimants' Affidavit at pp 207–208: SOC at pp 11–12, section III.C.2.

18 OA 963-Claimants' Affidavit at p 208: SOC at p 12, section III.C.3.

19 OA 963-Claimants' Affidavit at pp 209–211: SOC at pp 13–15, section III.C.4.

20 OA 963-Claimants' Affidavit at pp 211–212: SOC at pp 15–16, section IV.

> the other losses Texan suffered and will continue to suffer as a result of IGL's breaches of contract and breaches of warranties, and Respondents' misrepresentations to Texan, including, but not limited to:
>
> | **Description** | **Amount [US$]** |
> |---|---|
> | Money paid to [ICI] for Bulk Containers: | $217,574.77 |
> | Money paid to third parties to receive the IGL products: | $38,405.61 |
> | Sales preparation expenses: | $190,997.30 |
> | Direct marketing expenses: | $89,266.54 |
> | Cost for storing the unsellable IGL product: | $378,336.34 |
> | Bottle making equipment and raw material losses: | $100,000.00 |
> | **Total** | **$1,014,580.56** |
>
> In addition to an award of these damages, Texan seeks an award of its attorney fees and costs in this arbitration and the lawsuits in Texas and Singapore that preceded this arbitration. Texan prays the award in its favor will be issued jointly against Respondents.
>
> [footnote in original omitted]

15 In response, the Respondents pleaded that Texan's claims were baseless and should be dismissed.[21] The Respondents also raised a "set-off defence": they pleaded that Texan had failed to make payment of US$127,698.20 for the Retail Containers and that they were "entitled to set-off such amount against Texan's alleged claims" "thereby reducing or extinguishing Texan's claims to the extent of the set-off".[22]

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21 OA 963-Claimants' Affidavit at pp 245–269: Statement of Defence in the Arbitration dated 13 October 2023 ("Defence") at paras 38–116.

22 OA 963-Claimants' Affidavit at pp 270–271: Defence at paras 117–122.

***The Award***

16 On 19 June 2024, the Tribunal issued the Award.[23]

17 The Tribunal *rejected* Texan's claims of (a) breach of the alleged Product Return Agreement, finding that no such contract arose (Award at [137]–[141]); (b) misrepresentation, finding that the Respondents did not make any misrepresentations to Texan (Award at [142]–[147]); and (c) breach of implied warranties, finding that the Respondents did not breach any statutorily implied terms (Award at [165]–[166]).

18 However, the Tribunal found that:

(a) by cl 4.8 of the MRA, the "Respondents promised" that manufacturing would be maintained at the level of "GMP as required by US FDA" (Award at [148]);

(b) "on the true construction of the MRA, or alternatively on the basis of an implied term thereof, [the] Respondents committed to immediately start the process to become cGMP-compliant, and to become cGMP-compliant within a reasonable period of time, i.e. '*months*'" (Award at [151]); and

(c) "the Respondents breached the MRA" by at least May 2021 by "failing to bring their facilities up to cGMP compliance standards within a reasonable period of time as it had promised to do under the MRA" (Award at [154]).

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23 OA 963-Claimants' Affidavit at pp 18–63.

19 Turning to the question of what loss was caused to Texan as a result of the breach found, the Tribunal reasoned thus:

(a) Texan originally believed that the hand sanitiser products would sell well and quickly but that turned out not to be the case. Texan was thus left with a high volume of unsold product on its hands, which "[s]o far, … was not [the] Respondents' fault" (Award at [156]–[157]).

(b) However, "upon Respondents' failure to implement the cGMPs by May 2021 (in breach of the MRA)", Texan could not sell the products on the market at cost price or less because of the risk of breaching FDA regulations (Award at [158]).

(c) But for the said breach, Texan "would have approached the market with more aggression" and "would have been able to sell off the product it was holding on to" "at least at cost price" (Award at [160] and [162]).

(d) Texan suffered loss in the form of the expenses it incurred in storing and disposing of the products from May 2021 onwards (Award at [163]–[164]) (the "Storage Costs"), which, based on Texan's revised quantum figures that the Respondents did not seriously challenge, amounted to US$388,974.09 (Award at [171]).

20 The Tribunal further held that the Respondents had a claim in contractual debt against Texan for the price of the delivered product and deducted the set-off claim of US$127,698.20 from Texan's storage and disposal costs of US$388,974.09, resulting in a damages award of US$261,275.89 which the Respondents were ordered to pay to Texan (Award at [169]–[171] and p 42).

## Ground 1

### *The Respondents' case*

21 The Respondents submit that the Tribunal breached the fair hearing rule in reaching its decision that Texan was entitled to recover the Storage Costs as damages.[24]

22 First, the Tribunal assumed that if IGL had become cGMP-compliant by May 2021, Texan would have been able to sell all the unsold non-compliant products. However, this conclusion did not reasonably flow from any of the parties' arguments in the Arbitration and the Respondents could not have addressed it.[25] By placing orders for the products before and after the signing of the MRA, Texan had accepted the risk that it would not be able to sell the non-compliant products and would have to hold on to and subsequently dispose of the same.[26] The fact that IGL was required to become cGMP-compliant by at least May 2021 could not have had any bearing on the saleability of the products post-May 2021.[27] Texan's own evidence in the Arbitration was that it faced substantial difficulties in selling the products for various reasons independent of whether the products were cGMP-compliant, calling into question whether Texan would have been able to sell all the unsold products even if IGL had become cGMP-compliant by May 2021.[28] Neither party adduced any evidence or made arguments to address whether, but for IGL's breach of cl 4.8 of the MRA, Texan would have been able to sell all the products after May 2021. The

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24 OA 963-CWS at paras 22–25.

25 OA 963-CWS at para 27.

26 OA 963-CWS at para 28.

27 OA 963-CWS at para 29.

28 OA 963-CWS at para 30.

Respondents therefore did not have the opportunity to address this issue.[29] The Tribunal calculated the damages in respect of IGL's failure to comply with cl 4.8 of the MRA based on the Storage Costs. It followed that the Respondents could not have anticipated and addressed this basis for the computation of damages.[30]

23 Second, the Tribunal unilaterally applied what the Respondents term a "Break Even Presumption" in the Award at [162] despite acknowledging that the parties did not address this specific point in their pleadings. The Respondents did not have an opportunity to address the Tribunal on whether the presumption applied, and if so, whether it could be rebutted on the facts.[31]

24 Further and/or in the alternative, the Tribunal failed to apply its mind to the Respondents' submissions in their Statement of Defence dated 13 October 2023 ("Defence") at paras 98–99 and in the Respondents' Skeleton Submissions dated 14 February 2024 (the "Respondents' Submissions") at paras 71–72 that Texan had failed to prove its losses, as evidenced by the Tribunal not addressing their arguments in the Award. Instead, the Tribunal assumed that the Storage Costs were wasted expenditure recoverable as a measure of Texan's reliance loss.[32]

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29 OA 963-CWS at paras 29 and 31.

30 OA 963-CWS at para 32.

31 OA 963-CWS at paras 33–34.

32 OA 963-CWS at paras 38–40; Notes of Arguments of the OA 963 hearing on 6 January 2025 ("NOA") at p 7:15–21.

25 The Respondents also submit that they were prejudiced by the breach of natural justice because "it directly impacted the quantum which they were ordered to pay Texan".[33]

***Texan's case***

26 Texan submits that the issue of whether it was entitled to recover all its Storage Costs was ventilated and argued by the parties in the Arbitration. Texan had highlighted that it had incurred significant storage costs because it was unable to sell the defective products, and the Respondents were given every opportunity to and did in fact address such issues in the Arbitration.[34] Further, the Respondents have not shown that they were prejudiced by the alleged breach of natural justice. This is because the Tribunal would likely have arrived at the same result even if the Respondents had taken issue with the quantification of the Storage Costs at a granular level.[35]

***Decision***

27 In my judgment, the Tribunal did not breach the fair hearing rule in reaching its decision that Texan was entitled to recover the Storage Costs as damages.

28 The first and central argument of the Respondents is that the Tribunal had embarked on a line of reasoning that the Respondents had no opportunity to address (see [22] above). I find that this argument is contrived and without merit.

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33 OA 963-CWS at paras 41–42.

34 Written Submissions of the defendant in OA 963 dated 31 December 2024 ("OA 963-DWS") at paras 30–34.

35 OA 963-DWS at paras 38–41.

29 The Respondents contend that the Tribunal's decision hinged on a finding that Texan would have been able to sell all of the products after May 2021 if IGL had fulfilled (instead of breached) its obligation to be cGMP-compliant by then, and that this finding was not the subject of argument or evidence in the Arbitration.[36] To begin with, the Respondents' characterisation of the Tribunal's decision and findings in this regard is far too narrow and incomplete. I reproduce the relevant part of the Award:

> 158. However, **what happened upon Respondents' failure to implement the cGMPs by May 2021 (in breach of the MRA) was that Claimant was left in a limbo. The product had not yet sold. But at the same time, Claimant could not sell it on the market** at cost price (or even at less than that) because of the risk of breaching FDA regulations. I accept the testimony of Mr. Palani [*ie*, Texan's witness] on this point when he said:
>
> > "It's a good question and the difficulty is, the product we are discussing here goes along with the background because it's a regulated product. We can go aggressively sell, take few clear bottles and go aggressively sell. And not to address, but the whole thing is governed by totality of USA FDA coming in the background. For example, when USA FDA sent a notice to Purell, they received a multimillion dollar lawsuit because Purell was claiming something. So we are anxious, do we have a right partner who will support us when we are exposed to certain bigger market risks? Also in a way, we were a little bit become numb or paralysed just holding, safeguarding the product rather than aggressively selling in the market. We felt that we have a right market language, right market multi level marketing approach with Amazon, the big boxes, and everything. The question is, fair enough to ask, if IGL extended their support with their facilities and process is, we would have went there and then pushed the market."
>
> 159. This was supported by the evidence of Mr. Adelman [*ie*, Texan's witness]. He agreed that
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> > "it was difficult because of market conditions, but also because we felt that we were undermined by IGL. We didn't get enough support from them. And it's like

[36] OA 963-Claimants' Affidavit at para 28; OA 963-CWS at paras 27 and 31.

> eventually there was a lot of goodwill, but when they rejected our efforts to have them provide us with the data about quality control in cGMP it's like it took their oxygen out of there. We're still trying, but it became, our test became more formidable."

160. I accept therefore that *but for the breach of the MRA by Respondents, Claimant would have approached the market with more aggression, and have sold the product, without the FDA risk hanging over its head*. In this sense, Respondents left Claimant in the lurch after promising to become cGMP-compliant but failing to do so. On this basis, **I find that the Claimant having to hold on to and subsequently dispose of product that it could not sell from May 2021 onwards was caused by the Respondents' failure to implement compliance with cGMP pursuant to its obligation to do so under the MRA**.

161. As to what losses Claimant is seeking, it is not claiming any lost profits on the basis of what it could have sold the product for in the counterfactual. Rather, Claimant is seeking its expenses incurred in storing and disposing of the product. Pursuant to well-established principles of English law, whether Claimant is entitled to these damages depends on whether that loss was caused by Respondents' breach. I therefore have to consider, and compare, what happened in the actual scenario, against what happened in the counterfactual scenario (i.e. what would have happened but for Respondents' breach of the MRA).

162. *In the counterfactual scenario, I have to assume that the Respondents complied fully with the MRA, i.e. that they were cGMP-compliant by May 2021. For the reasons above, I consider that if this is the case, Claimant would have been able to sell off the product it was holding on to*. I find that, in this counterfactual, that Claimant would have been able to sell off that product at least at cost price; in other words, that Claimant would not have sold the product at a loss or profit. I am fortified in this finding that there exists a presumption under English law that a party claiming damages for the other party's breach of contract would have broken even on its expenses. As the Parties did not address this specific point in their pleadings, I take "judicial notice" of it as part of the governing law of this arbitration merely as a confirmation of what I have already found.

163. In the actual scenario, I accept that Claimant has incurred expenses in storing and disposing of the product. These expenses would surely not have been incurred if Respondents had achieved cGMP compliance and the product had been sold by Claimant who would have aggressively moved the product safe in the knowledge of cGMP compliance by its partner.

> 164. Comparing the counterfactual and actual scenarios, I find that the Claimant has suffered loss by reason of the Respondents' breach of the MRA in the form of storage and disposal expenses of the product from May 2021 onwards. …
>
> [footnotes in original omitted; emphasis added in bold; emphasis added in italics; emphasis added in underline]

30 It is evident from the portions of the above extract emphasised in bold that the Tribunal *first* made a primary finding in the Award at [158]–[160] that the Respondents' breach of the MRA obligation to be cGMP-compliant caused Texan to be unable to sell the products, and concomitantly, to have to incur the costs of storing and disposing of unsold products from May 2021 (*ie*, the Storage Costs). The Tribunal then deemed it necessary to consider the counterfactual scenario where the MRA obligation to be cGMP-compliant was fulfilled: as is evident from the portions of the above extract emphasised in italics, the Tribunal took the view in the Award at [160] and [162] that in this scenario, Texan would have been able to sell the products. Critically, the Tribunal reached this view based on the *same* evidence and "reasons above" that had earlier led the Tribunal to conclude that the Respondents' breach of the MRA caused Texan to be unable to sell the products (see the Award at [160] and [162]). In other words, the Tribunal proceeded on the basis that its finding in the counterfactual scenario (*viz*, that Texan would have been able to sell the products if the MRA was not breached) was simply the flipside of its finding in the actual scenario (*viz*, that Texan was unable to sell the products because the MRA was breached). Once this is appreciated, the Respondents' complaint in OA 963 – which is essentially that they did not have the opportunity to address the position reached by the Tribunal in the counterfactual scenario – is denuded of its force, as I will elaborate.

31 One, the issue of whether a breach of cl 4.8 of the MRA caused Texan to be unable to sell the products and to incur the Storage Costs (which the

Tribunal answered in the affirmative: see [18], [19] and [30] above) was an issue that the parties squarely put in play and addressed in the Arbitration:

> (a) In Texan's Statement of Claim dated 7 September 2023 ("SOC"), Texan pleaded that IGL breached cl 4.8 of the MRA (see [13(d)] above). Texan also pleaded that it sought "Cost for storing the unsellable IGL product" as a loss that it suffered as a result of, *inter alia*, "IGL's breaches of contract" (see [14] above). In my view, by its pleadings on the relief sought, Texan took the position that each pleaded claim it succeeded on entitled it to the suite of pleaded reliefs (*ie*, remedies) from the respective party(s) against whom the successful claim in question had been brought. This means that it was Texan's pleaded case that IGL's breach of cl 4.8 of the MRA had caused Texan to incur the costs of storing the products which Texan could not sell as a result of that breach.
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> (b) In the Respondents' Defence, Texan's assertion that IGL had breached cl 4.8 of the MRA was rejected (at para 83). It was further countered that "IGL's hand sanitizer products were saleable", "Texan's failure to sell the hand sanitizer products … is attributable to Texan alone", and "[t]hus, storage costs and/or disposal costs arising from Texan's failure … are liable to be dismissed" (at para 112).[37]
>
> (c) It was averred in the Statement of Mr Mani Palani ("Mr Palani"), Texan's witness, dated 8 September 2023 ("Mr Palani's Witness Statement") that "Texan's damages suffered because IGL provided non-conforming product that Texan could not sell include" "[c]ost for storing the unsellable IGL product" (at para 28); and that "Texan will

[37] OA 963-Claimants' Affidavit at pp 259 and 268–269: Defence at paras 83 and 112.

suffer damages related to disposal of the unsellable IGL product" (at para 30).[38]

(d) In the Respondents' Submissions filed prior to the evidentiary hearing, it was argued that Texan was unable to sell the products because the market for the products fell (at para 4); and that Texan had failed to prove that the products were not saleable because of non-compliance with cGMP (at paras 34–35).[39] Similar arguments were advanced in the Respondents' oral opening submissions at the evidentiary hearing.[40]

(e) Texan's witnesses gave oral evidence to the effect that Texan's difficulty in selling the products was because there was no "support" from IGL in terms of cGMP-compliance (as cited in the Award at [158] and [159]: see [29] above).

(f) In the Respondents' oral closing submissions, it was insisted that Texan's inability to sell the products was "not because IGL was not cGMP-compliant" but because of a "bad business decision" as there was no market for the products.[41]

32 Two, given that the parties were hotly contesting whether IGL's non-cGMP-compliance had resulted in Texan being unable to sell the products

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38 OA 963-Defendant's Affidavit at pp 36–37.

39 OA 963-Claimants' Affidavit at pp 312 and 326: Respondents' Skeleton Submissions in the Arbitration dated 14 February 2024 ("Respondents' Submissions") at paras 4 and 34–35.

40 OA 963-Claimants' Affidavit at pp 379, 389 and 390: Transcript of the Arbitration hearing on 27 February 2024 ("Transcript 27 Feb 2024") at pp 25:7–12, 35:29–32 and 36:27–33.

41 OA 963-Claimants' Affidavit at p 698: Transcript of the Arbitration hearing on 29 February 2024 ("Transcript 29 Feb 2024") at p 119:13–16.

and incurring costs of storing and disposing of the "unsellable" products, the Tribunal's finding that the flipside of Texan's position in the actual scenario would apply in the counterfactual scenario (*ie*, Texan *would* have been able to sell the products if there was cGMP-compliance) was a chain of reasoning that had a sufficient nexus to and flowed reasonably from the parties' arguments and could reasonably have been foreseen by the parties. Further, the parties had actual notice that the Tribunal could adopt this chain of reasoning as it was expressly alluded to by the Tribunal during the evidentiary hearing; the Respondents also had the opportunity to address it:

(a) During the oral testimony of Mr Palani, Texan's President,[42] the Tribunal had expressly put the following proposition to him:[43]

> … *Let's assume that the product had been perfect. Let's say you had got perfect bottles, clear, right alcohol level, right pump caps. Why would you have been able to sell that product in light of the fact that the market was lukewarm?* In other words, I'm just trying to understand, to what extent this is a question of a lukewarm market, and to what extent this is a question of a defective product? And just trying to separate that in my mind? [emphasis added]

Pertinently, in the italicised portion of the above extract, the Tribunal alluded to the counterfactual scenario where "the product had been perfect" (which must include cGMP-compliance) and asked why Texan contended that it would have been able to sell the products in that case (despite a lukewarm market). Mr Palani responded to this question in the manner cited by the Tribunal in the Award at [158] (see [29] above), which led the Tribunal to conclude that but for the breach of the MRA,

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42 OA 963-Defendant's Affidavit at para 1.

43 OA 963-Claimants' Affidavit at pp 545–546: Transcript of the Arbitration hearing on 28 February 2024 ("Transcript 28 Feb 2024") at pp 101:32–102:4.

Texan would have approached the market with more aggression and sold the products (Award at [160]).

(b) Of significance, after the Tribunal's exchange with Mr Palani, the Tribunal asked *both* counsel for Texan and the Respondents if there was "anything for the parties pressing out of [the Tribunal's] questions", and only released Mr Palani from the witness stand after both counsel responded in the negative.[44] This shows that the Respondents had, but chose not to take, the opportunity to press Mr Palani on whether Texan would have sold all the products if there had been cGMP-compliance.

(c) In Texan's oral closing submissions, counsel for Texan argued that "[i]f IGL had timely produced perfect product, or the product that was required … then Texan would have had the ability to sell the retail bottles when they arrived in May of 2021".[45] The Respondents, whose oral closing submissions followed Texan's oral closing submissions, could reasonably have addressed this counterfactual raised by Texan.

33 For these reasons, the chain of reasoning that Texan would have been able to sell the products if there was cGMP-compliance (*ie*, in the counterfactual scenario) was open to the Tribunal and there was no breach of the fair hearing rule in the Tribunal taking this line (see *BZW and another v BZV* [2022] 1 SLR 1080 at [60(b)]; *CJA v CIZ* [2022] 2 SLR 557 ("*CJA*") at [69]).

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44 OA 963-Claimants' Affidavit at pp 546–547: Transcript 28 Feb 2024 at pp 102:36–103:9.

45 OA 963-Claimants' Affidavit at p 690: Transcript 29 Feb 2024 at p 111:22–24.

34 Three, the Respondents' many criticisms of the Tribunal's line of reasoning (see [22] above) are, in substance, attacks on the merits of the Tribunal's reasoning:

(a) The Respondents' arguments that:

(i) Texan had accepted the risk that it would not be able to sell the non-compliant products as evidenced by its placement of product orders both before and after the signing of the MRA; and

(ii) the fact that IGL was required to become cGMP-compliant by May 2021 did not bear on the saleability of the products post-May 2021,

question the *logic* of the Tribunal's finding that Texan would have been able to sell all products (including non-cGMP-compliant products received prior to May 2021) if IGL had become cGMP-compliant by May 2021. However, any errors of fact or deficiency in the Tribunal's reasoning in this regard are not grounds for setting aside the Award.

(b) The Respondents' argument highlighting that Texan had acknowledged other reasons for its difficulties in selling the products questions the Tribunal's assessment that there was sufficient evidence that Texan would have been able to sell the products if IGL had become cGMP-compliant by May 2021. Any error in the Tribunal's assessment of the evidence is an error of fact and not a ground for setting aside the Award.

(c) As for the Respondents' argument that there was no evidence whether, but for IGL's breach of cl 4.8 of the MRA, Texan would have

> been able to sell all the products after May 2021, I think it is an overreach to say that neither party adduced any evidence or made arguments in this regard (see [32(a)]–[32(c)] above). In any event, this is a criticism of the Tribunal's assessment of the evidence, and not a valid ground for setting aside the Award.

35 The second main argument of the Respondents is that they did not have an opportunity to address the Tribunal on the Break Even Presumption which the Tribunal applied (see [23] above). Here, the Respondents are referring to the portion of the Award at [162] which is reproduced and emphasised in underline at [29] above. I find that, while the parties did not address the Break Even Presumption in the Arbitration, the Tribunal's comments on the presumption do not give rise to grounds for setting aside the Award, for two reasons.

36 One, in my view, there was no breach of the fair hearing rule. The emphasis of this aspect of natural justice is that the parties should have had the opportunity to address the "determinative issue(s) in a matter" and the "essential building blocks" in the tribunal's conclusion: *CJA* at [73] (citing *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 at [32]) and [75]. In the present case, as the Tribunal expressly stated, it had regard to the Break Even Presumption "merely as a confirmation of what [the Tribunal] ha[d] already found" (Award at [162]). In other words, the presumption was not material to the Tribunal's decision-making. As the applicability of the presumption was neither a determinative issue nor an essential building block in the Tribunal's decision, there was no necessity for the Tribunal to consult the parties on its thinking on the presumption before commenting as it did on the presumption in the Award at [162].

37 Two, viewed the other way, even if there was a breach of natural justice, the Respondents would not be able to satisfy the requirement of showing that arguments from the parties on the applicability of the presumption would have had a real as opposed to a fanciful chance of making a difference to the Tribunal's deliberations (see *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 at [54]). This is because the Tribunal took "judicial notice" of the presumption "merely as a confirmation" of what the Tribunal "ha[d] already found" (Award at [162]); *ergo*, absent consideration of the presumption, the Tribunal's prior-stated findings that Texan could not sell the products because of non-cGMP-compliance and would have been able to sell the products but for the breach of the MRA (Award at [159]–[162]) would still stand.

38 The third main argument of the Respondents is that the Tribunal failed to apply its mind to, and did not address in the Award, the Respondents' submissions in the Defence at paras 98–99 and in the Respondents' Submissions at paras 71–72 that Texan had failed to prove its losses (see [24] above). The submissions in question can be summarised as follows:

(a) Texan had not made a single averment or statement to show that it had incurred the amounts claimed or proven its losses occasioned on account of the Respondents' alleged breaches.[46]

(b) Texan had claimed an exorbitant and exaggerated amount as damages without offering any justification or breakdown of the losses actually suffered.[47]

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46 OA 963-Claimants' Affidavit at p 264: Defence at para 98.

47 OA 963-Claimants' Affidavit at p 264: Defence at para 99; OA 963-Claimants' Affidavit at p 343: Respondents' Submissions at para 71.

(c) Texan had failed to set out the amount already recovered through the sale of the products and had claimed the total amount paid for all products in an attempt to recover unjustified amounts.[48]

(d) Given Texan's failure to provide documents on the sale of the products, the Tribunal should draw an adverse inference that Texan had recovered from sales of the products at least 50% of the sum paid or owed to the Respondents for the products.[49]

39 I disagree that the Tribunal failed to consider and address these submissions. In the Award at [120], the Tribunal recapitulated the Respondents' submissions in the Defence at paras 98–99 and in the Respondents' Submissions at para 72. The Tribunal then found, on the issue of the quantum of Storage Costs to which Texan was entitled, that "[b]ased on Claimant's revised quantum figures in CS-002, which were not seriously challenged by Respondents, this would amount to $388,974.09" (Award at [171]). In my view, this finding directly, even if implicitly, answered and rejected the Respondents' submissions at [38(a)]–[38(b)] above; there is no requirement that the Tribunal had to expressly state that it was addressing these submissions by its finding: *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [77]. The Respondents' present objection in relation to [38(a)]–[38(b)] above appears to be, in substance, a disagreement with the Tribunal's assessment of the adequacy of proof of the Storage Costs. This is not a ground for setting aside the Award.

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48 OA 963-Claimants' Affidavit at p 265: Defence at para 99.

49 OA 963-Claimants' Affidavit at pp 343–344: Respondents' Submissions at paras 72.1–72.2.

40 As for the Respondents' submissions at [38(c)]–[38(d)] above, these must be understood in context. One of the reliefs sought by Texan was the recovery of "[m]oney paid to [ICI] for Bulk Containers" (see [14] above). Properly understood, the Respondents were resisting recovery by Texan of these moneys when they submitted in the Defence that: "Texan has failed to set out the amount already recovered through sale of the hand sanitizers. In clear violation of set principles of law, Texan has claimed the total amount paid for all hand sanitizer products in an attempt to recover unjustified amounts".[50] In a similar vein, the main thrust of the argument in the Respondents' Submissions was that: "the Respondents request this Tribunal to assume that Texan recovered at least 50% of the sum paid or owed to the [Respondents] towards the bulk and retail products delivered to Texan. Further, the Respondents request that such amount ought to be deduc[t]ed from Texan's overall damages claim if the Claimant is somehow successful on the liability front in this arbitration".[51] None of this had to do with the proof or quantum of the Storage Costs (which conceptually relate to "unsellable IGL product" to begin with[52]), and I reject the Respondents' present attempt to recast these submissions in the Arbitration as relating to Texan proving its loss in the form of Storage Costs. For completeness, the Respondents can hardly complain that the true essence of their submissions at [38(c)]–[38(d)] above was not addressed by the Tribunal because, in line with what the Respondents sought in the Arbitration, (a) the Tribunal did not grant Texan recovery of the moneys Texan had paid for the Bulk Containers and (b) the Tribunal allowed the moneys due from Texan on the Retail Containers to be set off in full against the damages (in the form of Storage Costs) awarded to Texan (Award at [169]–[171]).

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50 OA 963-Claimants' Affidavit at pp 264–265: Defence at paras 97 (S. No 1) and 99.

51 OA 963-Claimants' Affidavit at p 344: Respondents' Submissions at para 72.2.

52 OA 963-Claimants' Affidavit at p 212: SOC at p 16.

41 I therefore find that the arguments raised by the Respondents under Ground 1 do not establish any breach of natural justice and provide no basis for setting aside the Award.

**Ground 2**

***The Respondents' case***

42 The Respondents submit that the Tribunal's decision to impose liability for damages on ICI and Dharmesh was made in excess of the Tribunal's jurisdiction because: (a) the Tribunal held that Texan was entitled to damages based solely on the Tribunal's finding that cl 4.8 of the MRA was breached; (b) neither ICI nor Dharmesh were parties to the MRA; (c) Texan's case had always been that it was IGL that had breached the MRA, and Texan had not claimed or adduced evidence to suggest that ICI and/or Dharmesh had breached the MRA; and (d) Texan had not made arguments or adduced evidence to justify the imposition of liability on ICI and/or Dharmesh for the breach of the MRA for which damages were awarded.[53] The Tribunal's decision to impose liability on ICI and Dharmesh thus fell outside the matters submitted for arbitration, and this part of the Award against ICI and Dharmesh should be set aside.[54]

43 The Respondents further submit that Texan's argument that ICI and Dharmesh could have disavowed their joint liability with IGL is misconceived because Texan's claim was a contractual one based on a breach of the MRA, and it was not for ICI and Dharmesh to disavow liability for such a claim when they were not even parties to the MRA.[55] That the Respondents did not dispute

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53 OA 963-CWS at paras 44, 47 and 56.

54 OA 963-CWS at para 48; NOA at p 5:27–29.

55 OA 963-CWS at para 51.

their collective involvement in the supply of hand sanitisers to Texan is irrelevant where Texan's claim for breach of cl 4.8 of the MRA, which Texan pleaded only against IGL, is concerned.[56] While Texan did claim against the Respondents for the violation of alleged statutorily implied terms of the MRA and purchase orders, this is irrelevant because the Tribunal found that the Respondents did not breach any such statutorily implied terms.[57]

44 Alternatively, in so far as the Tribunal's decision to impose liability on ICI and Dharmesh was made without having considered any evidence or argument on this issue, this amounted to a breach of natural justice.[58]

***Texan's case***

45 Texan submits that it had plainly put into issue whether the Respondents were collectively liable for breaches of terms of the MRA and this matter was within the scope of the submission to arbitration. It was open to the Respondents to contend that ICI and Dharmesh were not jointly liable with IGL, but they did not do so, choosing to focus their substantive defence on denying the substance of Texan's claims of misrepresentation and breach.[59]

46 Texan argues that it was "consistent" in "its case [being] against the [Respondents] collectively",[60] citing the following:

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56 OA 963-CWS at paras 52–53 and 55.

57 OA 963-CWS at paras 52(c) and 54.

58 OA 963-CWS at para 49.

59 OA 963-DWS at paras 43, 46 and 47.

60 OA 963-DWS at para 43.

(a) Texan's claims in the SOC included a claim that the "Respondents also violated the implied terms of the MRA and purchase orders".[61]

(b) Texan's counsel stated in oral closing submissions that "… [Dharmesh] admits, they didn't comply with the Robust quality assurance that they promised, **they** breached the MRA" [emphasis added in bold by Texan].[62]

47 Texan argues that the Respondents "have always been aware of the case against them collectively",[63] citing the following:

(a) The Respondents used the term "Respondents" in various documents in the Arbitration, showing that they did not deny their collective involvement in the supply of hand sanitisers to Texan.[64]

(b) The Respondents stated in their Defence that "they are not in breach of the implied terms of satisfactory quality and reasonably fit for sale".[65]

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61 OA 963-DWS at paras 19 and 43; OA 963-Claimants' Affidavit at p 209: SOC at p 13, section III.C.4.

62 OA 963-DWS at para 19; OA 963-Claimants' Affidavit at p 691: Transcript 29 Feb 2024 at p 112:32–35.

63 OA 963-DWS at para 44.

64 OA 963-DWS at para 43.

65 OA 963-DWS at para 43; OA 963-Claimants' Affidavit at p 261: Defence at para 87.

(c) The Respondents' Submissions stated that "[t]he Respondents have not breached the terms of the MRA or of any express warranty".[66]

(d) The Respondents' counsel stated in oral closing submissions that the entire transaction was "a business opportunity seen by all Parties".[67]

48 At the hearing of OA 963, Mr Colin Seow ("Mr Seow"), acting for Texan, added that:

(a) The fact that the parties entered into the Arbitration Agreement for all claims to be heard together (see [12] above) is relevant background.[68]

(b) While Texan had admittedly pleaded in the SOC that "IGL breached the MRA" including cl 4.8 (see [13(d)] above), this was a "complaint". Under the "Relief Sought" section of the SOC, Texan had sought an award against the "Respondents" in the plural (see [14] above); this was the "claim arising from [the] complaint". There is a "distinction" between (i) Texan's "complaint", which was of IGL's breach of cl 4.8 of the MRA, and (ii) Texan's "claim", which was against all the Respondents for collective responsibility.[69]

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66 OA 963-DWS at para 44; OA 963-Claimants' Affidavit at p 337: Respondents' Submissions at section D.2 heading.

67 OA 963-DWS at para 45; OA 963-Claimants' Affidavit at p 697: Transcript 29 Feb 2024 at p 118:16–21.

68 NOA at p 9:22–27.

69 NOA at pp 9:29–10:5.

(c) The Respondents pleaded that Texan had an obligation under cl 4.14 of the MRA to make payment for the Retail Containers but failed to do so.[70] The Respondents pleaded that they were entitled to set off the sum of US$127,698.20 due for the Retail Containers against Texan's alleged claims.[71] That the Respondents advanced their case on set-off collectively showed that they understood that Texan advanced its claim for storage costs against the Respondents collectively.[72]

(d) The Tribunal's summary of the parties' cases in the Award at [108] and [115] showed that the Tribunal understood Texan to be submitting that the Respondents breached the MRA.[73]

49 Texan further submits that "[t]o the extent that there is any suggestion that there was an error made by the [Tribunal] in finding the [Respondents] jointly liable for the breaches, this is at best an error of law" which does not entitle the court to grant a setting aside order.[74]

## ***Decision***

### *The relevant legal principles*

50 Article 34(2)(*a*)(iii) of the Model Law provides that an award may be set aside if the party making the application establishes that:

> the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the

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70 OA 963-Claimants' Affidavit at p 270: Defence at para 117.

71 OA 963-Claimants' Affidavit at p 270: Defence at para 119.

72 NOA at pp 10:12–17 and 11:1–7.

73 NOA at p 12:7–12.

74 OA 963-DWS at para 49.

> submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside[.]

51 The proviso in Art 34(2)(*a*)(iii) expressly recognises the possibility of an arbitral award being severable and the court setting aside only that part of the award made in excess of the arbitral tribunal's jurisdiction (see *BAZ v BBA and others and other matters* [2020] 5 SLR 266 at [187]).

52 Article 34(2)(*a*)(iii) applies where an arbitral tribunal improperly decided matters that had not been submitted to it, and reflects the fundamental principle that an arbitral tribunal has no jurisdiction to decide any issue not referred to it for determination by the parties: *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2021] 2 SLR 1279 ("*Bloomberry Resorts*") at [68] and [69(b)]. The court adopts a two-stage enquiry to determine whether an arbitral award was made in excess of an arbitral tribunal's jurisdiction: (a) first, the court determines what matters were within the scope of the submission to the arbitral tribunal; and (b) second, the court determines whether the arbitral award involved such matters or a new difference outside the scope of the submission to arbitration (*Bloomberry Resorts* at [69(a)]; *CBX and another v CBZ and others* [2022] 1 SLR 47 ("*CBX*") at [11]).

53 The scope of the parties' submission to arbitration is determined with reference to five sources: the parties' pleadings, the agreed list of issues, opening statements, the evidence adduced, and closing submissions (*CDM and another v CDP* [2021] 2 SLR 235 at [18]). It would not suffice for the purposes of determining the arbitral tribunal's jurisdiction that the issue in question had been raised in *any one* of the five sources; instead, the overriding consideration

is to determine whether the relevant issues had been properly pleaded before the tribunal: *CAJ and another v CAI and another appeal* [2022] 1 SLR 505 at [50]. The court will view the whole position and the course of events objectively and fairly to determine what the parties may be taken to have accepted between themselves and before the arbitral tribunal: *CKH v CKG and another matter* [2022] 2 SLR 1 at [16]. The court will interpret the material on the record objectively, keeping in mind the context in which the material or communication was conveyed in the arbitration: *CIM v CIN* [2021] 4 SLR 1176 at [54].

54 Once the applicant shows that the arbitral tribunal had exceeded its jurisdiction by addressing matters beyond the scope of the submission to arbitration, there is no further requirement for the applicant to show that it had suffered real or actual prejudice: *CBX* at [11], citing *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd and another matter* [2018] 4 SLR 271 at [60]; *Swire Shipping Pte Ltd v Ace Exim Pte Ltd* [2024] 5 SLR 706 at [45]–[46].

*Analysis*

(1) The first stage of the enquiry

55 I begin with the enquiry into what matters were within the scope of the submission to the Tribunal. I find that only the issue of whether *IGL* had breached and was liable for breaches of the MRA (as opposed to whether *ICI and Dharmesh* had breached and were liable for breaches of the MRA) was within the scope of the submission to arbitration. This is evident from a holistic and objective review of the parties' pleadings, evidence and submissions; there was no agreed list of issues.

56 First, it is clear that Texan's pleaded case in the SOC was that only *IGL* (and not the other Respondents) had breached and was liable for the breach of the MRA.

57 In section II of the SOC (titled "Facts supporting Texan's claim"), Texan pleaded that "Texan and IGL" negotiated and executed the MRA.[75]

58 In section III.C.2 of the SOC (titled "Breach of Manufacturing Representation Agreement"), Texan pleaded that "IGL breached the MRA", specifically, cll 4.8, 4.10 and 4.11 which "required IGL" to perform certain obligations.[76] The express and singular references to IGL in this section of the SOC stand in stark contrast to other sections of the SOC in which Texan pleaded (a) claims for "Breach of the Product Return Agreement", "Misrepresentation", "Breach of Express [pre-contractual] Warranty" and "Breach of Implied Warranties" against the "Respondents" and (b) a claim for "Breach of Purchase Orders" against "IGL USA" (*ie*, ICI).[77] The contrast shows that Texan deliberately differentiated between its specific claims and the specific party(s) against whom each claim was advanced.

59 While section III.C.4 of the SOC (titled "Breach of Implied Warranties") contained a statement that the "Respondents also violated the implied terms of the MRA and purchase orders",[78] it is evident that this section concerned alleged statutorily implied terms in *two* separate contracts, *ie*, the MRA and the purchase orders. On an objective view, the use of the term

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75 OA 963-Claimants' Affidavit at p 200: SOC at p 4.

76 OA 963-Claimants' Affidavit at pp 207–208: SOC at pp 11–12.

77 OA 963-Claimants' Affidavit at pp 204–211: SOC at pp 8–15, sections III.A, III.B, III.C.1, III.C.3 and III.C.4.

78 OA 963-Claimants' Affidavit at p 209: SOC at p 13.

"Respondents" in section III.C.4 should be interpreted to mean that Texan was concurrently pursuing a claim against IGL for breach of implied warranties in the MRA, and a claim against ICI for breach of implied warranties in the purchase orders. This interpretation is particularly borne out when section III.C.4 is read in conjunction with sections III.C.1 and III.C.2, which respectively pleaded that only ICI breached the purchase orders (section III.C.1) and only IGL breached the MRA (section III.C.2). Therefore, contrary to Texan's argument at [46(a)] above, Texan was not advancing a claim against the Respondents "collectively" in section III.C.4. In any event, even if, *arguendo*, Texan's claim in section III.C.4 for breach of alleged implied warranties in the MRA had been brought against all three Respondents, this does not mean that Texan's separate claim in section III.C.2 for breach of express terms in the MRA (including cl 4.8) was advanced against all three Respondents, especially in the face of explicit wording otherwise (see [58] above). At most, this would only show that Texan was inconsistent in its application of the legal principles pertaining to privity of contract across the claims it brought in the Arbitration.

60 While section IV of the SOC (titled "Relief Sought") stated that "Texan also seeks an award *against Respondents* for the other losses Texan suffered and will continue to suffer *as a result of IGL's breaches of contract and breaches of warranties*, and Respondents' misrepresentations to Texan" [emphasis added],[79] I find that on an objective interpretation of the SOC, the umbrella term "Respondents" was used because Texan was referring to all its various claims against the various Respondents (including claims relating to the Respondents' alleged misrepresentations to Texan). Properly understood, the case advanced

[79] OA 963-Claimants' Affidavit at p 211: SOC at p 15.

by Texan in the Arbitration was that, should Texan succeed on any particular claim that it had pleaded, it would be entitled to the suite of reliefs (*ie*, remedies) set out in section IV from the relevant party(s) against whom the successful claim in question had been advanced. Thus, if Texan succeeded in its claim against IGL for breach of cl 4.8 of the MRA, Texan purported to be entitled to the pleaded reliefs (including the "Cost for storing the unsellable IGL product"[80]) *against IGL* (see also [31(a)] above). Texan's prayer that "the award in its favor will be issued jointly against Respondents"[81] does not change the foregoing analysis. Read objectively and in context, that prayer would pertain to an instance where Texan succeeded in a claim or claims that engaged the liability of all the Respondents.

61 It follows that I reject Mr Seow's arguments regarding the purported "complaint" and "claim" brought by Texan (see [48(b)] above). No juridical basis was provided for the purported characterisation of, and distinction between, what he called a "complaint" and "claim" in this case, and I do not think the purported characterisation and distinction are tenable. In my judgment, there was only *one* claim against IGL for breach of specified clauses (including cl 4.8) of the MRA, which included the remedies sought against IGL if IGL was found liable for such breach. It is contrived for Texan to now contend that its case was that a breach by IGL of the MRA would result in "collective" liability by all three Respondents for such breach. In any event, it was *not* the Tribunal's decision that *IGL's* breach of the MRA rendered *all the Respondents* liable for damages (see [90] below).

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80 OA 963-Claimants' Affidavit at p 212: SOC at p 16.

81 OA 963-Claimants' Affidavit at p 212: SOC at p 16.

62 Second, it is clear from the Defence that the Respondents understood and proceeded on the basis that Texan's claim for breach of the MRA was brought solely against *IGL*.

63 At para 20 of the Defence, the Respondents affirmed that "Texan and IGL negotiated and executed the MRA".[82] At paras 21.4 and 23 of the Defence, the Respondents pleaded what "IGL was required" to do under cl 4.8 of the MRA.[83]

64 At paras 26 and 27 of the Defence, the Respondents pleaded pre-action correspondence between Texan and IGL in which Texan alleged that IGL had breached the terms of the MRA and IGL denied any breach of the MRA by IGL.[84]

65 At para 74.2 of the Defence, the Respondents recapitulated their understanding that Texan had alleged in the SOC that "IGL breached Clauses 4.8, 4.10 and 4.11 of the MRA".[85] At para 83 of the Defence, the Respondents again recapitulated that "Texan asserts that IGL breached Clause 4.8 of the MRA".[86] It is evident that the Respondents understood Texan's case on breach of cl 4.8 of the MRA to be premised solely against IGL.

66 Texan highlights (see [47(b)] above) the Respondents' pleading in para 87 of the Defence that "they are not in breach of the implied terms of

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82 OA 963-Claimants' Affidavit at p 240: Defence at para 20.

83 OA 963-Claimants' Affidavit at p 241: Defence at paras 21.4 and 23.

84 OA 963-Claimants' Affidavit at pp 242–243: Defence at paras 26 and 27.

85 OA 963-Claimants' Affidavit at pp 256–257: Defence at paras 74 and 74.2.

86 OA 963-Claimants' Affidavit at p 259: Defence at para 83.

satisfactory quality and reasonably fit for sale".[87] However, this pleading was in response to Texan's claim in section III.C.4 of the SOC that the Respondents had breached alleged statutorily implied terms in the MRA *and* purchase orders (see [59] above). All the Respondents took the position that there was no basis for such terms to be implied and/or that the products were fit for purpose, and understandably pleaded this part of the Defence using the umbrella term "Respondents". Contrary to Texan's present suggestion, this is not basis for concluding that all of Texan's claims were brought against the Respondents collectively and/or were understood by the Respondents to be brought against them collectively.

67 Mr Seow also highlighted (see [48(c)] above) the Respondents' defence of set-off. In my view, bearing in mind that Texan brought some claims against ICI and IGL singly and some claims against all the Respondents collectively, the objective interpretation of this pleaded defence is that the Respondents were singly or jointly entitled to set off the sum of US$127,698.20 (due from Texan on the Retail Containers) against any liability that may be found against one or more of them respectively, as the case may be: see the Defence at paras 119–122.[88] Of course, given that the Defence at para 117 pleaded that Texan's obligation to pay for the Retail Containers arose under cl 4.14 of the MRA (to which ICI and Dharmesh were not parties), questions would arise as to why ICI and Dharmesh would also be entitled to such a set-off. However, that was for ICI and Dharmesh to establish in the Arbitration. It does not mean, and there was no pleading in the Defence, that ICI and Dharmesh also had rights and obligations under the MRA. There is nothing in the way the Respondents advanced their defence of set-off that suggests they understood Texan's claim

87 OA 963-Claimants' Affidavit at p 261: Defence at para 87.

88 OA 963-Claimants' Affidavit at pp 270–271: Defence at paras 119–122.

for breach of cl 4.8 of the MRA (and attendant remedies for such breach) to be advanced against all the Respondents collectively.

68 Third, Texan adduced, and sought to elicit from IGL's witnesses, evidence that *IGL* had breached the MRA.

69 In Mr Palani's Witness Statement, he averred, *inter alia*:[89]

> 15. … The MRA placed many burdens *on IGL that it ignored*:
>
> [reproduction of cll 4.8, 4.9, 4.10 and 4.11 of the MRA]
>
> …
>
> 19. In August 2021, I learned that *IGL had decided not to pursue cGMPs – despite its contractual obligation to do so* …
>
> …
>
> 22. Stated simply, *IGL did nothing to pursue cGMPs* …
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> …
>
> 24. *IGL completely failed to comply with cGMP standards*. The report of IGL's own regulatory consultant … firmly establishes that none of the hand sanitizer Texan received from IGL was produced in accordance with cGMPs – *in violation of IGL's explicit obligation in [cl] 4.8 of the MRA* and the requirements of Texan's earlier purchase orders. Respondents, therefore, failed to deliver to Texan products that complied with the requirements of their agreements and instead sent Texan products that could not be sold in the USA market.
>
> [emphasis added]

The reference in Mr Palani's Witness Statement at para 24 to "agreements" with "Respondents" was vague and not elaborated. It is unclear if he had in mind alleged "Respondents' representations" to which he had earlier referred (at para 11).[90] What is clear from Mr Palani's Witness Statement, however, is that

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89 OA 963-Defendant's Affidavit at pp 28, 32, 33 and 34–35.

90 OA 963-Defendant's Affidavit at p 26.

Texan regarded, and framed, the obligations under the MRA (including cl 4.8) as being owed and breached by *IGL*.

70 The Respondents called two witnesses, Dharmesh and one Mr Sunit Kapila ("Mr Kapila"), who worked for IGL. In the cross-examination of Dharmesh, Texan's counsel repeatedly put to Dharmesh that *IGL* did not comply with the obligations under cl 4.8 of the MRA.[91] In the cross-examination of Mr Kapila, Texan's counsel put it to Mr Kapila that "IGL [was] bound by [cl] 4.8 [of the MRA]", to which Mr Kapila agreed.[92] It was not put to the witnesses that ICI and/or Dharmesh (also) owed or breached obligations under cl 4.8 of the MRA.

71 Fourth, Texan's submissions in the Arbitration maintained that it was *IGL* that had breached the MRA.

72 In the Claimant's Skeleton Brief dated 14 February 2024, Texan highlighted that IGL and Texan had entered into the MRA;[93] the MRA imposed requirements on IGL to "comply with GMP";[94] and Dharmesh had testified that IGL breached cl 4.8 of the MRA.[95]

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91 OA 963-Claimants' Affidavit at pp 612–613: Transcript 29 Feb 2024 at pp 33:30–34:34.

92 OA 963-Claimants' Affidavit at p 666: Transcript 29 Feb 2024 at p 87:3–14.

93 OA 963-Claimants' Affidavit at p 274: Claimant's Skeleton Brief in the Arbitration dated 14 February 2024 ("Texan's Brief") at p 1.

94 OA 963-Claimants' Affidavit at pp 274–275: Texan's Brief at pp 1–2.

95 OA 963-Claimants' Affidavit at p 282: Texan's Brief at p 9.

73 Similarly, Texan's counsel argued in oral opening submissions that "IGL clearly violated the MRA" and "IGL also admits it failed to comply with cGMP".[96]

74 Given the weight of the foregoing references, I find Texan's counsel's statement in oral closing submissions that "… [Dharmesh] admits, they didn't comply with the Robust quality assurance that they promised, they breached the MRA"[97] to be an instance of loose phraseology, and, contrary to Texan's argument at [46(b)] above, not an indication that all of Texan's claims and/or Texan's claim for breach of cl 4.8 of the MRA were brought against the Respondents collectively.

75 Fifth, the Respondents' submissions continued to defend against Texan's claim that *IGL* had breached the MRA.

76 In the Respondents' Submissions at para 48.2, the Respondents recapitulated their understanding that Texan had alleged in the SOC that "IGL breached Clauses 4.8, 4.10 and 4.11 of the MRA".[98]

77 Texan argues that the Respondents' Submissions stated that "[t]he Respondents have not breached the terms of the MRA or of any express warranty", thus showing that the Respondents were aware of the case against

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96 OA 963-Claimants' Affidavit at p 370: Transcript 27 Feb 2024 at pp 16:11–12 and 16:21.

97 OA 963-DWS at para 19; OA 963-Claimants' Affidavit at p 691: Transcript 29 Feb 2024 at p 112:32–35.

98 OA 963-Claimants' Affidavit at pp 332–333: Respondents' Submissions at paras 48 and 48.2.

them collectively (see [47(c)] above).[99] However, this line from the Respondents' Submissions has been quoted without full and proper context. The line was actually the heading of section D.2 in the Respondents' Submissions. Within section D.2, the Respondents submitted at para 56 that "Texan alleges that IGL has breached several clauses of the MRA" including cl 4.8; and at para 57 that Texan had failed to make out the existence of a *pre-contractual* warranty much less a breach of the same by the Respondents. In other words, despite the shared heading of section D.2 of the Respondents' Submissions (titled "The Respondents have not breached the terms of the MRA or of any express warranty"), two separate defences were being advanced in that section: (a) that there was no breach of the MRA *by IGL* (as alleged by Texan in section III.C.2 of the SOC), and (b) that there was no breach of a pre-contractual warranty by the Respondents (as alleged by Texan in section III.C.3 of the SOC).

78 Texan's reliance on the Respondents' counsel's statement in oral closing submissions that the entire transaction was "a business opportunity seen by all Parties" (see [47(d)] above) does not assist Texan. It was a comment devoid of legal content and does not detract from Texan's pleaded case that it was IGL that owed and breached the obligations under cl 4.8 of the MRA.

79 Sixth, I address the remaining miscellaneous points made by Texan.

80 Texan relies on the Respondents' use of the term "Respondents" in various documents in the Arbitration (see [47(a)] above). This is a vague observation from which nothing meaningful can be derived without Texan

[99] OA 963-DWS at para 44; OA 963-Claimants' Affidavit at p 337: Respondents' Submissions at section D.2 heading.

pointing to specific instances such that the court can examine the context in which the term "Respondents" was used.

81 Texan also says that the Respondents did not deny their collective involvement in the supply of hand sanitisers to Texan (see [47(a)] above). However, it does not follow from this that non-contracting parties such as ICI and Dharmesh somehow owed obligations under the MRA or that Texan was running (and the Respondents had understood that Texan was running) such a case.

82 As for the parties' entry into the Arbitration Agreement (see [48(a)] above), the background to this is that Texan had commenced proceedings in the US against ICI and Dharmesh, while IGL had applied for an anti-suit injunction against Texan in the Singapore courts, in July 2022.[100] The parties thereafter decided to enter into the Arbitration Agreement so that all disputes arising out of and in connection with the sale of the hand sanitiser products to Texan could be resolved in a single arbitral forum.[101] This does not mean that the parties understood that every claim Texan might bring in the putative arbitration would be brought against all the Respondents collectively. That would turn on how Texan ultimately pleaded its claims in any arbitration.

83 Drawing the first stage of the enquiry to conclusion, the parties' pleadings, evidence and submissions, viewed individually and globally, consistently paint the picture that Texan's claim for breaches of the MRA (including cl 4.8) was brought against IGL only and not against the Respondents collectively. Texan cannot now airbrush or obfuscate the specific contours of

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100 OA 963-Claimants' Affidavit at p 186: Arbitration Agreement Recital (C).

101 OA 963-Claimants' Affidavit at p 186: Arbitration Agreement Recital (D).

its pleaded claim in the Arbitration by liberally and loosely asserting that its case was against the Respondents "collectively". Accordingly, the issue of whether *IGL* had breached and was liable for breaches of the MRA fell to be determined in the Arbitration. However, the question of whether *ICI and Dharmesh* had breached and were liable for breaches of the MRA never arose in the Arbitration and was *not* within the scope of the submission to arbitration.

(2) The second stage of the enquiry

84 Inexplicably, however, the Tribunal decided that the "Respondents", *ie*, ICI and Dharmesh included, had breached the MRA.

85 In the Award at [108] and [109], the Tribunal summarised Texan's case as simultaneously being that "the Respondents" breached the MRA and that cll 4.8, 4.10 and 4.11 of the MRA "required [IGL]" to do specific things. Mr Seow argued that this shows that the Tribunal understood Texan to be submitting that the Respondents breached the MRA (see [48(d)] above). However, an arbitral tribunal's misconception that a matter fell within the scope of the submission to arbitration when it did not, would not bring that matter within scope. Were it otherwise, any dispute the arbitral tribunal chose to or thought it had to decide would become a matter falling with the scope of the submission to arbitration, defeating the entire point of a challenge under Art 34(2)(*a*)(iii) of the Model Law. In my view, the Tribunal's confused summary of Texan's case is an indication of the point at which the Tribunal started to veer into deciding matters in excess of jurisdiction (*viz*, that ICI and Dharmesh had breached the MRA).

86 Indeed, in the Award at [148], the Tribunal then found that:

> at [cl] 4.8 [of the MRA], *Respondents promised* that manufacturing would be maintained at the level of "GMP as

> required by US FDA." This was a clear and unequivocal *promise in a contract.* [emphasis added]

However, none of the parties had argued in the Arbitration that ICI and Dharmesh had made promises under the MRA.

87 In the Award at [151], the Tribunal then proceeded to find that, on the "true construction" of cl 4.8 of the MRA "or alternatively on the basis of an implied term thereof", "*Respondents committed* to immediately start the process to become cGMP-compliant, and to become cGMP-compliant within a reasonable period of time" [emphasis added]. The Tribunal emphasised that this was a "contractual promise" (Award at [152]). To be clear, the "implied term" referred to in the Award at [151] had nothing to do with Texan's case on statutorily implied terms (on which the Tribunal ruled against Texan: see the Award at [165]–[166]). Again, none of the parties had argued in the Arbitration that ICI and Dharmesh had made promises under cl 4.8 or an alternative implied term of the MRA.

88 The Tribunal then found that "*the Respondents breached the MRA* by failing to bring their facilities up to cGMP compliance standards within a reasonable period of time as it had promised to do under the MRA" [emphasis added] (Award at [154]). Further repeated references were made by the Tribunal to the MRA obligation being owed and breached by the "Respondents" (*eg*, in the Award at [158], [160] and [164]).

89 The Tribunal decided that "by reason of *the Respondents' breach of the MRA*" [emphasis added], Texan had suffered loss in the form of the Storage Costs, which it was entitled to recover as damages from the Respondents (Award at [164]). The Tribunal held that the Storage Costs amounted to US$388,974.09, deducted the Respondents' "set-off claim of [US]$127,698.20"

from that sum, and arrived at an award of US$261,275.89 (Award at [169]–[171]), which it ordered the Respondents to pay Texan "as damages for breach of the MRA" (Award at p 42).

90 It bears emphasis that the Tribunal's decision was *not* that *IGL's* breach of the MRA somehow led to liability on the part of all the Respondents. Rather, the Tribunal's express decision was that *the Respondents (ie, ICI and Dharmesh included)* breached the MRA and were therefore liable for damages arising from *the Respondents'* breach of the MRA. However, the parties did not argue in the Arbitration that ICI and Dharmesh had breached and were liable for the breach of the MRA. In deciding that ICI and Dharmesh were liable for breach of the MRA, the Tribunal thus acted in excess of jurisdiction. This was not a case of mere error in the Tribunal's reasoning.

91 Concluding the second stage of the enquiry into whether the Award involved a matter outside the scope of the submission to arbitration, I find that the Tribunal's decisions that (a) ICI and Dharmesh made contractual promises under the MRA; (b) ICI and Dharmesh breached the MRA; and (c) ICI and Dharmesh were liable for damages for breach of the MRA, were decisions on matters falling outside the scope of the submission to arbitration.

(3) The part of the Award to be set aside

92 In my judgment, the Award is severable such that only that part holding ICI and Dharmesh liable for and ordering them to pay damages to Texan need be set aside.

93 Texan argues that, because the final award of damages in the amount of US$261,275.89 was derived by the Tribunal setting off US$127,698.20 from the Storage Costs of US$388,974.09, this would pose difficulty for the court in

setting aside the award of US$261,275.89 as against ICI and Dharmesh only.[102] I am not sure why Texan considers it to its advantage to take this point. Assuming Texan is correct, it does not automatically follow that the award of damages should not be set aside at all and instead raises the question of whether the award of damages should be set aside as against all the Respondents instead. But, in any event, I do not agree that there is any difficulty as suggested by Texan.

94 The starting point is that the parties accept that, on a sensible reading of the Award, the damages in the form of Storage Costs were awarded against the Respondents on the basis of joint and several liability.[103] There is thus no issue with setting aside the Tribunal's decision that ICI and Dharmesh are liable for the Storage Costs, leaving intact the Tribunal's decision that IGL, having breached the MRA, is liable for the Storage Costs.

95 Next, as Texan points out,[104] the Respondents had raised the matter of a set-off of the sum of US$127,698.20 as a *defence*,[105] and had not brought a counterclaim for the sum of US$127,698.20. The Tribunal's reference to the Respondents' "counterclaim for set-off" (Award at p 40) is inapposite but does not change the fact the Respondents had advanced set-off as a defence and does not have a bearing on the Tribunal's practical application of the set-off.

96 A successful defence of set-off is necessarily premised on the claimant having first successfully established its claim: *Inzign Pte Ltd v Associated*

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102 Further Submissions of the defendant in OA 963 dated 13 January 2025 ("OA 963-DFWS").

103 NOA at pp 5:19–22 and 10:29–30.

104 OA 963-DFWS at para 3.

105 OA 963-Claimants' Affidavit at p 270: Defence at para 120.

*Spring Asia Pte Ltd* [2018] SGHC 147 at [77]. If the claimant's claim fails, there would be no liability on the defendant's part to be extinguished pursuant to the defence of set-off. And, if the defendant has not separately pursued a counterclaim, there would be no basis for a separate award in the defendant's favour.

97 In the present case, as I have found at [67] above, the Respondents' defence of set-off, properly construed, was that the Respondents were singly or jointly entitled to set off the sum of US$127,698.20 against any liability that may be found against one or more of them respectively, as the case may be. When the Tribunal allowed the defence of set-off for the sum of US$127,698.20, the Tribunal did not apportion the entitlement to that sum as between the Respondents (Award at [171]), indicating that the Tribunal considered the entitlement to be joint and several. As the Tribunal's decision that ICI and Dharmesh are liable for the Storage Costs should be set aside (see [94] above), it follows that the defence of set-off raised by ICI and Dharmesh does not arise. ICI and Dharmesh are not liable for the Storage Costs to begin with; there is nothing owing by them to be extinguished by way of a set-off; and consequently, the award of damages against them in the net amount of US$261,275.89 may be set aside. However, IGL remains liable for the Storage Costs; IGL had singly (and not just jointly) relied on the defence of set-off; IGL remains entitled to the set-off of US$127,698.20 which the Tribunal allowed; and consequently, the award of damages against IGL in the net amount of US$261,275.89 can stand. I do not think there is any principled impediment to the court arriving at these conclusions. The Respondents have also confirmed that they take no issue with only that part of the Award awarding damages

against ICI and Dharmesh being set aside, leaving the remainder of the Award awarding damages against IGL standing.[106]

*The Respondents' alternative case of breach of natural justice*

98 For completeness, I find that the Respondents' alternative argument, *viz*, that the Tribunal's decision to impose liability on ICI and Dharmesh was made without consideration of any evidence or argument on this issue and amounted to a breach of natural justice (see [44] above), is superfluous. The Respondents rely on the same factual matrix for this objection as that for their objection that the Tribunal acted in excess of jurisdiction. Once it is found (as I have) that the Tribunal acted in excess of jurisdiction in determining this issue, it is unnecessary to further consider if the Respondents had an opportunity to be heard on the issue. Conversely, if the issue was within the scope of the submission to arbitration, it would follow that the Respondents did have the opportunity to engage the issue and there would be no breach of natural justice: see *CDM and another v CDP* [2021] 2 SLR 235 at [16]; *CJA* at [36].

**Conclusion**

99 The Respondents' challenge to the Award under Ground 1 is dismissed.

100 However, under Ground 2, the Respondents have established that the Tribunal acted in excess of jurisdiction when it held ICI and Dharmesh liable for damages for breach of the MRA. I therefore order that the part of the Award concerning the Tribunal's decision that ICI and Dharmesh are liable to pay Texan damages for breach of the MRA, as well as the Tribunal's order that ICI

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106 NOA at pp 5:24–29 and 13:28–14:1.

and Dharmesh pay such damages in the sum of US$261,275.89 to Texan, be set aside.

101 Unless the parties agree on costs, they should file their written submissions on costs, limited to three pages, within two weeks from the date of this judgment.

Kristy Tan
Judicial Commissioner

Siraj Omar *SC*, Larisa Cheng and Robbie Tan (Siraj Omar LLC) for the claimants;
Colin Seow Fu Hong and Huang Qianwei (Colin Seow Chambers) for the defendant.