<u>Neutral Citation Number: </u>[2023] EWHC 3281 (TCC)

<u>Claim No: HT-2022-000304</u>

<u>IN THE HIGH COURT OF JUSTICE</u>
<u>BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES</u>
<u>TECHNOLOGY AND CONSTRUCTION COURT (KBD)</u>

<u>In the Matter of section 9 of the Arbitration Act 1996</u>

<u>Date: 21 December 2023</u>

B e f o r e :

<u>MR JUSTICE WAKSMAN</u>

MUNICÍPIO DE MARIANA & ors

<u>Claimants</u>

and

(1) BHP GROUP (UK) LTD
(2) BHP GROUP LTD

<u>Defendants/Part 20 Claimants/Respondents</u>

and

VALE S.A.

<u>Part 20 Defendant ("Third Party")/Applicant</u>

RICHARD ESCHWEGE KC, **MICHAEL BOLDING** and **CRAWFORD JAMIESON** (instructed by White & Case LLP, Solicitors) for the Applicant
DANIEL TOLEDANO KC and **NICHOLAS SLOBODA** (instructed by Slaughter and May, Solicitors) for the Respondents

JUDGMENT

Hearing dates: 12 and 13 December 2023

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INTRODUCTION

1. This is my determination of an application made by the Third Party, Vale S.A. ("Vale"), pursuant to section 9 of the Arbitration Act 1996 ("the s9 application"), to stay the Part 20 Proceedings brought against it by the two Defendants to the main claim, being BHP Group (UK) Limited and BHP Group Limited. The First Defendant ("BHP UK") is an English company, while the Second Defendant ("BHP Australia") is an Australian company. Where I refer to both Defendants collectively, I refer to them as "BHP".

2. Vale's s9 application was made on 18 September 2023. It had previously, on 28 February and 2 May 2023 applied to set aside the Part 20 proceedings served upon it out of the jurisdiction on the basis that those proceedings disclosed no serious issue to be tried and/or England was not the clearly more appropriate forum ("the Jurisdiction Application"). The Jurisdiction Application was heard on 12 and 13 July 2023. By her judgment dated 7 August 2023, Mrs Justice O'Farrell dismissed it ("the Jurisdiction Judgment"). On 24 November 2023, following an oral hearing, Coulson and Laing LJJ refused Vale permission to appeal.

3. In the meantime, there had been a consequentials hearing in relation to the Jurisdiction Judgment on 10 and 12 October, following which various directions were made. These included directions for the hearing of Vale's s9 application, and for further statements of case in the Part 20 Proceedings. Although the latter involved Vale taking a substantive step in those proceedings, namely the service of a Defence, it was agreed that this was without prejudice to its s9 application which had, of course, already been made.

4. The arbitration clause relied upon by Vale is to be found at paragraph 11.1 of a Shareholders Agreement made between Vale (as successor to an earlier party), BHP Brasil Ltda ("BHP Brasil"), and the company owned by both of them, namely Samarco Mineração S.A. ("Samarco"). All three are Brazilian companies. BHP Brasil and Vale each own 50% of the shares in Samarco.

5. Vale's position in outline is as follows:

   (1) Although BHP is not a signatory to the SHA (and thus not a signatory to the arbitration clause) under Brazilian law, it can and should here be treated as being bound by the clause;

   (2) The matters in issue under the Part 20 Proceedings fall within the arbitration clause;

   (3) There is no basis for BHP's contention that the issue of the s9 application, when it was made, constituted an abuse of process;

   (4) Accordingly, the Court is obliged to stay the Part 20 proceedings.

6. BHP's responsive position in outline is as follows:

   (1) BHP is not in fact to be treated as bound by the clause under Brazilian law; accordingly, there is no basis for the s9 stay sought by Vale;

(2) In any event, even if it were, the matters in issue under the Part 20 proceedings are outwith the arbitration clause;

(3) Yet further, the s9 application should not be entertained at all because its making was an abuse of process; the application should have been made earlier and in particular not left until after the Jurisdiction Application had been determined;

(4) Accordingly, there is no basis for a stay.

7. For the reasons given in paragraphs189 - 202 below, I do not consider that Vale's s9 application does amount to an abuse of process. In any event, as almost all of the evidence and argument before me at the hearing concerned the merits of the s9 application, I would have to have made my findings on the merits anyway, as opposed to simply not dealing with it at all. Accordingly, what follows until paragraph 188 below is my consideration of the s9 application.

BACKGROUND TO THE LITIGATION

8. As a prelude to her determination of the Jurisdiction Application, Mrs Justice O'Farrell set out an uncontroversial background to and summary of the litigation of which the Part 20 Proceedings form part. I gratefully adopt that background and introduction here and repeat much of it *in extenso* below.

9. On 5 November 2015 Brazil suffered its worst ever environmental disaster when the Fundão Dam in South East Brazil collapsed, releasing around 40 million cubic metres of tailings from iron ore mining. The collapse and flood killed 19 people, destroyed entire villages, and had a widespread impact on numerous individuals and communities, not just locally but as a result of the damage to the River Doce system over its entire course to the sea some 400 miles away. The Brazilian public prosecutor has estimated the cost of remediation and compensation at a minimum of R$155 billion, about £25 billion at today's exchange rates.

10. The area affected by the dam collapse fell within two states, Minas Gerais, where the dam was situated, and Espírito Santo, in which the River Doce reaches the Atlantic ocean. The local government authority with responsibility for the area which included the dam itself, and the nearby villages which were destroyed, is the municipality of Mariana.

11. The dam was owned and operated by Samarco. BHP operated together as a single economic entity under a dual listed company structure and BHP Group Limited (i.e. BHP Australia) is the ultimate parent company of BHP Brasil.

12. Following the disaster, there were criminal proceedings against various defendants in the Brazilian courts. There were also civil proceedings at federal and state level, comprising individual claims and class actions ("CPAs"), including CPAs referred to as "the ADIC CPA", "the 20bn CPA" and "the 155bn CPA".

13. On 17 November 2015 the ADIC CPA was filed against Samarco by the Association for the Defence of Collective Interests ("ADIC") in the Federal Court, alleging violation of diffuse, collective and homogenous individual rights of all those impacted by the collapse in the States of Minas Gerais and Espírito Santo.

14. On 30 November 2015, the 20bn CPA was filed against Samarco, Vale and BHP Brasil by the Federal Government, the states of Minas Gerais and Espírito Santo, and nine government entities. The 20bn CPA sought orders that the named defendants should present plans to address the environmental and economic consequences of the dam collapse, take measures to ensure that the specific matters in those plans were dealt with, and fund the implementation of those plans through a private foundation in a minimum amount of R$20 billion, the then estimated quantum of damage caused by the disaster.

15. On 2 March 2016, the parties to the 20bn CPA agreed to settle the proceedings, without any admission of fault or liability, by entering into a transaction and conduct adjustment term ("the TTAC"), an agreement governed by Brazilian law. Under the TTAC, the Brazilian defendant companies, including Vale, agreed to provide full redress to all persons, sole traders, communities and the environment in the areas affected by the collapse of the dam, through 42 programmes.

16. On 5 July 2016 a Brazilian private foundation, Fundação Renova ("Renova"), was established by Samarco, Vale and BHP Brasil as the vehicle through which they would carry out the programmes of remediation and compensation. The programmes implemented by Renova include the 'Novel System', a judicially supervised compensation scheme.

17. In May 2016, the Federal Public Prosecutor filed the 155bn CPA against Samarco, Vale, BHP Brasil, the Federal Government and others, challenging the sufficiency of the relief provided for in the TTAC and demanding better relief for the victims of the collapse, estimating the damage caused at a minimum of R$155 billion.

18. On 25 June 2018, the parties reached an interim settlement agreement in the form of the Governance and Conduct Adjustment Agreement ("GTAC"). The GTAC was signed by all parties to the 20bn CPA and the 155bn CPA. It provided a framework by which the parties would undertake negotiations towards a final settlement of the 155bn CPA. Pending such final settlement, the 155bn CPA proceedings were stayed. There is a dispute as to whether the stay remains formally in place, as the Federal Court continues to resolve any disputes that arise regarding the interpretation and effect of the TTAC, GTAC and reparation programmes through the Priority Axes. However, it is accepted by all parties to the GTAC that no decision on the merits of the original claims brought in the proceedings will be rendered before a final settlement has been achieved. The current status of the proceedings is that there is an ongoing mediation in respect of the renegotiation of the GTAC and TTAC.

THE PROCEEDINGS HERE IN SUMMARY

Mariana's claim against BHP

19. On 2 and 5 November 2018, the Claimants here, Município De Mariana & Others ("Mariana") issued proceedings against BHP UK in this jurisdiction and on 3 May 2019, a further claim form was issued here against both Defendants i.e. BHP. On 24 February 2023 a new claim form was issued against BHP, increasing the total number of claimants to approximately 732,000. There are public statements from Mariana's solicitors estimating the value of the claims at £36 billion.

20. The claims, seeking compensation for losses caused by the dam collapse, are brought jointly and severally against BHP. The underlying claimants are all Brazilian and comprise (i) over

720,000 individuals; (ii) over 1,600 businesses; (iii) 78 churches and faith-based institutions; (iv) 46 municipalities; (v) 7 utility companies; and (vi) over 9,500 members of the indigenous and Quilombola communities. I shall refer to all the Claimants collectively as "Mariana".

21. The claims are advanced under Brazilian law and include the following pleaded causes of action in the Re-Amended Master Particulars of Claim ("the RAMPOC"):

(1) Articles 3(IV) and 14 of the Environmental Law and/or Articles 927 and 942 of the Civil Code impose strict liability on BHP for loss and damage caused by the environmental disaster by reason of their: (a) ownership and/or control of the entity responsible for the damage; (b) failure to supervise the activity giving rise to the damage; (c) funding the activity of others which led to the damage; and/or (d) benefiting from the activity of others which led to the damage ("the Strict Liability Claim");

(2) BHP are liable under Articles 186, 927, 932 and 942 of the Civil Code for the loss and damage suffered by Mariana by reason of their voluntary act or omission, negligence or imprudence in: (a) disregarding advice and warnings as to the risks of collapse and/or (b) failing to take satisfactory action to address such risks ("the Fault-Based Claim"); and

(3) BHP are liable under Articles 116 and 117 of the Corporate Law, as controlling shareholders, for the loss and damage suffered by Mariana, by permitting activities involving a significant risk of substantial damage to the community ("the Controlling Shareholder Claim").

22. BHP's Amended Defence, served on 10 March 2023, denies any liability on the part of BHP and includes the following defences:

(1) BHP were not polluters within the meaning of Article 3(IV) of the Environmental Law so as to attract strict liability for the loss and damage caused by the dam collapse. They carried out no polluting activity, nor did they cause environmental degradation through any relevant omission.

(2) The allegations of fault-based liability are denied. BHP met the expected standard of conduct of parties in their positions and breached no legal duty.

(3) There is no liability under the Corporate Law. BHP were not controlling shareholders of Samarco and/or owed no controlling shareholder duties and/or were not in breach of any such duties by act or omission.

(4) There was no causal link between any activity or omission on the part of BHP and the dam collapse and/or the claimants' alleged losses.

(5) All the claims are time-barred under Brazilian law.

(6) Certain claimants accepted compensation, pursuant to settlement agreements with Renova, Samarco, BHP Brasil, Vale and/or through the Novel System compensation scheme, and the terms of the release or waiver clauses in such settlements preclude them from pursuing the claims in these proceedings.

23. It will be necessary for me to make further detailed reference to both the RAMPOC and the Amended Defence below.

The Part 20 Proceedings

24. On 2 December 2022, BHP served a Part 20 claim against Vale, seeking declaratory relief and a contribution to any sums that BHP might be found liable to pay to Mariana. The essential claim made was that if BHP was found liable to Mariana, then Vale would be, too, for the same reasons and that both BHP and Vale would be liable to Mariana for the same damage. That claim is made under the Brazilian law of contribution. On 20 December 2022, Vale filed its acknowledgement of service, indicating that it intended to contest the Court's jurisdiction.

25. On 13 April 2023 BHP issued a new Part 20 claim against Vale, on the same basis and in the same form as the first Part 20 claim, but in respect of any liability arising out of the new claim form issued by Mariana. On 1 November 2023, BHP served its Amended Part 20 Particulars of Claim against Vale. I shall refer to this as "the Part 20 Claim". On 1 December 2023, Vale served its Defence to the Part 20 Claim ("the Part 20 Defence"). BHP is to serve any Part 20 Reply by 22 December 2023.

26. As with the main proceedings, it will be necessary for me to refer in detail to the content of the Part 20 Claim and the Part 20 Defence below.

THE EVIDENCE

27. In support of its application Vale relies upon the 5th and 7th witness statements ("WSs") of Lawson Caisley, its solicitor, dated 18 September and 16 November 2023 respectively. As for its expert evidence on the relevant principles of Brazilian law, it relies upon two reports made by Professor Joao Bosco Lee, dated 18 September ("Lee 1") and 17 November 2023 ("Lee 2"). Professor Lee does not speak English and so the original reports are in Portuguese and have been translated. Before me he spoke in Portuguese, but the Court had the benefit of a simultaneous English translation.

28. In opposing the application, BHP relies upon the 22nd WS of its solicitor, Efstathios Michael, dated 6 November 2023. As for its expert evidence, BHP relies upon the second report of Professor Anderson Schreiber, also dated 6 November. Professor Schreiber speaks English and so wrote his report, and gave his evidence, in English. (Professor Schreiber's first report was produced for the Jurisdiction Application). Lee 2 was Professor Lee's report in reply to Professor Schreiber's.

29. Both experts provided a joint statement dated 1 December 2023.

30. I should add that transcripts were provided in respect of both days of the hearing, including revised transcripts provided by Vale on 17 December.

THE LAW

31. Section 9 of the Arbitration Act 1996 provides that:

"(1) A party to an arbitration agreement against whom legal proceedings are brought… in respect of a matter which under the agreement is to be referred to arbitration may…apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter;…

(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

The Basic Application of s9(1) and s9(4)

32. Popplewell J (as he then was) in *Golden Ocean Group Ltd v Humpuss* [2013] 2 All ER 1025, stated the following at [59]:

> "I would venture to summarise the principles applicable to a situation where C brings proceedings against D in relation to matters which D claims, but C disputes, are governed by an arbitration agreement which confers Kompetenz-Kompetenz on the arbitral tribunal as follows: […]
>
> (2) Section 9(1) permits the grant of a stay under the section only if D is party to a written arbitration agreement which has agreed to refer to arbitration the matters in respect of which C has brought the proceedings. Section 9(1) is concerned with whether an agreement to arbitrate was concluded. It is not concerned with whether such agreement is valid or enforceable or continues in existence, which is the subject matter of s. 9(4). It is also concerned with whether the scope of the agreement to arbitrate extends to the matters in issue between the parties in their substantive dispute. To bring himself within the scope of section 9, D must establish that such an agreement was concluded, and that its terms apply to the underlying dispute. […]
>
> (5) It is for D to satisfy the court that he comes within s. 9(1) before the court can grant relief under that section. It is not enough for him to show merely an arguable case that he is party to a concluded arbitration agreement which has agreed to refer to arbitration the matters in respect of which C has brought the proceedings. Unless the court is satisfied that that is so, there is no jurisdiction under the section to stay proceedings. The court must therefore determine the dispute if it affects the question whether D comes within s. 9(1). If it cannot do so on the written evidence at the hearing of the application, it must direct a trial of that issue before granting a stay under s. 9. It may, however, decline to direct a trial of the issue and grant a stay under its inherent jurisdiction without resolving the issue."

33. As those principles make clear, it is for the Court to decide if the matters required to be established by s9(1) or (4) are so established. It may direct a trial, if necessary, which has of course happened here.

34. On the matters required to be established by s9(1) or (4), the relevant standard of proof is the balance of probabilities. This is stated expressly, so far as s9(4) is concerned, at paragraphs 77 and 78 of the judgment of Aikens LJ in the decision of the Court of Appeal in *Aeroflot v Berezovsky* [2013] 2 Lloyds Rep. 242. Further, as set out in paragraph 80 of his judgment, if the Court could only definitively decide the question of the application of s9(4) by deciding the substantive issues between the parties and that this was not realistic, it would be sufficient for the applicant to satisfy the Court that there was an arguable case that the clause was valid. But if the court can resolve the s9(4) issue, then it will not suffice for the applicant to show merely an arguable case.

35. This latter point is important because of one particular argument raised by Vale here. It says, first, that the question as to whether BHP is bound by the clause is one which arises in the context of s9(4), rather than s9(1). Second, all it has to show is that it is arguable that BHP is bound. That second point is clearly wrong in law having regard to what I have said at paragraph 34 above.

36. As for the former point, Vale relies upon what Lewison LJ said in *Lifestyle Equities v Hornby Street* [2022] EWCA 51. The key issue there was what the governing law of the arbitration clause was. If it was California law then the claimant in the proceedings would be bound by the arbitration clause even though it was not party to the underlying agreement which contained it. It would nonetheless be bound because it was the assignee of the trademarks in question and which were the subject of the agreement. The contest was therefore between California law or English law. A majority of the Court of Appeal held that it was California law, as contended for by the applicant for the stay. It followed that the stay should be granted.

37. At paragraphs 96-98 of his judgment, Lewison LJ said this:

> "96 The defendants (or at least some of them) are party to an arbitration agreement. It is not suggested that we should distinguish between them. Those who are parties are therefore entitled to apply for a stay under s 9. But there is nothing in s 9(1) (at least on the face of it) which says that the application for a stay may only be made against another party to the arbitration agreement (as opposed to a party to the proceedings). I agree with the judge, therefore, that the defendants are entitled to make the application against the claimants despite the fact that the claimants were not party to the arbitration agreement itself.
>
> 97 Section 9(4) provides:
> '(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.'
>
> 98 I am inclined to accept that if (for whatever reason) the arbitration agreement is not binding on the claimants it can, to that extent, be said to be 'inoperative', at least as against them."

38. He then concluded his judgment thus:

> "119 Since, under Californian contract law, the claimants are bound by the arbitration agreement (even though they were not parties to it) the arbitration agreement is not inoperative. That means that the court is bound to grant the stay. I would dismiss the appeal."

39. The location of an issue as to whether the party against whom the stay is sought was actually bound by the clause in the first place within either s9(1) or s9(4) is important because, while the applicant bears the burden of proof on the former, the respondent bears it on the latter.

40. Although there is nothing to suggest from the judgment in *Lifestyle* that it would have made a practical difference whether the issue was treated as one falling under s9(1) rather than s9(4), and where there was plainly no argument about the point, Vale contends that *Lifestyle* is binding authority for the proposition that the issue must be dealt with under s9(4). I disagree. It is not merely that there was no argument on the point, but that the location of the issue was entirely irrelevant to the outcome which turned on which governing law was applicable and what that governing law had to say about binding "third parties". It was simply not a necessary part of the decision.

41. However, even if it could be said that *Lifestyle* did originally constitute a binding authority in this respect, it was impliedly overruled by the decision of the Supreme Court in *Mozambique v Privinvest* [2023] UKSC 32. This is because the Court expressly approved at paragraph 35 of the judgment of Lord Hodge, the expression of some of the underlying principles set out by Carr LJ in the Court of Appeal:

> "..She also correctly recognised that there were two stages to the inquiry by the court when addressing an application for a section 9 stay: (i) to identify the matters in respect of which the proceedings are brought, and (ii) to assess whether those matters are matters which the parties have agreed to refer to arbitration."

42. It is implicit in that statement that the Court is to examine the matters arising in the proceedings between the parties and is then to assess whether they were ones which "the parties" agreed to refer to arbitration. If there is an issue as to whether one of the parties to the proceedings was a party to the clause at all, that should be considered in the context of these primary questions which fall under s9(1), and not s9(4).

43. It seems to me that as a matter of logic and principle, the correct "home" for a debate as to whether the respondent to the s9 application is bound by the clause at all is indeed s9(1). The starting point is that it is unusual for a party to be bound by an arbitration clause to which, on the face of things, it never itself agreed. But if this is what the applicant wishes to contend, then surely it should bear the burden of proof of establishing matters which would entail that unusual outcome. It is very hard to see why the respondent should have the burden of disproving them.

44. On the other hand, when it comes to s9(4), it makes sense for the incidence of the burden to shift, because on the face of the language of s9(4), this is all about vitiating factors asserted by the respondent who (by this stage) is, or is shown to be, a party to or otherwise bound by the clause but who wishes to contend that the clause nonetheless has no effect. The issue about whether a respondent is in fact bound by the arbitration clause does not concern any vitiating factors and, with respect to Lewison LJ, it is not easy to see why this debate falls within the rubric of whether the agreement is "inoperative" or not.

45. On that basis, Vale in fact bears the burden of proof of showing that BHP was bound by the clause here.

46. All of that said, in my judgment, the outcome of the dispute as to whether BHP is bound does not turn on the incidence of the burden of proof. The result would be the same, either way.

Assessment of the Matter to be referred to arbitration

47. In *Mozambique,* the Supreme Court set out the approach to the determination of the "matter which under the agreement is to be referred to arbitration". Here Lord Hodge stated as follows in his judgment (with which all JSCs agreed):

> "71 In my view there is now a general international consensus among the leading jurisdictions involved in international arbitration in the common law world which are signatories of the New York Convention on the determination of "matters" which must be referred to arbitration. I summarise my understanding of that consensus in the following paragraphs.
>
> 72 First, as I have stated (para 48 above) the court in considering such an application adopts a two-stage process. First, the court must determine what the matters are which the parties have raised or foreseeably will raise in the court proceedings, and, secondly, the court must determine in relation to each such matter whether it falls within the scope of the arbitration agreement [on its true construction].
>
> 73. In carrying out this exercise the court must ascertain the substance of the dispute or disputes between the parties. This involves looking at the claimant's pleadings but not being overly respectful to the formulations in those pleadings which may be aimed at avoiding a reference to arbitration by artificial means. The exercise involves also a consideration of the defences, if any, which may be skeletal as the defendant seeks a reference to arbitration, and the court should also take into account all reasonably foreseeable defences to the claim or part of the claim.
>
> 74. Secondly, while article II(3) of the New York Convention, which requires that the court refer a matter to arbitration, is silent as to the stay of the court proceedings, legislation implementing this provision of

> the New York Convention has generally made express provision for a stay pro tanto. Section 9 of the 1996 Act has done so expressly. The "matter" therefore need not encompass the whole of the dispute between the parties.
>
> 75. Thirdly, a "matter" is a substantial issue that is legally relevant to a claim or a defence, or foreseeable defence, in the legal proceedings, and is susceptible to be determined by an arbitrator as a discrete dispute. If the "matter" is not an essential element of the claim or of a relevant defence to that claim, it is not a matter in respect of which the legal proceedings are brought. I agree with the statement of Sundaresh Menon CJ in para 113 of *Tomolugen* that a "matter" requiring a stay does not extend to an issue that is peripheral or tangential to the subject matter of the legal proceedings. I agree with Foster J's third proposition in *WDR Delaware* that a "matter" is something more than a mere issue or question that might fall for decision in the court proceedings or in the arbitral proceedings.
>
> 77. Fourthly, the exercise involving a judicial evaluation of the substance and relevance of the "matter" entails a question of judgment and the application of common sense rather than a mechanistic exercise. It is not sufficient merely to identify that an issue is capable of constituting a dispute or difference within the scope of an arbitration agreement without carrying out an evaluation of whether the issue is reasonably substantial and whether it is relevant to the outcome of the legal proceedings of which a party seeks a stay whether in whole or in part. In so far as the summary of the law in *Sodzawiczny*, if read by itself, may suggest otherwise, it is in error.
>
> 78. The existing jurisprudence also supports a fifth point. There may not yet be a consensus on this matter, but common sense lends further support. When turning to the second stage of the analysis (para 48 above), namely whether the matter falls within the scope of the arbitration agreement on its true construction, the court must have regard not only to the true nature of the matter but also to the context in which the matter arises in the legal proceedings."

48. I have added the words "[on its true construction]" at the end of Lord Hodge's paragraph 72 because that is how he put it in his paragraph 48, to which paragraph 72 makes reference.

49. The point made about context in paragraph 78 of the judgment was a reference to the decision of Blair J in *Autoridad del Canal de Panamá v Sacyr SA* [2017] EWHC 2228 (Comm) ("*ACP*"), which Lord Hodge then discusses at paragraphs 79-80. He then notes with approval two particular aspects of ACP:

> "84 As I have said, the Republic has since conceded that the IFA assertion and the resulting UMIFA claim fall within the scope of the arbitration agreement in relation to each supply contract and it is no longer pursuing those claims in this action (see para 33 above). A claimant is entitled to decide on which of several available claims it wishes to pursue in a litigation: see Autoridad del Canal de Panamá, paras 137(4) and 138.
>
> 93 One must have regard to the substance of the controversy between the Republic and Privinvest in order to render ineffective the artificial manipulation by a claimant of its pleadings to circumvent an arbitration agreement which covers that substance: Lombard North Central para 14; Autoridad del Canal de Panamá, para 128…"

50. It is worth recalling that in *Mozambique* itself, the Supreme Court held that the relevant matters in issue did <u>not</u> fall within the clause. Those matters concerned claims that the Republic was not bound by certain sovereign guarantees, and for compensation for bribery and conspiracy to injure the Republic by unlawful means, dishonest assistance, knowing receipt and a proprietary claim. Standing back, the Court was of the view that none of the claims turned on the validity or otherwise of the underlying supply contracts which contained the arbitration clause. See paragraphs 81-98 of the judgment. Lord Hodge then went on to hold that the matters which were in issue did not fall within the clause. It is plain from his judgment that the assessment of the relevant matters requires a careful analysis of the substance of the claims and the putative (or, as in our case, the actual) defence.

THE SHA

51. The SHA contains the following material terms, which are referred to hereafter in this judgment:

> "2.1 Subject to the terms and conditions of this Shareholders' Agreement, the Shareholders agree to adopt, or to direct SAMARCO to adopt, as the case may be, the following measures necessary to operate SAMARCO:…
>
> (iii) to implement the corporate governance of SAMARCO, under the terms and conditions provided in Chapter IV below;
>
> 4.1 SAMARCO shall be administered by suitably qualified professionals, with appropriate extensive management experience.
>
> 4.2 SAMARCO shall be administered by a Board of Directors elected by the Shareholders at a general shareholders' meeting and by an independent Executive Board elected by the Board of Directors of SAMARCO…
>
> 4.15 The Board of Directors of SAMARCO shall elect the Chief Executive Officer of SAMARCO, who shall be a suitably qualified manager with appropriate extensive management experience. The Chief Executive Officer shall not have any employment or professional relations with either of the Shareholders or their Affiliates.
>
> 4.16 The Executive Board of SAMARCO shall be independent. The Chief Executive Officer shall select and submit for confirmation by the Board of Directors of SAMARCO the names of up to four other candidates to be Executive Officers, who, together with the Chief Executive Officer, shall form SAMARCO's Executive Board. Each of the Executive Officers of SAMARCO shall have suitably appropriate extensive management experience and shall not have any employment or professional relations with either of the Shareholders or their Affiliates .
>
> 5.1 The Shareholders, agree that the following issues, as they relate to the Group will depend on the approval by Shareholders representing at least sixty (60%) plus one share of SAMARCO's voting shares present at a duly called meeting to decide such matters (Supermajority Vote List I):
>
> (i) issuance of debentures, subscription bonuses and securities, any of which may be convertible into stock or redeemable by the holder;
>
> (ii) entering into financial transactions, either as a borrower or a lender, which are not contained in the then-current Budget, for aggregate amounts greater than US$25,000,000 (which amount shall be adjusted annually based on the US Consumer Price Index);
>
> (iii) equipment procurement (including leases and rentals) where the value of the transaction is in excess of the then-current Budget by more than US$1,000,000 on an individual basis and by more than US$10,000,000 on an annual aggregate basis (which amounts shall be adjusted annually based on the US Consumer Price Index);…
>
> (xiii) approval of technical matters, such as ore reserves, mine data, processing capacity and equipment functionality;
>
> 9.3.4 Whenever a Deadlock occurs in relation to technical matters, such ore reserves, mine data, processing capacity, equipment functionality and procurement or the weighted cost of capital for determining the Hurdle Rate, they shall be settled by the determination of an independent technical expert appointed by the Shareholders under an arbitration process.
>
> 9.3.5 Whenever a Deadlock occurs in relation to matters contained in Supermajority Voting List 1 which does not result in the occurrence of a Trigger Event, the matters shall be settled through the arbitration process set forth in Chapter XI.

11.1 Subject to Clause 9.17, any dispute, controversy or claim regarding the technical matters referred to in Clause 9.3.4 and the Supermajority matters referred to in Clause 9.3.5, as well as the breach, termination or validity of this Shareholders Agreement, including the validity of the Deadlock, which are not successfully resolved shall be finally settled by arbitration. The arbitration shall be conducted in accordance with the Rules of the International Chamber of Commerce in effect at the time of the arbitration, except as they may be modified herein or by mutual agreement of the Shareholders. The arbitration shall be conducted in Rio de Janeiro, Brazil, and it shall be conducted in the English language, with simultaneous translation into Portuguese, unless otherwise agreed between the Shareholders."

12.1 Notwithstanding the situations presented herein that are covered by arbitration, the Shareholders agree that in case there is sufficient legal justification (applying the concepts of fumus boni iuris and periculum in mora) they may request the specific performance of the obligations herein contracted, as per article 118, third paragraph, of the Corporations Law. In such cases Brazilian law shall be applicable and the Courts of the City of Rio de Janeiro, Brazil, shall have jurisdiction.

12.2 Notwithstanding the previous Clause, an injured Shareholder shall also have the right to seek damages from the defaulting Shareholder, and the Shareholders recognize that the payment of such damages does not constitute a fulfillment of the shareholders obligations contracted hereby."

THE EXPERT EVIDENCE

Introduction

52. Two questions were posed for the experts to address, namely:

(1) "What principles of Brazilian law are relevant to interpreting the scope of an arbitration clause?" and

(2) "Under Brazilian law, can an arbitration clause in a written contract signed by two companies bind non-signatory companies related to the direct signatories? If so, under what circumstances?"

53. I would make the following general observations:

(1) I think that at the end of the day, the differences between the experts were largely ones of emphasis; moreover, I do not think that my determination of the issue as to whether BHP is bound by the arbitration clause, and the proper interpretation of the clause itself, turned very much on the differences between the experts;

(2) All of the materials referred to were in Portuguese and so had to be translated; I suspect that some of the nuances in the original materials were not wholly reflected in the translation;

(3) The amount of relevant Brazilian case-law (where there is no strict doctrine of precedent) was limited; both experts cited extracts from text-books but in the absence of the citation of relevant cases on certain topics, I found those other materials to be of limited value.

54. As to the experts themselves, both are obviously highly experienced and respected lawyers; both hold numerous senior academic posts as well as being well-known practitioners and

arbitrators; neither party suggested that one expert was better qualified than the other. Vale suggested that Professor Schreiber was partisan, but I saw no evidence of that. Insofar as I take a particular view of one expert's evidence in relation to any given topic, I shall deal with that in context below.

Principles of Interpretation of Arbitration Clauses

55. First, both experts agree that the general principles of contractual interpretation apply to arbitration clauses.

56. The two key provisions here are Articles 112 and 113 of the Civil Code. As taken from Professor Schreiber's report, they are as follows:

> "Article 112: the statements of will shall comply more with the intention therein than with the literal meaning of the language.
>
> Article 113. Contracts must be interpreted in accordance with good faith and the usages of the place where they were entered.
>
> Paragraph 1. The interpretation of contracts should attribute to them the meaning that:
> I – is confirmed by the behaviour of the parties subsequent to the execution of the contract;
> II – corresponds to the uses, customs and practices of the market regarding the type of contract;
> III – corresponds to good faith;
> IV – is more beneficial to the party that did not write the provision, if identifiable; and
> V – corresponds to what would be the reasonable negotiation of the parties on the matter discussed, inferred from the other provisions of the contract and the economic rationality of the parties, considering the information available at the moment of its execution.
>
> Paragraph 2. The parties may freely agree upon rules of interpretation, filling of gaps and integration of contracts different from those set forth in law."

57. In Lee 1, and as translated, Article 112 is described thus:

> "Art. 112. In declarations of will, more attention will be paid to the intention embodied in them than to the literal meaning of the language"

58. I am sure that this translation of Article 112 is in substance the same as that given by Professor Schreiber. However, I think that this second translation is easier to follow. It is common ground that "declarations of will" or "statements of will" are simply references to a contract.

59. In Lee 1, Professor Lee said that the effect of Article 112 was that if there was a doubt as to the purpose of the contract, the judge must not rely on the literal meaning of the written language; on the contrary, the judge must investigate the expressed will of the contracting parties in order to understand their real intention and give it a legal meaning. In explaining this provision in cross-examination, Professor Lee's evidence was not always clear. But I think that in the end, he accepted that in the exercise of interpretation mandated by Article 112, it was of course necessary to consider the express words of the relevant provision. They were not simply to be jettisoned. But one looks to the overall intention of the parties as disclosed in the contract as a whole; if that pointed to an interpretation different from one which is connoted by focusing only on the literal words of the relevant provision, the former meaning will be ascribed. In other words, there must be a contextual analysis.

60. For his part, Professor Schreiber agreed, in my view, with that analysis; see paragraph 17 of his report. However, he also said that although the text may allow for different interpretations (which is where Articles 112 and 113 come in) one could never adopt an interpretation which

is beyond the "possible" interpretations of the relevant provision. Professor Lee disagreed with this, but I think it is all a question of emphasis. I saw Professor Schreiber's point as really applying where the suggested meaning proffered by an examination of the contract as a whole was completely inconsistent with or contradicted the language of the provision at issue and went beyond any possible interpretation of the words. But in such a case (which I think would be extreme) it could properly be said that there was no proper Article 112 contextual analysis at all. Moreover, in any given case, it might be difficult to ascertain a clear overall contractual intention which was so completely at odds with the language used.

61. As for Article 113, there was a debate as to which of its elements if any, had primacy over the others. Professor Lee was asked about the role of good faith here, on which he placed a great deal of emphasis. This was in the context of his evidence that within Article 112 and 113, there was a hierarchy of different interpretive tools with good faith coming up at the top. However, he accepted that this hierarchy was not stated anywhere within the Civil Code itself; it was just his understanding. He said that the hierarchy in Article 113 consisted of good faith but also the party's performance of the contract. He suggested that there was a connection because of Article 422 of the Civil Code which states that parties must perform their contracts with good faith, but I thought this connection was somewhat stretched. I did not, for myself, see any particular hierarchy within the individual Article 113 factors, but for present purposes, I do not think this matters.

62. There was more of an issue between the experts which arose from Professor Schreiber's suggestion that in the context of arbitration agreements, the courts would take a restrictive approach to their interpretation because an arbitration agreement was excluding the right of a party to seek access to justice in the usual way from the court. Here, he relied upon Article 114 which provides that:

> "benefic contracts and waivers shall be interpreted in a strict manner"

63. He also relied upon a passage from Professor Carmona's book on Arbitration Law, 3rd edition, as follows:

> "[n]othing prevents the arbitration clause from covering only certain issues relating to the legal relationship between the parties. In other words, the contracting parties have the power to limit the issues (possible and future) that will be submitted to arbitration, and it is certain that the arbitration clause must be interpreted restrictively. If the contracting parties say that any dispute over the quality of the products they sell will be submitted to arbitration, it will not be possible to submit disputes over the interpretation of a contractual clause to arbitration, let alone a dispute over the fulfillment of other contractual obligations."

and in particular the sentence underlined (by me).

64. In Lee 2, Professor Lee disagreed. He said that Article 114 did not apply to arbitration clauses where, in effect, while the parties had agreed to give up one adjudicative process (i.e. the court) they had been able to use another (i.e. arbitration). He also pointed out that the 4th edition of Professor Carmona's book (published in July 2023) had in fact removed the section which I underlined. While Professor Lee had included some extracts from the 4th Edition in Lee 1, this part of the book was not included. Although the 4th Edition was actually available before Professor Schreiber wrote his report, he had not actually looked at it. It was therefore a simple oversight on the part of Professor Schreiber not to refer to the 4th Edition and nothing more than that.

65. However, Professor Lee went on to say positively that not only was there no restrictive interpretation, it was in fact the case that there should be a wide interpretation. See paragraph 46 of Lee 2. In this context, he refers to a different part of Professor Carmona's book which says this:

> "Broad expressions such as "disputes related to a certain contract" or "disputes arising from a certain legal relationship" tend to cause interpretative doubts about the objective scope of the arbitration agreement. These doubts, in my opinion, should be resolved in favour of arbitration. Those who agree to arbitration to settle disputes are not, in principle (unless they are acting with mental reservation) imagining slicing up the dispute in order to submit part of the claims to the arbitrator and part of the Judiciary. In the absence of a clear exclusion, the interpretation of the agreement must involve the entire legal relationship."

66. I see that, but on the other hand, the earlier passage from a different part of Professor Carmona's book stated that parties to arbitration agreements can choose what to render arbitral and what not; see the passage quoted at paragraph 63 above.

67. Moreover, there are no actual cases cited in support of the principle of wide interpretation in the relevant footnote 32 to Lee 1.

68. In my judgment, the expert evidence does not establish a clear rule under Brazilian law to the effect that arbitration clauses should be interpreted widely. As it so happens, even if there was such a rule, it would not make any difference in this case.

69. Finally, I should add that a further issue in relation to this first question of interpretation arose. This was because Professor Schreiber said in his report that in relation to a typical shareholder agreement, the arbitration clause would be interpreted on the basis that what the parties would intend it to cover would be disputes among themselves as shareholders and not claims that may arise between one of them and a third-party.

70. Professor Lee, for his part, did not accept that there was any general rule of law to this effect. Rather, one had to assess each particular case, based on the expressed will of the parties in the specific shareholder agreement in question. One would also apply the general interpretative rules. I think he is right on this point and obviously, parties can add what they wish to a "typical shareholder agreement". It is all a question of the particular context and that is how I shall examine the arbitration clause here.

Non-signatories being bound by arbitration clauses

71. Again, at the end of the day, there was not much between the experts here. Professor Lee had pointed to four cases where the appellate court had held that a party was bound by an arbitration clause even though it was not a signatory to it.

72. The difference between the experts turned on whether those cases showed that it was or would be "highly exceptional" to have third parties bound in this way which is what Professor Schreiber suggested, or not. There was also something of a difference as to what those cases showed would have to be established in order for a third party to be bound.

73. Here, it is necessary for me to consider the facts and findings in each of those four cases.

74. By way of a preface, I should explain that in three of the four cases an arbitration had already taken place and an award had been made against, among others, the third party which was not a signatory to the arbitration clause. The matters came before the courts by way of an appeal from the arbitral award on the basis that the third party was not bound by the clause in the first place.

Trelleborg Industri AB v AEP Sao Paulo State Court of Appeals, 24 May 2006

75. The translation of the brief law report is not always easy to follow but the key facts would appear to be these: the appellant Trelleborg Industri AB ("TIAB") appealed from an arbitral award whereby it was liable jointly and severally with another Trelleborg company called Trelleborg de Brasil ("TDB") to pay US$4 million to the respondent AEP. AEP had brought arbitral proceedings against TDB and TIAB. AEP had previously sold 60% of its shares in a company called PAV to TDB. It then learned that a parent company of TDB and "a mere extension of TIAB" acquired a different company which competed with PAV. AEP then sought an order that its remaining 40% interest in PAV should be acquired by TDB and TIAB for US$4 million. The point appears to have been that one or more of the agreements concerned with the original acquisition of PAV had an arbitration clause to which TDB was a party, as the purchaser of PAV, but to which TIAB was not. TIAB in fact participated fully in the arbitration and indeed paid some or all of the arbitral award. Its participation in the arbitration was so extensive that the respondent to the appeal before the court suggested that the appeal was now otiose. The arbitrators held that TIAB had participated as an extra party in the letters of intent for the underlying share purchase contract and had sent letters in relation to the negotiation of the purchase of the shares in PAV. Indeed, the English version of the underlying contract included the name TIAB, although the latter did not sign. The arbitrators also held that TIAB was actively involved in the joint business. The Court dismissed the appeal in this regard.

GP Capital v Fernando and others Sao Paulo State Court of Appeals, 26 August 2015

76. The case concerned the sale of a controlling block of shares in a company called Imbra to another company called Almeria, whose ultimate owner was GP Capital. The latter provided the funds for Imbra through intermediary companies which were merely investment vehicles. Documents showed that it was GP Capital that was always on "the business scene". GP Capital executives negotiated the terms of the contract with the defendants and after acquiring control of Imbra, they took over the running of the commercial operation and finally negotiated the sale of the controlling shares in Imbra to another company. As decided in the arbitral award against which GP Capital was appealing, GP Capital was held to be the "true contracting party" and thus subject to the arbitration clause. It had also issued a guarantee for the obligations of Almeria which included liability for any judgment arising from an arbitral award. GP Capital also began to demand that its business development partners, being Imbra and the defendants, all adopt arbitration as a route to resolving corporate disputes. Documents showed that it was the intention of all relevant parties, including GP Capital, to use arbitration as a solution for any disputes which might arise from the multi-party deal. The Court held that GP Capital was the "true contractor"; it was not a question of extending the arbitration clause to it as a non-party. Rather, it really was a party to the arbitration clause in the first place.

Tianda v CCV and Aeroportos Brasil ("AB") Sao Paulo State Court of Appeals, 13 March 2018

77. Here, the Claimant brought a claim in court originally against CCV on the basis that it was the party with whom it contracted for the supply of equipment and materials for an airport expansion project. CCV argued that its role had been taken over by AB and in any event there

was an arbitration clause in the supply contract. AB argued that the court claims against both CCV and it should be dismissed in favour of arbitration even though AB was not a signatory to the contract which included the arbitration clause. In other words, in this case, AB positively wished to be bound by the clause. The Court held that it had to be satisfied that the other parties to the contract consented to AB as a party to the arbitration clause. It was noted here that AB had actively participated in the negotiation of the contract containing the arbitration clauses as the claimant had originally asserted. In addition, the claimant had issued a number of invoices directly to AB which it had paid. For all those reasons, the Court held that AB was indeed bound by the clause.

Fischer v Totalcom and Pro Basil Sao Paulo State Court, 16 September 2019

78. Here, Fischer's parent company Totalcom, the first defendant, had brought arbitration proceedings against Pro Brasil, the second defendant. Pro Brasil succeeded in the arbitration but also obtained an award not only against Totalcom, but its subsidiary Fischer. Fischer appealed that award. The Court dismissed the appeal. It held that Fisher had indeed participated in the actual execution of the underlying contract where it was the principal beneficiary, where the underlying business was operated directly by Fischer and where Fischer was the final recipient of the revenue produced. Further, Totalcom had signed the contract in its capacity as representative of Fischer. It was further agreed that certain payments which were due from Totalcom could be effected by certain credits received by Fischer. The entire commercial relationship of the parties was considered. Moreover, Fisher had authority to negotiate prices and payment conditions. Finally, the arbitration clause itself was very wide. Yet again, therefore, in this case, there was extensive and active participation by the third party in the formation and the performance of the contract.

79. Again, the Court also emphasised that the question was not about extending the arbitration clause to a third party; it was about who the original parties to the arbitration clause actually were.

Analysis of the Four Cases

80. In his report at paragraphs 60 and 61, Professor Schreiber said that what the four cases were about was a "tacit novation" (although they did not express it that way). In cross examination, however, he accepted that there was no formal substitution of the "3rd party" for the "original" contracting party and in fact, in the cases, the "original" party remained as a party to the arbitration. And in *Trelleborg*, for example the actual award was made against both entities jointly and severally. Professor Schreiber said that procedurally, it would actually have been difficult to have excluded the "original" party from the arbitration anyway. However, as I saw it, his main point was that on any view, the third party had, by its actions, fully assumed the role of a party to the underlying agreement. See his paragraph 62. The fact that the "original" party was "still there", as it were, would make no difference to that analysis.

81. In my judgment, Professor Schreiber was entitled to say that the result in the Four Cases was highly exceptional. This was not least because what all of them required for the result was effectively a finding that the so-called third-party was in reality a true party to the arbitration clause from the outset. That is why participation in the original negotiations was so important (along with participation in performance) and was a feature in each of these cases. It does not matter that the stated signatory to the contract is also still a party.

82. Of course, there is no rule of law called "highly exceptional" but what it means in practice, and what Professor Schreiber was in effect saying, was that the Court needs to examine with care a claim that a third party is indeed bound by an arbitration clause, and needs to be satisfied that through its involvement in the negotiation and performance of the underlying contract, it really was a true party to the arbitration clause from the outset.

THE INTERPRETATION OF CLAUSE 11.1

83. First, I restate the key part of Clause 11.1 which I have divided into sections:

> "Subject to Clause 9.17, any dispute, controversy or claim regarding (a) the technical matters referred to in Clause 9.3.4 and (b) the Supermajority matters referred to in Clause 9.3.5, as well as (c) the breach, termination or validity of this Shareholders Agreement, including the validity of the Deadlock, which are not successfully resolved shall be finally settled by arbitration.." [Underlined words added]

Technical Matters

84. The only real dispute as to the interpretation of the words of this provision concern the reference to "technical matters".

85. In my judgment, it is clear, first, that the reference to "the Supermajority matters referred to in Clause 9.3.5" is a reference to the settlement of the Deadlock described in Clause 9.3.5. It is simply picking up the fact that Clause 9.3.5 itself says that such a Deadlock is arbitrable under Clause 11.1. The latter clause does not itself add to the scope of what is arbitrable in relation to that particular Deadlock.

86. The same is true of the reference to "the technical matters referred to in Clause 9.3.4". It is, again, a reference to the settlement of a Deadlock over those matters (and here see also Clause 5.1 (xiii) referred to in paragraph 51 above). It is true that the arbitration provided for in Clause 9.3.4 itself is not, on its face, a Clause 11.1 arbitration, but something less sophisticated. However, that is surely because there might be some issue in connection with one of the technical matters which can be resolved by an expert alone. But if that is not the case, then the Deadlock would be fully resolved by a Clause 11.1 arbitration. Such an outcome obviously fits with the entire scheme for providing a mechanism for the settlement of the various kinds of Deadlock described in Clause 9.3.

87. This is in marked contrast to Vale's contention, which is that any dispute covering any technical matter, of whatever kind, falls within the clause provided it is not due to a Deadlock. Not only would that be a highly abstract coverage, but it would be extremely unlikely to arise, in the eyes of the shareholders when considering, objectively, the scope of the arbitration clause at the time of its making, precisely because what they would be envisaging is how to deal with disputes *inter se* under the SHA. In my judgment, and on the clear wording of this part of clause 11.1, it is obviously speaking of Deadlock matters.

88. However, if this was not clear as a matter of interpretation, then, in my view, it is the result dictated in any event by Article 112, upon a consideration of this part of Clause 11.1 in its full contractual context, including Clause 9.3, in order to derive the parties' contractual intentions. In other words, looked at in context, this part of Clause 11.1 must be seen as part of the overall Deadlock-resolution machinery. This is because the general intention of the parties must surely have been that what was necessary for arbitral resolution, along with claims regarding breach of the SHA itself, are issues over decision-making which are not otherwise resolved by the terms of the SHA itself and Samarco's own governance rules; in other words, Deadlock matters

which do not give rise to Trigger Events. There is nothing in the SHA as a whole which would support the kind of abstract coverage of technical matters which Vale suggests. The points made here and indeed in the preceding paragraph arise out of a consideration of the particular shareholders agreement in issue, i.e. the SHA, and not on the basis of some presumption arising in respect of all shareholder agreements.

89. There is a further point here. Clause 9.3.4 (and indeed the other clause 9.3 Deadlock-relief provisions) is there to enable forward-looking decisions to be made about important aspects of Samarco's business, in other words the planned use of its assets. This can be seen from the type of technical matter referred to in Clause 9.3.4 itself, which includes ore reserves, mine data, processing capacity, procurement and the weighted cost of capital for determining the Hurdle Rate (itself being Samarco's weighted cost of capital in relation to the proposed expansion of operations). On that basis, the collapse of the Dam cannot itself possibly count as a technical matter. This has nothing to do with such business decision-making. It is an event which has taken place after the making of the SHA and as a consequence, or in respect of Samarco's operations. The fact that the fourth amendment caters for the foundation which was to be established as part of the settlement of the Brazilian litigation over the collapse of the Dam is irrelevant; it does not make the Dam's collapse a "technical matter" for the purpose of clause 9.3.4.

90. That outcome does not change even if I were to apply a principle (which I have in fact found is not established under Brazilian law) that one should interpret arbitration clauses widely. That is because it would, in my view, still make no sense to construe this part of Clause 11.1 (and, for that matter, Clause 9.3.4) as encompassing technical matters in the abstract way contended for by Vale.

91. Nor would it make any difference if Article 113 was applied as an interpretive tool and even giving to it the particular emphasis on good faith suggested by Professor Lee.

Breach of the SHA

92. No real issue of interpretation arises here. Clause 11.1 clearly covers disputes regarding breach of the SHA.

Vale's Wide Interpretation of the clause

93. In oral argument, Vale's primary focus was on those parts of the clause which dealt with "technical matters" and breach, in other words looking at the actual language used. This was on the basis that the matters in issue in the Part 20 Proceedings would then be covered by those parts.

94. However, to the extent necessary, Vale also relies upon a very wide interpretation of the clause as a whole, to the effect that any dispute arising out of the relationship between the shareholders was arbitrable. It has to be recognised at the outset that this claimed interpretation bears no relation at all to the words of Clause 11.1. It is not merely that the words used should be interpreted in accordance with the overall intention of the parties, to be found within the SHA as a whole; the language is simply jettisoned entirely, such that the clause is rewritten. Nonetheless, Vale says that there are a number of factors which support this interpretation.

95. First, it says that the language of the clause is expansive because it uses the words "any" disputes "regarding" the matters listed. That point goes nowhere, precisely because the language here is limited to disputes in respect of a number of particular matters. The words do not say, for example, "any dispute relating to or arising out of the SHA.".

96. Vale then relies upon Clause 12.1, set out at paragraph 51 above. However, in my view, what this is all about is simply that the remedy of specific performance is available from the court in connection with the enforcement of particular shareholder obligations. Clause 12.2 then preserves the right to damages. On the assumption that the right to damages arises because of one shareholder's breach of the SHA, I fully accept that this would be covered by Clause 11.1. But I fail to see why Clauses 12.1 and 12.2 thereby imply that any dispute of whatever kind would otherwise fall within the clause.

97. Vale here contends that unless its wide interpretation prevails, there is a danger of disputes which fall outside the words of Clause 11.1 ending up in some kind of "black hole" or "no man's land". I fail to see this. If a dispute is not caught by Clause 11.1, it will be dealt with by the court. The only reason why Vale posits a no-man's land is because it has already concluded that access to the court is limited to specific performance, which is wrong, in my view.

98. Vale then relies on the second recital to the SHA to the effect that the parties wish to contract as to their rights and obligations related to Samarco's operations, and their relationship as shareholders. Vale also refers to the first amendment which contains recitals explaining that the parties signed the agreement in their capacity as controlling shareholders of Samarco. I do not see that these references take the matter any further. It is obvious that the SHA is dealing with the rights of BHP Brasil and Vale as shareholders, hence the title of the agreement. But I fail to see why that should entail this very wide interpretation of Clause 11.1 when in truth, the disputes which the putative parties might reasonably imagine could arise between them concerning the operation of Samarco fall plainly within the actual words of clause 11.1 anyway.

99. The truth is that Vale only needs to allege this wide interpretation if it cannot bring the matters in dispute on the Part 20 Proceedings within the actual wording. I deal with such matters and their coverage or otherwise by the clause below, but the hypothesis here is not simply that the wide interpretation covers any dispute between BHP Brasil and Vale, which are the actual shareholders in Samarco. Rather it is that a different dispute involving claims made by a third party i.e. Mariana and a contingent claim made by an indirect shareholder, i.e. BHP are also covered.

100. In these unusual circumstances I do not accept that the notion that all rational contractors would want to see all and not just some of their disputes covered by the arbitration clause assists Vale here. And of course, as I have already noted, I do not accept that there is established in Brazilian law a principle of wide interpretation of arbitration clauses.

101. In any event, the claimed wide interpretation is simply not justified by reference to the language of clause 11.1 taken in its full contractual context. And again, the application of any heightened notion of good faith would not make any difference here.

102. What follows from this is that if Vale cannot show that the essential matters in dispute in the Part 20 Proceedings are within the "technical matters" or "breach" elements of the actual

language of Clause 11.1, they cannot be "saved", as it were, by some much wider interpretation of the clause.

103. For that reason, I need not consider this supposed wide interpretation further, when it comes to analysing the question of the clauses coverage of the Part 20 Proceedings' disputed matters, because I have rejected this wide interpretation.

THE CONTENT OF AND CLAIMS WITHIN THE RAMPOC

Introduction

104. Vale has no independent case that BHP was bound by the clause, and has adduced no evidence of its own to the effect that it was. Rather, its case is wholly parasitic on what the RAMPOC has alleged about BHP, which such claim is repeated against Vale by reason of the Part 20 Proceedings. Accordingly, Vale's case is that if the allegations made by Mariana are found to be established, then it must follow that BHP was bound by the clause as a matter of Brazilian law.

105. Vale then goes on to say that if BHP was bound in that way, the "matters" arising in the Part 20 Proceedings (in the *Mozambique* sense), and which effectively start with what is alleged in the RAMPOC, fall within the clause. Since both this question and the prior question as to whether BHP is bound depend on an analysis of what the RAMPOC alleges (and does not allege) I first set out below in one place, as it were, a description of the salient points within the RAMPOC including those parts of it upon which Vale specifically relies. Before doing that, I set out the provisions of Brazilian law relied upon by Mariana in support of its claim against BHP.

Relevant Brazilian Law Provisions

106. These are as follows:

(1) **The Constitution**, which contains the following material articles:

> "170 The economic order, founded on the appreciation of the value of human work and on free enterprise, is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice, with due regard for the following principles:
> …
> VI – environment protection, which may include differentiated treatment in accordance with the environmental impact of goods and services and of their respective production and delivery processes …"
>
> "225 All have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations.
> …
> Paragraph 2. Those who exploit mineral resources shall be required to restore the degraded environment, in accordance with the technical solutions demanded by the competent public agency, as provided by law."

(2) **The Brazilian Environmental Law** ("the Environmental Law") which contains the following material articles:

> "Article 3 (II): Environmental quality degradation means adverse change of the characteristics of the environment.

Article 3 (III) Pollution means environmental quality degradation resulting from activities that directly or indirectly:
(a) adversely affect the health, safety and well-being of the population;
(b) create adverse conditions for social and economic activities;
(c) adversely affect the biota;
(d) affect the aesthetic or health environmental conditions;
(e) launch materials or energy in disagreement with the environmental standards established."
provides that:

Article 3 (IV): Polluters means the individuals or legal entities, of public or private law, responsible, directly or indirectly, for activity resulting in environmental degradation."

Article 14 paragraph 1: Without prejudice to the imposition of penalties provided in this article, the polluters are obliged, regardless of the existence of fault, to indemnify or repair the damages caused to the environment and to third parties, affected by their activity. The Public Prosecutor's Office of the Federal Government and of the States shall have authority to file civil and criminal liability action for damages caused to the environment."

(3) **The Civil Code** which contains the following material articles:

"186 A person who, by voluntary act or omission, negligence or imprudence, violates rights and causes damage to another, even though the damage is exclusively moral, commits an illicit act.

187 The holder of a right also commits an illicit act if, in exercising it, he manifestly exceeds the limits imposed by its economic or social purpose, by good faith or good conduct."

275 The creditor has the right to claim and receive from one or more of the debtors, in whole or in part, the common debt; if payment is made in part, all other debtors remain jointly and severally liable for the rest."

927 Anyone who, by an illicit act (Articles 186 and 187), causes harm to another, is obliged to redress it.
(Sole paragraph) There will be an obligation to redress the damage, regardless of guilt, in the cases specified by law, or where the activity usually developed by the wrongdoer involves, by its nature, risk to the rights of others."

932 The following are also responsible for civil reparations:
…III the employer or principal, by his/her employees, servants or agents, in the performance of the work given to them, or by reason of that work."

942 The property of the person responsible for the offense or violation of another's right is liable for redress of the damage caused; if more than one person has committed the offence, all of them shall be jointly and severally liable for the redress.
(Sole paragraph) All those who committed the offence are jointly and severally liable; the persons designated in Article 932 are also jointly and severally liable responsible with those who committed the offence.

944 Indemnification is measured by the extent of the damage.

948 In the case of homicide, the indemnification consists, without excluding other redress:
I - payment of expenses incurred in the victim's treatment, his funeral and the family's mourning;
II – payment of support to the persons to whom the deceased owed it, taking into account the probable duration of the victim's life."

949 In the event of the injury or other offense to health, the offender shall indemnify the offended person for the expenses of treatment and loss of profit until the end of the convalescence, in addition to any other loss that the offended person proves he has suffered."

(4) **The Brazilian Corporate Law** ("the Corporate Law") contains the following material articles:

> "116 A controlling shareholder is defined as an individual or a legal entity, or a group of individuals or legal entities bound by a voting agreement or under common control, which:
> (a) possesses rights which permanently assure it a majority of votes in resolutions of general meetings and the power to elect a majority of the corporation officers;
> and
> (b) in practice uses its power to direct the corporate activities and to guide the operations of the organs of the corporation.
> Sole paragraph. A controlling shareholder shall use its controlling power in order to make the corporation accomplish its purpose and perform its social role, and shall have duties and responsibilities towards the other shareholders of the corporation, those who work for the corporation and the community in which it operates, the rights and interests of which the controlling shareholder must loyally respect and heed.
>
> 117 A controlling shareholder shall be liable for any damage caused by acts performed by the abuse of its power.
> Paragraph 1. An abuse of power may take any of the following forms:
> (a) to guide a corporation towards an objective other than in accordance with its corporate purposes clause or harmful to national interest …
> …
> (g) … to fail to investigate a report of something wrong which he knows, or should know, to be well founded, or which gives grounds for a reasonable suspicion of irregularity."

(5) **The Brazilian Environmental Criminal Law** ("the Environmental Criminal Law") contains material provisions concerning civil liability as well as criminal liability, including in particular Article 4, which provides:

> "A legal entity may be disregarded whenever its legal personality is an obstacle for the compensation for damage caused to the quality of the environment."

107. Mariana adds that under Brazilian law, these statutes and conventions are to be given a purposive construction, having regard to the object of the statute concerned and in particular any relevant provisions of the Constitution.

Relevant parts of the RAMPOC

Background Matters to the causes of action pleaded

108. Paragraph 54 refers to BHP's annual reports and its two assets, one of which is Samarco. Here it says that "We are a 50-50 joint-venture partner with Vale at the Samarco operations in Brazil". Paragraph 58 states that at all relevant times BHP's interest in, and control over Samarco has been exercised through its wholly-owned subsidiary, BHP Brasil, the share capital is now held by direct or indirect subsidiaries of BHP Australia, including, as the largest shareholder, BHP Minerals with 47.08%. Paragraph 59 recites the 50%/50% ownership of Samarco by BHP Brasil and Vale and refers to the SHA as setting out the terms on which Samarco would be operated and controlled as a joint-venture by them.

109. Paragraph 71 says this:

> "**C.2. BHP's control over Samarco**
> 71. Although BHP Brasil is notionally the party to the Samarco Shareholders Agreement together with Vale, as referred to below, it was at all material times BHP that enjoyed effective *de jure* and *de facto* control of Samarco together with Vale through the joint venture governed by the Samarco Shareholders Agreement."

110. Paragraph 72 then sets out a number of terms of the SHA, including as to how Samarco was to be governed by its Board. Paragraph 72.7 refers to the fact that clause 16.7 of the SHA states that any notices required in the case of BHP Brasil should be sent to BHP Australia, copied to BHP Brasil.

111. Paragraph 74 recites that the Samarco Board had an equal number of directors appointed by each of BHP (through BHP Brasil) and Vale. Paragraph 75 points out that a number of the members of the Samarco Board which were appointed by BHP (through BHP Brasil) were those who had occupied senior positions within BHP. Paragraph 77 recites that a number of individuals who worked for BHP were also on various committees within Samarco.

112. Paragraph 83 then says this:

> "It is therefore evident that by virtue of provisions such as clauses 3.7, 4.5, 5.1 to 5.4, of the Samarco Shareholders Agreement and articles 12, 13, 14, 16 and 17 of Samarco's Bylaws, and such matters as the ability to appoint, and the appointments in fact made to the Samarco Board, including those of Mr Randolph and Mr Wilson by BHP, BHP together with Vale controlled Samarco and BHP and Vale were able to require the Samarco Board, its Executive Board and its CEO to act in accordance with their directions."

113. Here, I observe that the point of these references to provisions within the SHA was to show that BHP and Vale were able to control the board of Samarco through the various enabling powers which the SHA gave to BHP Brasil and Vale. In other words, while it was important for Mariana to allege such control, it was no part of its case that such control was illegitimate.

114. Paragraph 91 then stated as follows:

> "91. Further, although BHP Brasil was nominally the shareholder in Samarco, effective control of Samarco through the joint venture with Vale was exercised and enjoyed by BHP through the BHP Boards of Directors, the CEO and the GMC such that:
> 91.1. Appointees to the Board of Samarco were in practice selected for appointment by BHP itself rather than any subsidiary;
> 91.2. Key decisions such as in relation to the approval of major capital projects, including the P4P Project, and other key decisions concerning the Samarco operation (including the Dam and the stability thereof) were made, or at least approved by the GMC, if not also the Boards of Directors;
> 91.3. Key issues in relation to the Samarco operation (including in relation to the Dam and the stability thereof) were referred to and considered by the GMC, if not also the Boards of Directors."

115. Paragraph 92 then set out a number of matters which Mariana relies upon to establish the points it made in paragraph 91. What all of this really boils down to is the assertion that at the end of the day, BHP Brasil was largely driven by BHP in terms of the decisions made by the former in its role as shareholder of Samarco. That is not a particularly remarkable proposition in terms of subsidiaries being directed by their holding companies, but it was important for Mariana to establish this, in the light of its allegations as to the extent of knowledge of and participation in decisions relating to the Dam, which of course was being operated by Samarco.

116. Paragraphs 98 and 99 concerned the vulnerability of the tailing sands, which formed part of the Dam, to liquefaction. There are later references to the risks involved in constructing a tailings Dam using the "upstream" method which is what happened here. Paragraph 113 refers to a design modification for the Dam which created the risk of sound liquefaction. Paragraph 122 refers to the discovery of cracking in 2010.

117. Paragraphs 132-137 referred to the "P4P Project". This involved increasing iron ore production and significantly expanding the Dam. Paragraph 136 stated that while the shareholders in

Samarco had approved this project, the approval had in reality been given by BHP as the ultimate decision-maker in "the Group". It is worth pointing out that this is a reference to the BHP Group and the subsidiaries within it, not to Samarco itself (see paragraph 91 of the RAMPOC set out at paragraph 114 above).

118. Consistent with that, paragraph 138 states:

> "138. As referred to above, reflecting the fact that BHP was the real and effective decision maker in the process, when the expansion of Samarco's operations through the P4P Project was approved in April 2011, BHP issued the press release headed "*BHP Billiton Approves Samarco Expansion*", stating that BHP Billiton had a 50% interest in Samarco."

119. Paragraphs 177 and 178 form an important part of Mariana's allegation that BHP possessed the relevant knowledge, as follows:

> "177. The Samarco Board, including the members thereof appointed by, and representing and holding the positions within BHP, as referred to above, frequently discussed issues affecting the Dam and the stability thereof, including:
> 177.1. The approval, and putting into effect of the P4P Project;
> 177.2. The handling of tailings waste, including the handling of waste resulting from Samarco's increase in production, and the corresponding risk created by the additional waste capacity Samarco's tailings dams were expected to absorb.
>
> 178. Further, as referred to above and as particularised in more detail below, other senior employees of BHP were often in attendance at meetings of the Samarco Board when the above issues in respect of the Dam were considered. Where members of the Samarco Board appointed by BHP (through BHP Brasil) or other employees of BHP attended such meetings, they represented the interests of BHP at such meetings (whatever other roles they may have had), and the knowledge which they acquired at such meetings is to be attributed to BHP. Where individuals are referred to below as attending or participating in meetings "on behalf of BHP" that allegation should be understood in the sense described above."

120. A particular example of BHP's knowledge was given at paragraph 179.5 which refers to a meeting of the Samarco Board on 10 August 2011 where concern was expressed over tailings management. Paragraphs 183 and 184 make the point that representatives of BHP served on Samarco's Operations Committee.

121. Paragraphs 206 and 206A describe the fact and cause of the Dam Collapse. The immediate cause was the saturation and subsequent liquefaction of the sand near the left abutment.

122. I then turn to the causes of action alleged against BHP, pleaded later in the RAMPOC.

Strict Liability as Polluter

123. Paragraphs 269 and 270 explain how this cause of action is pleaded against BHP:

> "269. BHP are polluters within the meaning of Article 3 (IV) of the Environmental Law. In this regard, the Claimants will rely on the matters pleaded in Sections B and C above and in particular the following.
>
> 270. For the purposes of Article 3(IV) of the Environmental Law, a person or legal entity may be treated as responsible, directly or indirectly, for activity resulting in environmental damage not only by reason of its own activity, but also (amongst other things) by reason of ultimate ownership and/or control (either solely or jointly with others) of the entity directly responsible for the damage, by reason of failure to supervise the activity of others which led to the damage, by reason of funding or facilitating the funding of the activity of others which led to the damage, and/or by reason of benefiting from the activity of others which led to the damage."

124. This explains why it was necessary for Mariana to set out in detail BHP's ultimate ownership of Samarco, along with Vale, of the entity "directly responsible for the damage" i.e. Samarco itself, along with a failure to supervise others and benefiting directly from the activity of others (i.e. Samarco). That would all then give rise to a claim for damages pursuant to Articles 927 and 942 of the Civil Code.

Fault-Based Liability

125. This section of the RAMPOC starts at paragraph 282, which provides as follows:

> "282. BHP together with others caused the Collapse by their voluntary act or omission, negligence or imprudence within the meaning of Article 186 of the Civil Code. In this regard, the Claimants will rely on the matters pleaded in Sections B and C above and in particular the following:
>
>> 282.1. Fault-based liability under Article 186 does not depend on establishing that the defendant owed a duty of care to the claimant. Rather, if a defendant causes damage to the claimant by an act which is of a character described in Article 186, and there is no defence under Article 188 (such as that the claimant acted in order to remove an imminent danger), the defendant is liable. However, in any event BHP, by virtue of their ultimate control (together with Vale) of Samarco, owed duties both to protect the environment (under Article 225 of the Constitution, as pleaded above) and to the communities liable to be affected by Samarco's activities (under Article 116 of the Corporate Law, as pleaded below)…"

126. There then follows what might be described as particulars of negligence, which include these allegations:

> "282.3. As pleaded in paragraphs [48]-[49] above, BHP itself recognised that in relation to its subsidiaries' operations (including Samarco) nothing was more important than health and safety…
>
> 282.4. Notwithstanding that recognition, in the period leading to the collapse of the Dam, BHP, notwithstanding its controlling position in respect of Samarco, repeatedly disregarded the advice and warnings, from a variety of sources, all of which pointed towards the Dam posing an increasingly serious health and safety risk, as further pleaded below.
>
> 282.7. BHP further ignored and/or did not take any or any sufficient action to address concerns that were raised at meetings of the Samarco Board. These meetings were all attended as full or alternate members of the Samarco Board by its senior representatives, including Mr Randolph and subsequently Mr Wilson, who were, as referred above, members of and reporting to the GMC. In addition, these meetings were attended by other senior BHP executives such as Mr Raman. The Claimants rely, in particular, upon the following:…
>
> 282.8. Further, BHP through its representatives on the Samarco Operations Committee, including Mr Fernandes, was aware of all the problems, flaws or nonconformities in the Dam brought to the Subcommittee's attention, as pleaded at paragraphs [183] to [196] above, and ignored and/or did not take any or any sufficient action to address the same.
>
> 282.9. The above acts and/or omissions or one or more of them (together with the acts and omissions of others) caused the Collapse."

Liability as Controlling Shareholder

127. Paragraph 284 alleges that BHP was a controlling shareholder of Samarco within the meaning of Article 116 of the Corporate Law on the basis that where two shareholders each have a 50% interest in a company and jointly control it, each is treated as a controlling shareholder; further, associated with Article 116 establishes that for its purposes, a legal entity which has either *de facto* or *de jure* control over a company can be treated as a controlling shareholder of that company.

128. Paragraph 285 then says that the duties and/or responsibilities of a controlling shareholder under Article 116 include a duty to pay heed to the interests of the community in which the controlled company operates and to take particular care to ensure that the community is not damaged, and a duty not to permit activities involving a significant risk of substantial damage to the community. Paragraph 286 then says that the collapse resulted from a breach by BHP of those duties because of the matters pleaded at paragraph 282, but also by permitting the Dam to be constructed as an upstream dam and increasing its height.

129. There is then a further or alternative plea alleging abuse of power on the part of BHP in its position as controlling shareholder, within the meaning of Article 117. Such an abuse is constituted where the controlling shareholder exercises its power in a way which manifestly exceeds the limits imposed by its economic or social purpose, by good faith or by good conduct. Here, it is alleged that BHP's abuse of power consisted in its permitting the Dam to be constructed as an upstream dam, and increasing its height, which involved a significant risk of catastrophic damage (see paragraph 1 (a) of Article 117), and in repeatedly failing to take any or any sufficient action to investigate or respond to repeated warnings that the safety of the Dam was being compromised (see paragraph 1 (g) of Article 117).

IS BHP BOUND BY THE CLAUSE?

130. The essential thrust of the allegations made against BHP by Mariana which are relevant here, and as set out above, is that BHP was aware of the risks posed by the construction of the Dam and its expansion. It was so aware because of its representatives who sat on the Board and other committees of Samarco. It was able to, and did direct BHP Brasil, its indirect wholly-owned subsidiary. Everything it knew or did was through the medium of BHP Brasil.

131. Here, it is important to recognise that Mariana is not alleging that BHP itself controlled Samarco. Rather it is that BHP controlled BHP Brasil which was the shareholder in Samarco, along with Vale. Hence the numerous references in RAMPOC to BHP <u>acting with Vale</u> in relation to Samarco.

132. Nor is Mariana alleging that BHP was the "real" shareholder in Samarco in place of BHP Brasil. I say that, despite the fact that at paragraph 71 of the RAMPOC, Mariana refers to BHP Brasil as the "notional" shareholder in Samarco. The remainder of that paragraph is important because it states that BHP, together with Vale, enjoyed *de facto* and *de jure* control of Samarco through the SHA. The same observation can be made about paragraph 91 of the RAMPOC.

133. However, what the RAMPOC does not allege is that BHP itself performed the SHA *qua* shareholder of Samarco, either by itself in place of BHP Brasil, or alongside it. Mariana simply did not need to. It is enough, on Mariana's case on the law and the facts, for it to allege that BHP was a controlling shareholder in BHP Brasil as a matter of Brazilian law, and that through BHP Brasil's role as shareholder of Samarco, BHP had the knowledge and involvement that it did. The fact that BHP, as a "topco" was involved in key decisions about Samarco which would be made through its subsidiary, BHP Brasil, along with Vale, does not alter that conclusion.

134. Nor does Mariana allege that BHP was involved in the underlying negotiations of the SHA. Here, Vale contends that an inevitable result of Mariana's allegations must be that BHP did participate in the negotiation of the SHA, and its four amendments. That may or may not be so, but it forms no part of Mariana's allegations.

135. Indeed, this latter point highlights one of the problems with Vale's approach, which is its failure to mount a positive case of its own as to BHP being bound by the clause. The fact that the Part 20 Claim is itself a contingent one, did not prevent Vale from presenting its own case and evidence that BHP's involvement with Samarco and its activities were such as to render it bound by the clause. As Vale has chosen not to do so, the court is strictly limited to what Mariana has alleged that could be relevant to this issue.

136. Vale also points to Clause 16.7 of the SHA, pleaded by Mariana at paragraph 72.7 of the RAMPOC, whereby relevant notices were to be given to BHP Brasil at the address of BHP Australia. But again, I fail to see why this suggests that BHP was somehow performing the SHA in place of or additional to BHP Brasil.

137. I therefore do not consider that this is a case where BHP has acted "as a *de facto* contracting party and being subject to the rules governing that contract" as Professor Lee put it at paragraph 73 of Lee 2. Everything BHP did, it did through BHP Brasil as the actual contracting party.

138. In all those circumstances, I find it impossible to see how this case is analogous to any of the four Brazilian cases where an entity was found to have been bound by the clause.

139. Accordingly, BHP is not bound by the clause. Although, for the reasons given above, I consider that this is a s9(1), rather than a 9(4) question, in practice here it makes no difference which it is. This is because, even if BHP bore the burden of satisfying me that it was not bound by the clause, I would hold that it has done so.

140. That being the position, the s9 application must fail at this point. However, lest I am wrong in my conclusion here, I proceed to deal with the position if BHP <u>was</u> bound.

141. Here, and following *Mozambique*, two questions arise:

    (1) What are the essential matters in issue in the Part 20 Proceedings? and

    (2) Do all or any of those matters fall within the clause?

142. I now deal with those questions.

<u>WHAT ARE THE ESSENTIAL MATTERS IN ISSUE IN THE PART 20 PROCEEDINGS?</u>

The position in relation to the allegations within RAMPOC

143. This is the necessary starting point for a consideration of the matters raised by the Part 20 Proceedings, since the latter are contingent on Mariana succeeding on the matters alleged in the main proceedings. I have set out above the salient allegations made in the RAMPOC.

144. Given my interpretation of Clause 11.1 itself, set out at paragraphs 84 - 102 above, a particular focus of the enquiry here, as to the matters raised in the main proceedings and in the Part 20 Proceedings, will be the extent to which those matters concern breaches of the SHA and also technical matters.

145. I deal with technical matters first. There can be no doubt that the RAMPOC raises disputed issues as to the responsibility for and the cause of the Dam Collapse. As a matter of common parlance (although not as a defined term) these obviously concerned technical matters. How far that takes Vale in terms of arbitrability I discuss below.

146. On the question of breach of the SHA, this is an allegation entirely absent from the RAMPOC. That is hardly surprising since, on any view, Mariana is not a party to the SHA so it could have no claim against anyone for breach of it. However, Vale contends that breach of the SHA is implicit within Mariana's case under the RAMPOC in two respects; first, the operational independence of Samarco, and second, in relation to Vale's implied duty of good faith within the SHA. In both cases, the putative breach of the SHA is said to have been committed by Vale. To consider this, it is necessary, first, to examine the relevant parts of BHP's Amended Defence and also Mariana's Reply.

BHP's Amended Defence and Mariana's Reply in the main proceedings

147. It is worth pointing out that, as one might expect, given the length of the RAMPOC, the Amended Defence is itself a lengthy and detailed document running to some 219 pages. The vast majority of its content is related to substantive matters of law and fact concerning the collapse of the Dam and BHP's responsibility for it (or not), by reference to the three causes of action pleaded against it. Only a few parts of the Amended Defence are relied upon by Vale for present purposes.

148. Paragraph 20 of the Amended Defence, as part of the summary of this statement of case, says that Samarco's Board of Directors represented the "governance tier" of Samarco's operations. The Executive Board and management team (comprised of Samarco employees) represent the management tier. The Executive Board was required to be independent of the Board of Directors.

149. Paragraph 102 of the Amended Defence is headed "BHP's alleged control over Samarco". Paragraph 102 (6) denies, if alleged, that BHP, whether itself or with Vale exercised effective control over Samarco's day-to-day operations saying that this was the responsibility of the Executive Board and management. See also paragraphs 78 (3)-(4) to the same effect.

150. Paragraph 103 has the sub-heading "Corporate governance of Samarco". Here, BHP relies on a number of provisions of the SHA relating to the Board of Directors and decisions made by Samarco, voting rights and so on. Paragraphs 104 and 105 deal with other aspects of the SHA as a response to what had been pleaded by Mariana in the RAMPOC.

151. Paragraph 114 does not admit paragraph 83 of the RAMPOC. In particular, it says that BHP had never controlled Samarco and never required its Board of Directors, an Executive Board or CEO to act in accordance with its directions.

152. Paragraphs 308, 317, 336 and 338 effectively repeat the above points, but now in the specific context of the causes of action pleaded in the RAMPOC. BHP's detailed answer to those pleaded causes of action is set out in paragraphs 283-340 of the Amended Defence.

153. Mariana's Amended Reply consists of 49 pages. It is worth citing in full two parts of paragraph 10, which respond to paragraph 20 of the Amended Defence:

> "10.2. It is denied that Samarco either is or was "operationally independent" in the natural and ordinary meaning of those words. As pleaded in paragraphs 71-92 and 275-278 of the RAMPOC, at all material times BHP together with Vale has exercised ultimate control over the activities of Samarco, and BHP representatives were involved in the management of Samarco including in relation to the operations and decisions which ultimately led to the Collapse.
>
> 10.3. Even if Samarco was a "non-operated joint venture" and was "operationally independent" (whatever those expressions may mean in relation to Samarco):
> 10.3.1. As a de facto joint venture partner in relation to Samarco, and for the reasons set out in RAMPOC paragraphs 270 to 281, BHP was and is responsible for the activity of Samarco resulting in environmental degradation, within the meaning of Article 3(IV) of the Environmental Law.
> 10.3.2. BHP owed duties in relation to Samarco of which it was in breach, as pleaded in the RAMPOC and further pleaded below."

154. Vale relies in particular on paragraph 10.2, as demonstrating that there is an issue over whether Samarco was or was not operationally independent. I see that, although Mariana goes on to say, in paragraph 10.3, that even if Samarco was operationally independent, BHP was still responsible as a *de facto* JV partner. Paragraph 10.3.2 refers to BHP's duties "in relation to Samarco" of which it was in breach. It is plain that the breaches of duty referred to here are <u>not</u> breaches of the SHA, but rather breaches of duty which form part of the causes of action pleaded against BHP, as searches for the term "breach" within the Amended Reply reveals. Indeed, Vale does not suggest otherwise.

155. I do not accept that an essential or substantial matter arising from the RAMPOC is some subversion by BHP of Samarco's operational independence, but even if that were the case, it does not follow that an essential or substantial matter is any breach of the SHA. If one looks simply at the main proceedings as a whole, not only is breach of the SHA not alleged but it cannot seriously be suggested that any implicit breach which might be entailed by the dispute over Samarco's operational independence constitutes a substantial or essential matter in dispute in the *Mozambique* sense.

156. However, Vale also relies upon a second kind of breach of the SHA. This is of the implied duty of good faith. Vale argues that the "controlling shareholder" causes of action pleaded against by Mariana (and resisted by BHP) would, if successful, necessarily involve a breach of good faith on the part of Vale. This is because of Article 422 of the Civil Code which requires parties to perform their contracts with good faith. The same result would obtain if BHP were guilty of abuse of power under Article 117.

157. For present purposes, let it be supposed that Vale is correct about a possible entailed breach of its duty of good faith. The fact remains that Mariana has not alleged any such breach of duty of good faith, yet again, unsurprisingly, because no relevant contractual duty could have been owed to it. The fact that a breach of the duty of good faith might in theory arise if Mariana's allegations under Articles 116 or 117 succeeded does not mean that this is an essential issue within the main proceedings. It plainly is not. Nor is it the case that the main proceedings are "really" or "in truth" really about a breach of the contractual duty of good faith.

158. It follows from all of the above that there is, in my judgment, no question of breach of the SHA arising as an essential matter in the main proceedings. That, however, is not the end of the analysis because it is necessary to see if the position is different, once the Part 20 Proceedings themselves are considered.

The Part 20 Claim

159. The Part 20 Claim alleges that if, contrary to some or all of BHP's Amended Defence in the main proceedings, it is held to be liable to Mariana, then it seeks contribution from Vale since Vale would also be liable to Mariana on the same or similar factual and legal bases.

160. In seeking such contribution, BHP relies on the facts and matters alleged in the RAMPOC and also in particular that:

(1) From 2001 to 2015 (and to date) Vale directly held 50% of the share capital of Samarco, appointed 4 members of Samarco's Board of Directors (2 full and 2 alternate members) and also appointed others. These appointees included Vale's Executive Officers in charge of the Ferrous Minerals (or Bulk Materials) division and other senior Vale executives;

(2) Between 2008 and 2015 Vale's Board of Directors appointed Executive Officers to Vale's Executive Board, including a CEO. Between 2008 and 2015, Vale reported on its businesses in its Annual Reports and Forms 20-F under several 'lines of business'. Samarco's activities fell under Vale's "Ferrous Minerals" or "Bulk Materials" lines of business, within the "Iron Ore" sub-division;

(3) Therefore, the allegations in the RAMPOC against BHP regarding control of Samarco, knowledge of alleged risks relating to the Dam, and alleged failures to take sufficient action to address the alleged risks, would also apply to Vale;

(4) If, by reason of these and other allegations in the RAMPOC, BHP was held to be liable to the Claimants, then Vale would also be liable with BHP under Brazilian law (a) as polluters under the Environmental Law (i.e. Strict Liability); (b) for acts and/or omissions pursuant to the Civil Code and/or the Constitution (i.e. Fault-Based Liability); and/or (c) for acts and/or omissions regarding the 'controlling shareholder' claim (i.e. Controlling Shareholder Liability;

(5) Accordingly, if BHP was held liable to the Mariana, then Vale would be liable to contribute to 50% or more of any sums payable to the Claimants by BHP pursuant to Articles 275, 283 and 942 of the Civil Code. There is no independent claim for a contribution based on any contractual or other provision as between BHP on the one hand, and Vale on the other.

161. As with the RAMPOC, there is no pleaded allegation of breach of the SHA as against Vale. Nor is there any relevant allegation of breach necessarily implicit in the Part 20 Claim, for the same reasons that I found none was implicit in the RAMPOC.

162. But as with the RAMPOC, I accept that the Part 20 Claim does raise technical matters in a broad sense.

163. I therefore turn to the Part 20 Defence.

The Part 20 Defence

164. In this case, the Court is in the fortunate position of having a fully pleaded defence from the party seeking to invoke the arbitration clause, namely Vale's Part 20 Defence which has been

filed without prejudice to its position that the proceedings should be stayed. So this is one of those cases where it is not necessary to divine what the defence is going to be, once filed or to consider what defence could "foreseeably arise" on the claim.

165. That being so, it is possible to analyse the various parts of the Part 20 Defence which expressly raise the applicability of the arbitration clause so that one can consider what substantial matters are in issue in the Part 20 Proceedings as a result of what is said in the Part 20 Defence.

166. I turn first to paragraph 40. This is the response to paragraph 50 of the Part 20 Claim which alleges that if BHP are found liable to Mariana by reason of the allegations in paragraph 206-251 of the RAMPOC regarding the collapse, release of tailings and the effects of the tailings on water quality and consequential impacts on Mariana, Vale would also be liable in respect of the same damage. As to this:

(1) Vale says at paragraph 40.1 that the main causes of the collapse were the three earthquakes which took place within 4 minutes of each other and 90 minutes before the Collapse;

(2) Paragraph 40.2 denies that the collapse was caused by a series of failures and/or modifications in the Dam's original design;

(3) Paragraph 40.3 then denies that other physical factors (as alleged against BHP in paragraph 206 of the RAMPOC) did in fact cause or contribute to the Collapse;

(4) Paragraph 40.4 then says this:

> "The facts and matters averred at paragraphs 40.2 and 40.3 above concern technical matters regarding Samarco's operations and/or mining activities, which fall within the scope of an arbitration clause as follows:
> (a) Vale, BHP Brasil and Samarco are parties to the Samarco Shareholders Agreement, which governs the relationship between the shareholders of Samarco.
> (b) Pursuant to Clause 15.1, the Samarco Shareholders' Agreement is governed by Brazilian law.
> (c) Pursuant to Clauses 5.1(xiii), 9.3.4, 9.3.5 and 11.1 of the Samarco Shareholders' Agreement, "*any dispute, controversy or claim regarding the technical matters*" concerning Samarco's operations and/or mining activities shall be referred to arbitration in Brazil in accordance with the Arbitration
> Rules of the ICC.
> (d) As a matter of Brazilian law, BHP is bound by Clause 11.1 of the Samarco Shareholders' Agreement (which is governed by Brazilian law under Clause 15.1).
> (e) BHP's commencement of the Part 20 Claims regarding technical matters regarding Samarco's operations and/or mining activities is accordingly a breach of Clause 11.1 of the Samarco Shareholders' Agreement. All of Vale's rights in respect of the same are expressly reserved.
> (f) Further, as stated at paragraph 1 above, this Part 20 Defence is filed without prejudice to Vale's application seeking a stay of the Part 20 Claims under s.9 of the Arbitration Act 1996."

167. I deal with such technical matters and their coverage or otherwise by the arbitration clause in context, below.

168. The next relevant passage in the Part 20 Defence is paragraph 63. Here, Vale is responding to paragraph 56 of the Part 20 Claim. This in turn refers to the allegations in paragraphs 275 and 276 of the RAMPOC to the effect that BHP exercised "ultimate control together with Vale"

over Samarco's activities. The point of that allegation, as can be seen from paragraphs 277 and 278 of the RAMPOC, and as already noted, was that because of BHP's involvement in the management of it had direct knowledge of the various risks of catastrophic damage to the Dam. BHP states that if it was found to have exercised such control, then Vale would have done so, as well.

169. Vale denies that it had such control. It also (for the purpose of knowledge of the risks) alleges that had it possessed such control, this would have constituted a breach of the SHA because Clauses 2 (iii), 4.2, 4.15 and 4.16 (see paragraph 51 above) are to the effect that Samarco and its Board should be acting independently. Vale then goes on to say that it was not in breach of the SHA in this way, but that this denial by itself entails a dispute governed by the arbitration clause because of the putative breach of the SHA.

170. I regard this as highly artificial. Mariana is alleging that BHP exerted ultimate control over Samarco for the purpose of showing knowledge of the risks to the Dam. Neither Mariana nor BHP allege breach by Vale of the SHA. If all Vale means to say here is that it would not have exercised ultimate control over Samarco because if it did it would have been in breach of the SHA, and so that is a reason for saying it did not in fact exercise ultimate control, that is perhaps unobjectionable. But it cannot possibly amount to a dispute between BHP and Vale (or Samarco) concerning a breach of the SHA.

171. Paragraph 70 of the Part 20 Defence responds to BHP's allegation at paragraph 63 of the Part 20 Claim that if BHP was found liable to Mariana because it caused the collapse of the Dam by reason of its voluntary acts or omissions or negligence, then such acts would be attributable to Vale as well, which would then render it equally liable to Mariana. Vale provides a substantive response to this at paragraphs 70.2 and 70.3. Paragraph 70.4 then says that BHP's allegation is again premised on the fact that it exercised ultimate control over Samarco along with Vale. Then, paragraph 63.3 of the Part 20 Defence is relied upon again. But in my view, the reliance upon the arbitration clause here fares no better than it did under paragraph 63.3 itself.

172. Paragraph 77 of the Part 20 Defence responds to paragraph 70 of the Part 20 Claim, which refers to Article 116 of the Corporate Law, which I cited at paragraph 106(4) above. Mariana's argument here was that BHP was liable for decisions regarding the Dam including permitting the Dam to be constructed as an upstream dam and for permitting Samarco's activities. BHP alleges, contingently, that if BHP was liable to Mariana in this way, then Vale would be, too. As to that, Vale denies that it was a controlling shareholder. It also says that if it were, then it would have been in breach of duties owed to BHP Brasil. Paragraph 77.2 (c) then says that if Vale had been in breach of Article 116, it would mean that it was also in breach of its (implied) duty of good faith to Samarco under the SHA whereas in fact, it was not. There was therefore a dispute about breach of the SHA within the meaning of the arbitration clause, to which paragraph 77.2 (f) then refers.

173. But the whole question of any consequential breach of duty of good faith by Vale was not the essence of the issue at this point, as I have already explained above. Although Vale chose to raise the implied duty of good faith, that does not mean that without more, the arbitration clause was engaged. Again, the spectre of a breach of the duty of good faith as against BHP Brasil is something of a construct; it is not what the issue engendered by the Part 20 Claim (and indeed most of paragraph 77 of the Part 20 Defence) was essentially about.

174. Paragraph 78 of the Part 20 Defence is a response to paragraph 71 of the Part 20 Claim which repeats paragraph 287 of RAMPOC. This alleged that BHP's acts or omissions constituted an abuse of power under Article 117, cited at paragraph 106(4) above. The abuse of power is said by Mariana to arise because BHP exercised its powers beyond the limits of their economic or social purposes, good faith or good conduct, in that, in particular, the Dam was constructed as an upstream dam and BHP failed to heed warnings. That, in turn, constituted a failure by BHP to verify a complaint which it knew was well-founded. Again, BHP contends that if it was guilty of an abuse of power, then so was Vale. At the end of Vale's response to this, after paragraphs 78.1-78.6, it says that an abuse of its powers would constitute a breach of its implied duty of good faith to Samarco and BHP Brasil and again, this would be caught by the arbitration clause. But once more, this analysis, in my view, misses the essential parts of the allegation and of course neither BHP nor Samarco were alleging breach of duty of good faith as against Vale.

175. Finally, paragraph 87 of the Part 20 Defence responds to paragraph 85 of the Part 20 Claim which invokes Articles 275 and 942 of the Civil Code. The premise is that if BHP was liable, then Vale would also be liable "for the same loss and damage". Paragraph 87.3 of the Part 20 Defence then simply refers back to the earlier paragraphs to say that this alleged liability to make contribution to BHP was itself an arbitral matter. Further or alternatively, Vale says that its alleged liability raised technical matters or concerns Vale's relationships as a shareholder with BHP Brasil or/or BHP which are also covered by the arbitration clause. This is really just a repeat of the earlier points, which I have dealt with above. Further, it would also seem to invoke Vale's wide interpretation of Clause 11.1 which I have rejected above.

Analysis

176. I deal here solely with Vale's contention that an essential matter arising in the Part 20 Proceedings is a dispute concerning a breach or breaches of the SHA. I have already concluded that the Part 20 Proceedings do raise technical matters in a broad sense. I consider that separate matter below.

177. As already stated above, I consider that:

(1) there are no allegations of breach of the SHA made either in the RAMPOC or in the Part 20 Claim; and

(2) no such allegations are necessarily implicit within Mariana's case such as to make them substantial issues.

178. Nonetheless, Vale argues that the question of breach should be seen as an essential matter and in this context, it relies upon the first-instance Australian case of *WDR v Hydrox* [2016] FCA 1164. Here, the Claimant brought an unfair prejudice petition against the Defendant which was the other shareholder in the joint-venture company in question. The relief sought by the Claimant was the winding-up of the company which both parties accepted could not have been granted by an arbitrator. Nonetheless, the Defendant sought a stay of the unfair prejudice proceedings as a whole on the basis that they were covered by the arbitration clause in the parties' JV agreement. The clause was widely drafted, referring to all questions arising out of the agreement.

179. There were many matters alleged by the Claimant in support of the winding-up petition which were themselves clearly arbitrable under the agreement. Those included wrongful termination

of the JV agreement itself. The Court held that in truth, there was only one matter which was strictly outwith the clause and this was the winding-up order sought by the Claimant. The Court rejected the proposition that because of this feature alone, the entire dispute between the parties was not arbitrable. It ordered that all the underlying matters should go to arbitration and stayed the unfair prejudice petition pending the outcome of the arbitration. The stay would be lifted if and when the Claimant proved its underlying allegations in the arbitration which would then pave the way for the Court to consider whether or not to make a winding-up order.

180. In fact, it does not appear from the report that there was any serious dispute about the arbitrability of the underlying claims; see paragraphs 116 and 117 of the judgment of Foster J. It was all about the significance of the (non-arbitrable) winding-up order. *WDR* was, therefore, an entirely different kind of case to the one before me. It does not provide any support for the proposition advanced by Vale here that in truth, the substantial matters raised in the Part 20 Proceedings included breaches of the SHA.

181. Further, while I accept that Vale has certainly made reference to breaches of the SHA in its part 20 Defence, I consider that these references are artificial, and designed to bring the claims made against Vale within the arbitration clause, when otherwise they would not. Far from being a case where Mariana (or indeed BHP) has eschewed any reference to breach so as to avoid the clause applying, it is Vale which has raised the issue of breach, in order to ensure that the clause <u>did</u> apply, where otherwise it would not.

182. Accordingly, the main proceedings and Part 20 Proceedings do not have, as an essential or substantial matter within them, breach of the SHA.

183. I now turn to consider the applicability of the clause in the light of my findings thus far.

APPLICABILITY OF THE CLAUSE

184. It follows from what I have just concluded above that no question of any dispute or claim "regarding" a breach of the SHA arises. This means that there is no relevant engagement of the clause in this respect.

185. That leaves the technical matters raised in the Part 20 Claims. As for those, first, I have already held that the coverage of technical matters by the clause is not abstract and open-ended. See paragraphs 84 - 90 above. I have also held that *ex post facto* claims about the collapse of the Dam made in the main proceedings and carried over by BHP to the Part 20 Proceedings, do not constitute technical matters for the purposes of Clause 9.3.4 (and therefore) for the purposes of Clause 11.1. That being so, no part of the Part 20 Proceedings are arbitrable on this basis, either.

186. Finally, I have already rejected, at paragraphs 93 - 102 above, the much wider interpretation of clause 11.1 contended for by Vale.

187. It therefore follows that there is no matter within element of the Part 20 Proceedings which is subject to the clause.

188. This means that the s9 application must fail in its entirety even if (contrary to my conclusion above) BHP was bound by the clause in the first place.

ABUSE OF PROCESS

189. Since I have concluded that the s9 application must fail on the merits, it is strictly unnecessary for me to deal with the abuse of process argument raised by BHP. However, I deal with it briefly because, had there been an abuse of process then the s9 application could not succeed even if it was otherwise meritorious.

190. BHP contends that the s9 application is an abuse of process for two reasons:

(1) it amounts to a collateral attack on the Jurisdiction Judgment in circumstances where the existence and effect of the arbitration clause could have been raised at that stage; and/or

(2) in any event, the s9 application could and should have been made either before or at the same time as the Jurisdiction Application, on *Henderson v Henderson* principles.

191. I deal with each in turn.

192. The basis for the "collateral attack" argument is that a key finding of Mrs Justice O'Farrell in the Jurisdiction Judgment was that England was clearly the more appropriate forum. However, it is said that this finding is wholly inconsistent with a necessary outcome of any s9 application which is that no court, and certainly not the English Court, is an appropriate forum because the matter must be referred to arbitration. As a matter of comparison of outcomes I see that, but I do not consider that the s9 application amounted to a collateral attack here. Mrs Justice O'Farrell was dealing with a question of jurisdiction and in that context, England was the more appropriate forum. But there is no necessary challenge to that decision constituted by any later reliance upon an arbitration clause. The two matters are separate. There is nothing implicit in the Jurisdiction Judgment which thereafter rendered impossible an application for a stay under s9. The two applications are fundamentally different and the analysis required of each is different. In particular, if s9 applies, then the Court must grant a stay. The assessment of jurisdiction is a much more "multi-factorial" assessment. Accordingly, there is nothing in the collateral attack point.

193. I therefore turn to the *Henderson v Henderson* point. I accept that in principle, there was nothing stopping Vale from making the s9 application at an earlier stage. Indeed, because it did not, it required BHP's agreement that serving its Part 20 Defence was not to be treated as taking a substantive step in the action, so as to disable Vale from bringing the s9 application.

194. I can also see the force of the argument that it would in some ways have been much better had the s9 application been made before, or at the same time as the Jurisdiction Application. There would have been advantages in having it heard at the same time because there was, after all, a commonality of background matters and analysis of the issues in the main proceedings and in the Part 20 Proceedings, as my judgment here demonstrates. There would probably also have been some saving in court hearing time as well. Even if Vale had to decide which foreign expert it would use to cover both applications I am sure this could have been done.

195. On the other hand, if both applications were heard at the same time, and even if, say, the s9 application succeeded, so as to render the concomitant Judgment Application otiose, the judge would almost certainly have had to consider the Jurisdiction Application as well, lest she were wrong on the s9 application.

196. Of course, that position could be avoided if the (logically prior) s9 application was made before any Jurisdiction Application. If the former succeeded then the latter would be redundant. But if the former failed, the Jurisdiction Application would still be necessary.

197. As it happens, there has been one advantage of the two applications proceeding in the way that they did. This is that I was able to consider a fully pleaded defence to the Part 20 Claim served by Vale. This was a real advantage because it meant that I did not have to embark upon the exercise of working out the content of a reasonably foreseeable defence, about which there would no doubt have been argument.

198. It seems to me that all of this is really a matter of case management. Vale had intimated its intention to make the s9 application in March of this year. In fact, in the 17th WS of Mr Michael, BHP's solicitor, he said at paragraph 60 that:

> "Vale should therefore be ordered to make its position clear and, if it wishes to do so to bring any further Arbitration Stage challenge forthwith."

199. However, no application for such an order was made then or later. Had it been sought, the Court would have had to consider the matter at an early stage and make appropriate directions. It seems to me that if a party wishes to take the position that BHP then took, it needed to "put it on the table" for the court to deal with, as it were. Then, Vale would have been bound to comply with whatever order the court chose to make as a matter of efficient case management.

200. Instead, what actually happened was that no order was sought in relation to the s9 application, including at the hearing on 30 October when directions for the hearing of that application were made. What this meant was that I was faced with having to deal with the s9 application on the merits anyway, as this was the essential purpose of the 2-day hearing with expert evidence, and yet also consider whether I should have done so at all because the s9 application should not be entertained. On the facts and the history of this case, this was simply an unrealistic position.

201. Overall, I do not consider that Vale's conduct in bringing the s9 application when it did amounts to a:

> "misuse of [the court's] procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people" (see Hunter v Chief Constable of the West Midlands [1982] AC 529 at 563C).

202. Accordingly, there is no abuse of process on this limb, either.

CONCLUSIONS

203. It follows from the above that, while the s9 application did not constitute an abuse of process, it must be dismissed on the merits.

204. I am most grateful to counsel for their very helpful oral and written submissions.