THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2022-01832

IN THE MATTER OF THE ARBITRATION ACT CHAP. 5:01

AND

IN THE MATTER OF AN ARBITRATION BETWEEN CONSTRUTORA OAS S.A. AND NATIONAL INFRASTRUCTURE DEVELOPMENT COMPANY LIMITED, LCIA CASE NO. 163399 (THE "ARBITRATION")

AND

IN THE MATTER OF THE DECISION OF JOHN FELLAS, ADAM CONSTABLE KC AND ANDREW WHITE KC (THE "TRIBUNAL")

BETWEEN

NATIONAL INFRASTRUCTURE DEVELOPMENT COMPANY LIMITED

Claimant

AND

CONSTRUTORA OAS S.A.

Defendant

Before the Honourable Mr Justice Frank Seepersad

Date of Delivery: 14 December 2022.

Appearances:

Claimant: Ms. Anneliese Day K.C., Mr. Jason Mootoo and Mr. Hugh Saunders instructed by Ms. Marcelle Ferdinand Attorneys-at-law.

Defendant: Mr. Rolston F. Nelson S.C., Mr. Gregory Pantin and Ms. Ria Mohammed-Davidson instructed by Mr. Miguel Vasquez Attorneys-at-law.

DECISION

1. By way of Fixed Date Claim Form and Statement of Case dated May 24, 2022, the Claimant, National Infrastructure Development Company Limited (hereinafter referred to as "NIDCO") has challenged the Partial Final Award (hereinafter referred to as "the Award") of an Arbitral Tribunal comprised of Messrs. John Fellas, Adam Constable QC and Andrew White QC (hereinafter referred to as "the Tribunal") delivered on April 16, 2022. In its claim, the Claimant has invited this Court to review aspects of the Award to set aside same pursuant to Section 19(2) of the Arbitration Act, Chap 5:01 (hereinafter referred to as "the Act") and/or the inherent jurisdiction of the Court, and to remit same to the Tribunal for its reconsideration pursuant to Section 18 of the Act.

2. In its Defence filed on June 22, 2022, the Defendant, Construtora OAS S.A. (hereinafter referred to as "OAS"), contends that this claim is devoid of merit.

Factual Background

3. The factual matrix is largely undisputed and the chronology was referenced and summarised at paragraphs [151] – [239] of the Award. The relevant and material facts were also outlined at Appendix A of the Defendant's submissions filed herein and the material facts are as follows:

(a) **July 4, 2011:** NIDCO and OAS entered into a modified FIDIC Yellow Book Contract for the design and construction of an extension of the Sir Solomon Hochoy Highway to Point Fortin (hereinafter referred to as "the Project") at a contract price of TT$5,213,893,000.00. NIDCO hired AECOM as the Engineer for the Project.

The Contract provided for the issuance of interim payment certificates ("IPCs") by OAS which would be approved and certified by the Engineer within 28 days and paid within 56 days of the Engineer's receipt of the statement and supporting documents by NIDCO.

(b) **April 10, 2013:** The Contract was amended by Addendum 1 which provided that NIDCO was to pay OAS TT$108,800,000.00 in settlement of all claims up to August 30, 2012 including those relating to delay and disruptions caused by NIDCO's failure to provide full access to the site up to February 2013.

(c) **March 31, 2015:** OAS filed a petition for judicial reorganisation in Brazil. OAS informed NIDCO of the filing of the petition.

(d) **April 28, 2015:** NIDCO wrote to OAS and pointed out that the filing of the petition for judicial reorganisation was sufficient for NIDCO to exercise its rights under Clause 15.2(e) of the Contract but "notwithstanding this contractual right to terminate the contract, NIDCO would prefer to negotiate an arrangement with OAS whereby (sic) the scope of work under the contract was reduced" and "that it retains the right to exercise its rights under Clause 15 of the Conditions of Contract if a suitable arrangement cannot be made."

(e) **September 3, 2015:** IPC 50 was certified by AECOM for the amount of US$37m, which had to be paid on October 12, 2015.

(f) **September 4, 2015:** The Contract was amended by Addendum 2 which recited that NIDCO had been unable to provide the whole of the work sites from Penal to Mon Desir by the dates set out in Addendum 1 and that OAS had filed for judicial reorganisation but wished to remain on the Project provided some scope and

commercial adjustments were made. The parties agreed to certain changes in the scope of works, value engineering items and the utilisation of nominated sub-contractors. Clause 5 of the Addendum released and discharged the parties from all actions, claims, debts and the like of whatever kind or nature arising (both present and future) from any events that occurred on or before the signing of the Contract Addendum.

(g) **September 7, 2015:** General Elections were held in Trinidad and Tobago which led to a change in government. The new administration had concerns relative to the project.

(h) **October 2, 2015:** IPC 151 was certified by AECOM in the amount of US$4,313,626.39 for work from August 18 – 28, 2015.

(i) **October 12, 2015:** NIDCO made a partial payment of US$7,822,187.23 towards IPC 51, leaving an unpaid balance of US$12.4m.

(j) **October 19, 2015:** OAS provided official notification that pursuant to Clause 16.1 of the Contract it had the right to suspend or reduce the rate of work owing to NIDCO's non-payment in full of IPC 50.

(k) **October 22, 2015:** AECOM responded to OAS and indicated that its letter under Clause 16.1 was defective. IPC 52 was certified by AECOM for the amount of US$1,623,703.73 for work from August 29 – September 28, 2015.

(l) **October 28, 2015:** OAS wrote to NIDCO to provide notice of default and reserved its rights under Clause 16.1 of the Contract.

(m) **October 29, 2015:** NIDCO acknowledged OAS' rights and advised that it was "working assiduously to meet its obligations to OAS under the Contract". A new Chairman was appointed to head NIDCO.

(n) **November 12, 2015:** AECOM wrote to NIDCO and proposed that negative deductions be applied to previous IPCs in order to remedy NIDCO's default. This proposal was not accepted.

(o) **November 18, 2015:** NIDCO and OAS entered into an MOU/Payment Agreement by which NIDCO agreed to pay IPC 50 by January 5, 2016 and OAS agreed that it would not exercise its right to terminate.

(p) **November 24, 2015:** A new Board of Directors of NIDCO was appointed. AECOM's proposal to apply deductions in IPC to negate advanced funds and delayed deductions was not accepted.

(q) **November 26, 2015:** IPC 53 was certified by AECOM in the amount of US$2,077,450.00 for work performed between September 29 – October 28, 2015.

(r) **December 15, 2015:** OAS wrote AECOM and signalled its intention to file a claim for compensation for delays and disruptions arising out of non-payment and advised that it owed US$41m to suppliers and sub-contractors. The NIDCO Board decided to terminate the contract of its President.

(s) **December 16, 2015:** AECOM met with NIDCO and provided a draft schedule for negative adjustments which could be applied to future IPCs.

(t) **December 17, 2015:** NIDCO and OAS entered into two further MOUs extending the date for payment of IPC 50 to January 15, 2016 and IPCs 51-52 to January 25, 2016. IPC 54 was certified by AECOM in the amount of US$1,668,997.00 for work from October 29 – November 28, 2015. OAS submitted its plan for reorganisation.

(u) **December 21, 2015:** AECOM sent a letter to NIDCO and raised the option of applying negative adjustments.

(v) **December 29, 2015:** OAS submitted IPC 55 to AECOM and claimed US$1.4m for the period November 29, 2015 – December 28, 2015.

(w) **January 7, 2016:** AECOM wrote to OAS and requested that it provide an undertaking to waive the right to terminate for non-payment on all IPCs to enable NIDCO to enter into a controlled termination of the Contract and to work with OAS to minimise adverse effects. AECOM further advised that this waiver should be provided urgently "as there is strong pressure from the Board to take other action."

(x) **January 8, 2016:** OAS provided a draft MOU/Payment Agreement which extended the time for payment of IPCs 50 – 52 to January 30, 2016 in exchange for OAS waiving its right to terminate for non-payment.

(y) **January 11, 2016:** OAS's re-organisation plan was approved by the Brazilian courts.

(z) **January 12, 2016:** Email from AECOM stated that Minister Stuart Young instructed the new Chairman of NIDCO about the application of negative values. OAS provided a draft Heads of Agreement to AECOM providing for the parties to

amicably terminate the Contract and for a reduced scope of work with a demobilisation date of May 28, 2016 and the remaining work to be completed by sub-contractors.

(aa) **January 13, 2016:** NIDCO's new acting President wrote to AECOM and requested that negative adjustments be applied urgently so that NIDCO's default would be "completely eliminated" prior to the deadline for payment of IPC 50.

(bb) **January 14, 2016:** IPC 55 was certified by AECOM in the amount of negative US$22,192,265.00.

(cc) **January 22, 2016:** AECOM wrote OAS stating that the new acting President had confirmed NIDCO's desire for "an amicable termination."

(dd**) January 29, 2016:** IPC 56 was submitted by OAS for the period December 29, 2015 to January 28, 2016.

(ee) **February 4, 2016:** OAS wrote to NIDCO and requested a reduction in its performance bonds based on the reduced scope of works consequent to Addendum 2. There was no response to this request.

(ff) **March 4, 2016:** AECOM, as directed by the Board of NIDCO, wrote to OAS and documented its concerns regarding the lack of progress on the Project and alleged that OAS had apparently abandoned the works as defined in Clause 15.2(b) of the Contract.

(gg) **March 10, 2016:** OAS advised AECOM that it had decided to reduce its workforce with immediate effect but would retain the necessary employees/sub-contractors to continue to perform its obligations.

(hh) **March 11, 2016:** NIDCO's Chairman wrote to the Minister of Works and Transport and confirmed AECOM's March 4, 2016 letter to OAS and suggested that the "most equitable option …would be to proceed pursuant to clause 15.2(e)."

(ii) **March 28, 2016:** OAS responded to AECOM's letter of March 4, 2016 and denied that it had abandoned the Project and stated, *inter alia*, that it had injected US$31m of its own funds into the Project and that the reduction in the pace of works was as a consequence of NIDCO's non-payment.

(jj**) March 31, 2016:** IPC 56 was certified by AECOM in the amount of US$908,824.00. OAS wrote AECOM and sought formal confirmation of the main terms of the amicable termination in order to avoid delay in the completion of the sub-contracting process.

(kk) **April 14 and 18, 2016:** AECOM wrote OAS to confirm there was "no affirmative response" from NIDCO regarding the proposed amicable termination of the Contract.

(ll) **April 27 - May 12, 2016:** OAS renewed its performance and retention bonds.

(mm) **May 5, 2016**: OAS sent a Notice of Dispute to NIDCO regarding non-payment of IPCs beginning with IPC 50.

(nn) **May 17, 2016:** IPCs 57, 58 and 59 were certified by AECOM for work performed over the period January 29 – April 28, 2016. AECOM wrote OAS and reiterated its assertion that OAS had abandoned the works and did not have capacity to continue to meet its obligations.

(oo**) May 25, 2016:** OAS wrote AECOM stating that IPC 55 was not valid and the negative amounts certified therein related to events which occurred prior to Addendum 2 which had been expressly waived by the parties.

(pp) **June 1, 2016:** NIDCO appeared before the Parliamentary Public Accounts (Enterprises) Committee and indicated that "NIDCO does not have sufficient financial resources to take it beyond June 2016." In relation to the Project, NIDCO indicated that "the contractor (i.e. OAS) has not terminated the contract" and "there is no official suspension from the contractor."

(qq**) June 8, 2016:** Email re NIDCO's "Plan for the way forward"' stated that "There is no direct source of funding presently available for the project and none has been identified in the national budget or the quarterly fiscal review package."

(rr) **June 15, 2016:** NIDCO held a Board meeting at which the decision was taken to terminate the Contract.

(ss) **June 21, 2016:** NIDCO served Notice of Termination and terminated the Contract as of July 6, 2016 pursuant to Clause 15.2(b).

(tt) **June 28, 2016:** OAS wrote and denied that it had abandoned the Project or demonstrated an intention not to continue. It stated that the problems on the

Project were caused by NIDCO's payment defaults and indicated that IPC 55 was null and void as it related to events prior to Addendum 2.

(uu) **July 6, 2016:** Contract was terminated. NIDCO commenced drawing down on the advance payment and performance securities in the total sum of US$139,572,877.62.

The Arbitration

4. The parties accepted the validity and applicability of the Arbitration Agreement as contained at Clause 20 of their governing contract. OAS on the August 1, 2016 submitted a Request for Arbitration against NIDCO and the Republic of Trinidad and Tobago. The Arbitration commenced on November 30, 2016 and concluded on July 30, 2021. The Tribunal delivered the Award on April 16, 2022.

5. In the Award the Tribunal identified that the central issue was whether NIDCO's termination of the Contract was valid and if it was not the entitlement and quantum of damages which resulted.

6. With respect to the question of termination, the Tribunal considered the two contractual grounds upon which NIDCO relied to justify its termination of the Contract, namely Clause 15.2(b) and Clause 15.2(e) which provides as follows:

> *"15.2 Termination by Employer*
>
> *The Employer shall be entitled to terminate the Contract if the Contractor:*
> *…*
> *(b) abandons the Works or otherwise plainly demonstrates the intention not to continue performance of his obligations under the Contract*

…

(e) becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with his creditors, or carries on business under a receiver, trustee or manager for the benefit of his creditors, or if any act is done or event occurs which (under applicable Laws) has a similar effect to any of these acts or events."

7. The Tribunal ultimately concluded that NIDCO's termination of the Contract on the basis of Clause 15.2(b), and alternatively under Clause 15.2(e), was invalid.

8. On the question of damages, the Tribunal ordered NIDCO to pay to OAS US$126,365,899.30 and reserved its ruling on OAS's claim for damages.

The Claimant's Case:

9. The Claimant claims that the documentary record (including OAS's own documents) plainly reveals that, as at the date of the Termination Notice, OAS had:

   i. *not been mobilised on site at all since March 2016 (a period of three months);*

   ii. *completed very little work between September and December 2015 (and nowhere near sufficient work to achieve the contractual completion date of 28 May 2016);*

iii. *completed virtually no work since January 2016, with the value of work certified completed in February and March 2016 being nil (and the total value of interim payment certificates ("IPC"s) certified between January and June 2016 being under US$2m);*

iv. *failed to provide a revised programme despite repeated requests by the Project Engineer ("AECOM") that it do so, and allowed the contractual completion date (28 May 2016) to pass without making any proposal as to when and how the remaining Works were to be completed;*

v. *dismissed practically all of its construction staff (with no approved process to replace them) and had no management or supervisory personnel on site;*

vi. *allowed the level of overdue debt to suppliers and subcontractors to rise to US$54m; and*

vii. *removed equipment from the site without NIDCO's or AECOM's consent (contrary to clause 4.17 of the Contract).*

10. The Claimant submits that it was patently obvious that the Defendant had abandoned the Works and plainly demonstrated its intention not to continue with the discharge of its obligations under the Contract. Consequently, it was sufficient to entitle NIDCO to terminate pursuant to Clause 15.2(b) of the Contract.

11. The Claimant further suggests that in the Arbitration, the Defendant stated that it was effectively entitled to abandon the Works as it exercised a right to suspend or

reduce the rate of work pursuant to Clause 16.1 of the Contract on the basis of an alleged payment default on NIDCO's part.

12. It is the Claimant's view that the Award was premised upon the following flawed findings;

    i. That IPC 55 was void *ab initio* on the basis that it was not made in accordance with the Contract. This finding, the Claimant contends was based on an erroneous interpretation of the Contract and was wrong as a matter of law. The Claimant outlined there were errors of reasoning which are manifest on the face of the Award and postured that these amounted to errors of law which now enables this Court to set aside the Award.

    ii. That OAS's conduct post-October 2015 and/or post-January 2016 was permitted by Clause 16.1 of the Contract and was inconsistent with abandonment or a demonstration of an intention not to continue with performance of its obligations under the Contract. This finding, the Claimant argues, was wholly contrary to the evidence and was based on an erroneous interpretation of the Contract (which constituted an error of law manifest on the face of the Award). In addition, it was unsupportable based on the material before the Tribunal and represented a finding that no reasonable arbitrator who properly applied the law and evaluated the evidence could have reached.

13. The Claimant further contends that it was also entitled to rely upon Clause 15.2(e) as this clause entitled it to terminate, if, OAS (among other things) became insolvent, had a receiver or administration order made against it, compounded with its creditors, or if any act was done which had a similar effect. NIDCO stated

that there was evidence that these conditions were met at the time of termination. The Claimant suggested that although same was accepted by the Tribunal it however went on to find that NIDCO had waived the right to rely on Clause 15.2(b) of the Contract by virtue of Clause 5 of Addendum 2 to the Contract dated 4 September 2015 **("Addendum 2")**. This waiver, according to the Tribunal, extended to NIDCO's right to terminate under Clause 15.2(e) for events which post-dated Addendum 2, including OAS compounding with its creditors on 11 January 2016. This finding, the Claimant contends was based on an erroneous interpretation of the Contract and constituted an error of law which is manifest on the face of the Award.

14. Consequently, the Claimant argues that the Tribunal should have found that it was entitled to terminate the Contract under either Clauses 15.2(b) or 15.2(e) (or both) and that OAS's claim should have been dismissed. The Claimant also contends that the Tribunal ought to have found that, having validly terminated the Contract under Clause 15.2, that it was entitled to recover the losses and damage incurred by OAS's wrongful abandonment of the Works as well as the extra costs which it had to incur to complete the Works pursuant to Clauses 15.3 and 15.4 of the Contract.

The Defendant's Case:

15. The Defendant claims that NIDCO has no realistic prospect of success as the Award is final and binding and not subject to appeal.

16. The Defendant contends that NIDCO referred a point of contractual construction to arbitration and must abide by the Tribunal's decision in relation to its

interpretation of Clauses 15.2(b), 15.2(e), 14.6 and 16 of the Contract, Addendum 2 and the validity of IPC 55.

17. The Defendant further outlined that any Court review must be limited to the Award itself and to any documents which were incorporated. As a consequence, the Defendant argues that the documents attached to the Statement of Case as "A.1" to "D.10", were not so incorporated in the Award and they should not be considered by this Court.

18. In relation to IPC 55, the construction and effect of Clause 5 of Addendum 2 and the remit of Clause 16.1 of the Contract, the Defendant states that there is no legal basis to set aside or remit the Award under the limited review provisions of Section 19(2) of the Act and/or under the Court's inherent jurisdiction. The Defendant posits that the Tribunal's findings in law were sound, well-reasoned and supported by the weight of authorities.

19. With respect to OAS's conduct post-October 2015 until January 2016 and the scope of Clause 16.1, the Defendant contends that there exists no legal basis to set aside or remit the Award under the limited review provisions of Section 19(2) of the Act and/or under the inherent jurisdiction of the Court. It is the Defendant's view that the Tribunal's findings of fact, assessments of evidence and formations of judgment were well-supported and/or that there are no errors of law and/or fact. It also contends that no unsupportable and/or unreasonable findings were made by the Tribunal. The Defendant further contends that the Tribunal's finding in relation to its conduct post-October 2015 to January 2016 and the scope of Clause 16.1 was consistent with applicable principles of law and accorded with the facts as set out in the Award.

The Issues:

20. As directed by this Court the parties on September 21, 2022 filed an Agreed Statement of the issues as follows:

(a) Is the claim to set aside the Award and/or remit the Award for reconsideration by the Tribunal legally impermissible as an attempt to appeal the Award and/or is expressly foreclosed by Clause 20.10 of the Contract?

(b) Were the documents referred to in the Statement of Case and/or attached thereto at items "A.1" to "D.10" incorporated into the Award and is NIDCO entitled to rely on them for the purpose of its challenge to the Award in these proceedings?

(c) Did the Tribunal err in law on the face of the Award in:

(i) construing the Contract as not providing any power for AECOM to determine (even on a provisional basis) whether any deduction or adjustment was permitted under clause 14.6 of the Contract and/or clause 5 of Addendum 2;

(ii) positing that by making deductions or adjustments that were not permitted by Clause 14.6 of the Contract and/or by failing to take into account claims that had been mutually waived under Clause 5 of Addendum 2, AECOM "departed from their instructions in a material respect";

(iii) finding that AECOM's errors of construction of Clause 5 of Addendum 2 had the effect that its certification of IPC 55 was not carried out in accordance with the Contract;

(iv) Eliding the concepts of "invalidating" a certificate prospectively and declaring it void ab initio (i.e. retrospectively); and

(v) finding that IPC 55 was void ab initio?

(d) Did the Tribunal err in law on the face of the Award in finding that Clause 16.1 of the Contract justified OAS's conduct post-October 2015 and/or January 2016?

(e) Did the Tribunal err in law on the face of the Award in finding that the waiver in Clause 5 of Addendum 2 extended to events post-dating Addendum 2, including OAS compounding with its creditors on 11 January 2016, on the basis that such events were "merely a continuum of the same process which had started in March 2015".

(f) If the claim to set aside the Award and/or remit the Award for reconsideration by the Tribunal is not legally impermissible as an attempt to appeal the Award and/or is not foreclosed by Clause 20.10 of the Contract, having regard to the documents properly before the Court:

Was the Tribunal's finding and/or conclusion that OAS's conduct post-October 2015 and/or post-January 2016 was permitted by Clause 16.1 of the Contract and was inconsistent with abandonment or a demonstration of an intention not to continue performance of OAS's obligations under the Contract an error

of law and/or fact; and/or a finding and/or conclusion that no reasonable arbitrator/Tribunal could have reached properly applying the law, the evidence and the provisions of the Contract; and/or unsupportable based on the material before the Tribunal.

21. The Claimant outlined one unagreed issue namely whether it is entitled to rely on the documents referenced in the list of documents which was filed before this Court on September 21, 2022.

Resolution of the Issues:

***Does Clause 20.10 of the Contract prohibit this Court's engagement of the instant action*?**

22. The Claimant seeks to challenge the final and binding nature of the Award in apparent contravention of Clause 20.10 of the Contract (the "No Appeals Provision"). The Defendant has relied on the purport and effect of the No Appeals Provision and has invited this Court to hold that it has no jurisdiction to set aside the Award. The Claimant on the other hand contends that the No Appeals Provision purports to oust the Court's jurisdiction and is therefore invalid as a matter of law.

23. In **ICS (Grenada) Limited v NH International (Caribbean) Limited (HCA 1541 of 2002)** at page 4, Jamadar J (as he then was) noted that the Arbitration Act, Chap. 5:01 of the Laws of Trinidad and Tobago provides (*inter alia*):

> *"18. (1) In all cases of reference to arbitration the Court may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.*

19. […] (2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the Court may set the award aside."

24. The Court also has an inherent jurisdiction to set aside an award when the following factors apply, namely if it is:

    a. subject to an error on the face of the award;
    b. wholly or in part in excess of jurisdiction;
    c. subject to a patent substantive defect; or
    d. subject to an admitted mistake.

25. Lord Neuberger at [28] - [31] in **National Insurance Property Development Company Limited v NH International (Caribbean) Limited [2015] UKPC 37** stated that:

    "28. The Arbitrator's conclusion in this connection was one of fact rather than of law. It can be said to be a finding of secondary fact or even the making of a judgment rather than a strict fact-finding exercise, but it is not a resolution of a dispute as to the law. In those circumstances, save (arguably) to the extent that it might be contended that there was simply no evidence on which he could make the finding (or reach the judgment) that he did, or that no reasonable arbitrator could have made that finding (or reached that judgment), it was simply not open to a court to interfere with, or set aside, his conclusions on such an issue.

29. Where parties choose to resolve their disputes through the medium of arbitration, it has long been well established that the courts should respect their choice and properly recognise that the arbitrator's findings of fact, assessments of evidence and formations of judgment should be respected, unless they can be shown to be unsupportable. In particular, the mere fact that a judge takes a different view, even one that is strongly held, from the arbitrator on such an issue is simply no basis for setting aside or varying the award. Of course, different considerations apply when it comes to issues of law, where courts are often more ready, in some jurisdictions much more ready, to step in.

[…]

31. In his judgment in the Court of Appeal, with which Mendonça and Jamadar JJA agreed, Bereaux JA relied on the fact that whether the evidence provided under clause 2.4 was "reasonable" was a matter of law. That is only true in the sense that there would be an error of law if the Arbitrator had reached a conclusion on this issue which was unsupportable in the light of the evidence, or if, which may well be the same thing, it was irrational. But, as already explained, such a contention cannot be maintained in this case: there plainly was evidence which justified the Arbitrator's conclusion. In effect, the Court of Appeal took the view that he had applied too high a standard when deciding what constituted "reasonable evidence", but that approach involved an impermissible substitution of the court's judgment for that of the Arbitrator, in circumstances where the parties had mutually agreed to have the issue determined by an arbitrator."

26. Having reviewed the aforesaid dicta, this Court holds the view that where the facts as placed before a Tribunal reveal that there existed no evidence upon which a reasonable arbitrator could have arrived at the findings which were issued, the Court may set aside an award. The governing test requires the Court to refrain from imposing its own view and it must be circumspect and measured in its approach. Any review ought to be restricted to an assessment as to whether the evidence relied upon, as a matter of law, reasonably supported the Tribunal's conclusions. In the discharge of this mandate the decision advanced by the Tribunal is critical and once it reflects that all the material evidence was judiciously evaluated and a reasoned and rational explanation in support of the decision has been proffered, then same should be upheld. Where however there was no reasoned evaluation of material evidence and the finding appears to be unsupported by the evidence adduced, the Court may intervene and remit the decision back to the Tribunal for further consideration.

27. The Court's inherent jurisdiction has been given statutory recognition in this jurisdiction by virtue of Section 3 of the Arbitration Act, which provides as follows:

> "An arbitration agreement, unless a contrary intention is expressed therein, shall be irrevocable except by leave of the Court and shall have the same effect in all respects as if it had been made an order of Court."

28. In **Czarnikow v Roth, Schmidt and Company [1922] 2 KB 478** (a decision of the English Court of Appeal), the Court stated at page 484:

> *"The ground of objection to the rule is that as an agreement it ousts the jurisdiction of the Courts of law, and is consequently against public policy and void. The importance of maintaining in its integrity the rule of law in reference to public policy is in my opinion a matter of considerable*

importance at the present time. Powerful trade organizations are encouraging, if not compelling, their members and persons who enter into contracts with their members to agree, as far as they can lawfully do so, to abstain from submitting their disputes to the decision of a Court of law. The present case is a case in point. There have been others before the Courts. Among commercial men what are commonly called commercial arbitrations are undoubtedly and deservedly popular. That they will continue their present popularity I entertain no doubt, so long as the law retains sufficient hold over them to prevent and redress any injustice on the part of the arbitrator, and to secure that the law that is administered by an arbitrator is in substance the law of the land and not some home-made law of the particular arbitrator or the particular association. To release real and effective control over commercial arbitrations is to allow the arbitrator, or the Arbitration Tribunal, to be a law unto himself, or themselves, to give him or them a free hand to decide according to law or not according to law as he or they think fit, in other words to be outside the law. At present no individual or association is, so far as I am aware, outside the law except a trade union. To put such associations as the Refined Sugar Association in a similar position would in my opinion be against public policy. Unlimited power does not conduce to reasonableness of view or conduct."

29. Bankes LJ went on to hold (at page 485-486):

"If therefore the agreement that neither party shall apply to the Court to require the arbitrator to state a special case is to stand, the only hold which the Court can have over the proceedings is, (1.) if the Arbitration Tribunal itself states a case for the opinion of the Court, or states its award in the form of a special case, or (2.) if either party applies to set aside the award

for misconduct on the part of the Arbitration Tribunal or upon the ground of error on the face of the award. To hold that under these circumstances the agreement not to apply for a special case is not to oust the jurisdiction of the Court within the meaning of the rule of law as I interpret it is in effect to decide that the Appeal Tribunal is entitled to be a law unto itself, and free to administer any law, or no law, as it pleases. I cannot but think that this is against public policy. I therefore hold that so much of r. 19 as provides that neither party shall apply for a special case, when incorporated into an agreement, is unenforceable and void."

30. In **Sinai Mining Company Ltd v Compania Naviera Sota Y Aznar (1927) 28 LL LR 364**, Bankes LJ and Scrutton LJ, sitting as additional judges of the King's Bench Division dismissed an application to set aside an award. Attorneys for the Defendant submitted to this Court that this case stands as the only relevant English precedent on the validity of an Arbitration agreement as being binding and final. This Court however holds the view that this is a specious argument. This case was a first instance extemporaneous judgment and it is difficult to follow the actual intent of the Court. In addition, it appears that the case did not directly deal with the validity of an ouster clause. In any event the subsequent decision advanced in *ICS (Grenada)* (supra) adopted a contradictory but compelling view which this Court is inclined to adopt.

31. In *ICS (Grenada)* (supra), the Court at pages 5 and 32 to 33 stated as follows:

"Thus, all voluntary references to arbitration attracted the court's inherent powers of enforcement and supervision. The decision in Czarnikow v Roth (1922) 2 K.B. 478 is generally cited as an authority for the proposition that

it is contrary to public policy for parties to attempt to oust the jurisdiction of the court, by purporting to contract out of the same. Any such clause or term in an arbitration contract was often considered to be invalid."

32. At pp.32-34:

"[…] I would also decline to change or modify the existing public policy as applied after Czarnikow (see in this regard Lord Diplock, in the 'Nema' (1981) 2 L.L.R. 239 at 244, 245 and 246).

Though it is clear that 'the law relating to public policy cannot remain immutable' and 'must change with the passage of time' (Nagle v Feilden (1966) 2 QBD 633 at 650; Maxin Nordenfelt v Nordenfelt (1893) 1 Ch. D. 630 at 647- 648, 661); and the Courts are vested with the responsibility of applying and/or varying principles of public policy (Hal[s]bury's Laws of England (1974) 4th ed. Vol. 9, at page 266, paragraph 392); there are good reasons for exercising caution before introducing any change in public policy (Fender v Mildmay (1937) 3 AER 402 at 406-407 – 'the doctrine should be invoked only in clear cases').

[…]

Thus, if I had to decide this issue on this point, I would decline to modify the existing public policy to choose finality in commercial arbitrations with respect to the review of questions of fact and law over the need for supervision of awards. In my opinion, in the context of arbitration, such a change in policy is best done by Parliament or even by a Superior Court, where the breadth and depth of the available wisdom and experience may

be best able to determine what should be the appropriate modifications to the existing rule of public policy. […]"

33. **In the instant case the Arbitration Agreement references the words "final and binding" and these words relate to the efficacy to be attached to the Award. For example, an Order of the High Court is final and binding but same is subject to an appeal. This Court holds the view that if on the face of the arbitration award there are evident errors of law or the decision is irrational, the review jurisdiction of the High Court can be invoked so as to remit the decision back to the tribunal for further consideration. The power exercised by the Court is not appellate in nature but falls within the remit of the Court's supervisory jurisdiction. The High Court must always ensure that the processes are engaged in a fair and transparent manner which strictly accords with the tenets of natural justice.**

34. **Having reviewed the law this Court firmly holds the view that the dicta in *Czarnikow* (supra) remains applicable as a statement of public policy. The factual matrix mandates that it is in public interest for the Court to exercise its supervisory jurisdiction. The effect and impact of the Award is not limited to the insular rights of the named parties but extends to every citizen of this Republic as the Tribunal's Award, if upheld, would have to be borne by the public purse. On the other hand there are many local businesses and suppliers who provided materials and services to OAS and who are still awaiting payment. In the circumstances the No Appeals Provision must be viewed as being contrary to public policy and same cannot be upheld. The Court as the guardian of the Constitution must always protect the public interest and uphold the rule of law. Consequently, this Court will not arbitrarily divest itself of its jurisdiction and**

shall methodically exercise its discretion so as to ascertain whether or not the Award should be set aside.

***What documents should be considered by this Court in its determination as to whether it should set aside the Award*?**

35. The next issue which the Court shall address is whether the documents attached to the Claimant's Statement of Case can be considered in its resolution of the general question as to whether the Award should be set aside.

36. With respect to the resolution of the issue as to whether the Tribunal on the face of the Award, erred in law in finding that IPC 55 was void *ab initio* and its finding that the waiver in Clause 5 of Addendum 2 extended to events which occurred post Addendum 2, the Claimant accepted that it could only rely on the Award itself and any document which was actually incorporated into the Award. Where documents were recited in the Award or referenced therein they must be treated as having been incorporated into the Award. The Claimant outlined that with the exception of document C4 that it was not relying on documents C1 to C20 with respect to the issues to be determined by the Court.

37. C4 is the Reorganisation plan as between the Defendant and its creditors which was approved by the Brazilian courts and same was recited in the Award. The Claimant submitted that the said documents should be viewed as having been incorporated into the Award. This approach, the Claimant stated, accords with the dicta of Lord Duncan at page 487 in **Champsey Bhara & Co v Jivraj Balloo Spinning & Weaving Co [1923] AC 480** as well as the dicta of Lord Russell at 610 - 611 in

Absalom (FR) Ltd v Great Western (London) Garden Village Society Ltd [1933] AC 592.

38. These authorities also establish that a Court in its review of an Arbitration award must operate with a high degree of circumspection and cannot step into the shoes of the arbitrator and consider the dispute afresh.

39. In **Giacomo Costa Fu Andrea v British Italian Trading Co. Ltd [1963] 1 QB 201** at 216-217, the court considered whether it was entitled to look at a contract which was purportedly incorporated into an award and whether the finding of law that the contract was void was a proper finding or whether it was erroneous on its face. Diplock LJ held as follows:

> *"It seems to me, therefore**, that on the cases there is none which compels us to hold that a mere reference to the contract in the award entitles us to look at the contract.** It may be that in particular cases **a specific reference to a particular clause of a contract may incorporate the contract, or that clause of it, in the award.** But **I think we are driven back to first principles in this matter**, namely, that **an award can only be set aside for error which is on its face**. It is true that an award can incorporate another document so as to entitle one to read that document as part of the award and by reading them together find an error on the face of the award. **But the question whether a contract or a clause in a contract is incorporated in the award is a question of construction of the award**. It seems to me that the test is put as conveniently as it can be in the words of Denning L.J. which I have already cited from Blaiber & Co. Ltd. v. Leopold Newborne (London) Ltd.34: …I therefore apply that principle to the award in the present case — that is to say the award of the Board of Appeal, incorporating that of the umpire, in which he says: "I hereby*

award that buyers have failed to declare the final port of destination by the 1st of February, 1961." ***This is a finding of fact and there is nothing about any clause of the contract there****. Then he goes on to state the consequences of that finding — "and therefore — the contract is void."* ***There is no reference to any specific provision of the contract from which that consequence flows. It seems to me that it is quite impossible to say, reading those words, that he has incorporated the contract in the award in the sense that he has invited those reading the award to read the contract."*** *[emphasis court's)*

40. The learned Judge added at page 217:

> ***"The principle of reading contracts or other documents into the award is not, in my judgment, one to be encouraged or extended****, and in my view we are not entitled in this court, on an award where there is a purely general reference to "the contract" — and a reference only in that part of the award which deals with the consequences of the finding of fact — to look at the contract and search it in order to see whether there is an error of law." [emphasis added]*

41. Having considered the law, this Court holds the view that the question as to whether or not a document has been incorporated into an arbitral award is ultimately a matter of construction. A circumspect and cautious approach must be engaged and the incorporation of documents which formed no part of the Award should be discouraged. The general principle should be that there exists a presumption against incorporation and same ought only to be displaced when it is evident that particular documents were considered in arriving at the Award.

42. Having reviewed the Award it is evident that all of the material documents referenced by the Claimant for use in the instant claim were specifically

referenced in the Chronology outlined by the Tribunal in the Award. Consequently and as a matter of construction, this Court holds the view that document C4 did form part of the Award and this Court declares that it can consider same in its consideration as to whether there was an error on the face of the Award with respect to its finding that there was a waiver and that no right of termination under Clause 15 .2 (e) of the Contract existed.

43. The documents referenced at items A.1 to A.3 are the Contract (General Conditions and Particular Conditions) as well as Addendum 2, and these were incorporated into the Award. They were recited in the Award and the relevant terms of the Contract and Addendum 2 were also referenced in the Award. This Court also notes that the documents B.1 to B.11 are all contract documents and these were referenced in the Award. The dates covered and sums certified by AECOM for payment were also clearly set out in the Award. In the circumstances this Court shall consider documents A1 to A3 as well as documents B1 to B11.

44. In relation to documents D4 and D5, the Court notes that these were included in the Agreed Bundle. These documents are essentially the procedural orders issued by the Tribunal and they by implication were incorporated by the Award. As a result, this Court can and will have regard to them.

45. Having reviewed and applied the law to the operative factual matrix, this Court will not, however, consider documents D1, D2, D3, D6, D7, D8, D9, D10 nor will it have regard to the further documents which were included in Volume 2 of the Trial Bundle.

***Should the Tribunal's Award be set aside*?**

46. The Tribunal had the power to declare that IPC 55 was wrongly determined and it concluded as a mixed matter of fact and law that IPC 55 was wrongly determined. Its decision was premised on the following findings:

    a. *All of the deductions certified by AECOM in IPC 55 related to matters which had been settled by Clause 5 of Addendum 2; and*

    b. *AECOM did not have the power unilaterally to value the works without regard either to the fact that the work had previously been valued by reference to an "agreed" WBS or to the fact that an amended WBS was to be agreed pursuant to Addendum 2.*

47. The Claimant submitted that there is no challenge to the aforesaid findings in so far as they relate to any prospective opening up, review or revision of IPC 55 pursuant to Clause 20.1 of the Contract however the nub of its complaint is that the Tribunal went beyond those findings when it held that IPC 55 was void *ab initio*. As a consequence of this ruling, the Tribunal found that the Claimant defaulted in its payments as at January 2016 and that the Defendant's reduction of the rate of work was justified. In essence, the voiding of IPC 55 negated the Claimant's Claim for termination pursuant to Clause 15.2 (b) of the Contract.

48. The material portions of the Award which support the Tribunal's findings in relation to this issue are paragraphs 254, 326 and 327. The Claimant submitted that the Tribunal made three fundamental errors namely; 1) it wrongly construed the contract by finding that AECOM could not provisionally determine whether any deduction or adjustment was permitted under Clause 14.6 of the Contract; 2) it erroneously concluded that by making deductions or adjustments that were not permitted by Clause 14.6 or had been settled in Addendum 2, AECOM departed

from its instructions in a material respect and; 3) it elided the concept of invalidating the certificate prospectively when it declared the IPC to be void *ab initio*. The Claimant cited the cases of **Jones v Sherwood Computer Services [1992] 1 WLR 277** and **Campbell v Edwards [1976] 1 WLR 403** at 407 and extracts from Keating on Construction Contracts were also cited.

49. In *Campbell* (supra) at page 407 Lord Denning stated as follows:

> *"If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it. If there were fraud or collusion, of course, it would be very different. Fraud or collusion unravels everything."*

50. An engineer's certificate may in principle be invalidated if it is "not properly made in accordance with the contract": Keating at 5-054. Keating goes on to say (at 5-059) that:

> *"The first step is to see what the parties have agreed as a matter of contract to remit to the expert. If they have departed from their instructions in a material respect, either party would be able to say that the certificate was not binding because they had not done what they were appointed to do."*

51. The Claimant posited that the general rule is that an engineer's certificate cannot be invalidated simply on the basis that it is incorrect or mistaken and reference was made to the following extracts:

i. Keating at 5-059:

"A certificate of the architect intended to be binding and conclusive 'cannot be impeached for mere negligence, or mere mistake or mere idleness on the part of the architect'."

ii. Hudson's Building and Engineering Contracts (14th ed.) at 4-049:

"A certificate in proper form, issued at the correct time, will not be invalidated if the Certifier has arrived at a valuation which is later proved to be incorrect in certain respects. The parties have agreed that either temporarily or permanently the Certifier's judgment as to the value is the one which will be used under the contract, and they are normally taken to accept that there will be errors which will either be left uncorrected until a later review or will not be corrected at all."

iii. Hudson at 4-068:

"In relation to significant and material matters, if there is an error in the certificate which is neither the result of interference by the Employer, nor of the Certifier's decision to rely on extraneous or inappropriate considerations, or to apply the wrong test, or of any other unfairness but simply the result of human error, then it cannot invalidate the certificate. It may be grounds for revising the certificate at a later stage through a contractual review process or in court. Nevertheless, in the meantime the certificate will be valid."

iv. Hudson at 4-049 states that:

"[…] it may be possible to show that the general approach adopted was contrary to the contract. In such circumstances the certificate

may be invalidated on the same ground that decisions of experts under an expert determination clause may be invalidated. That is that the valuation departed from contract requirements."

52. In *Jones v Sherwood* (supra) Dillon LJ considered the law prior to *Campbell* (supra) as well as the dicta of Denning LJ in **Dean v Prince [1954] Ch 409** and at page 286D and 287 said as follows:

At 286D:

"Plainly Lord Denning came to change his views between 1954 and 1976. The reason for that was that in 1954 there was an established line of authority, from Pappa v. Rose (1871) L.R. 7 C.P. 32 to Finnegan v. Allen [1943] K.B. 425, to the effect that a valuer who had given a certificate as an expert was not liable to an action unless he was dishonest, but that line of authorities had been overruled by the House of Lords in Arenson v. Arenson [1977] A.C. 405 and Sutcliffe v. Thackrah [1974] A.C. 727 where the dissenting judgment of Lord Denning M.R. in Arenson v. Arenson [1973] Ch. 346 was approved and it was established that the expert could be liable for damages in negligence if he had acted negligently in giving his certificate."

53. At 287:

"On principle, the first step must be to see what the parties have agreed to remit to the expert, this being, as Lord Denning M.R. said in Campbell v. Edwards [1976] 1 W.L.R. 403, 407G, a matter of contract. The next step must be to see what the nature of the mistake was, if there is evidence to show that. If the mistake made was that the expert departed from his instructions in a material respect—e.g., if he valued the wrong number of

shares, or valued shares in the wrong company, or if, as in Jones (M.) v. Jones (R.R.) [1971] 1 W.L.R. 840, the expert had valued machinery himself whereas his instructions were to employ an expert valuer of his choice to do that—either party would be able to say that the certificate was not binding because the expert had not done what he was appointed to do.

The present case is quite different, however, as Coopers have done precisely what they were asked to do. […] Any number of issues could arise under the various sub-paragraphs of paragraph 2 of appendix 1 as to the application of the wording of those sub-paragraphs to particular facts. All these issues are capable of being described as issues of law or mixed fact and law, in that they all involve issues as to the true meaning or application of wording in paragraph 2. I cannot read the categorical wording of paragraph 7 as meaning that the determination of the accountants or of the expert shall be conclusive, final and binding for all purposes "unless it involves a determination of an issue of law or mixed fact and law in which case it shall only be binding if the court agrees with it."

Accordingly, in my judgment, because Coopers did precisely what they were instructed to do, the plaintiffs cannot challenge their determination of the amount of the sales."

54. Further guidance relative to the instant issue can be found in **Nikko Hotels (UK) Ltd v MEPC plc [1991] 2 EGLR 103** where the claimant sought a declaration that an expert's determination under a rent review clause was a nullity and of no effect on the grounds that the expert misconstrued and misapplied the expression "average room rate" as used in the deed. At page 108, Knox J held:

"The result, in my judgment, is that if parties agree to refer to the final and conclusive judgment of an expert an issue which either consists of a question of construction or necessarily involves the solution of a question of construction, the expert's decision will be final and conclusive and, therefore, not open to review or treatment by the courts as a nullity on the ground that the expert's decision on construction was erroneous in law, unless it can be shown that the expert has not performed the task assigned to him. If he has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity.

[…]

Mr Gaunt, who appeared for the tenant before me and indeed before Mr Lawrence, identified, while accepting that Jones v Sherwood was the decision that should guide this court, two questions as needing solution. The first was, what was it that the parties remitted? And the second was, what was the mistake? For this purpose, of course, I assume, in his favour, that the construction which was urged upon Mr Lawrence and me by the tenant is the correct one. He answered those questions as follows: that the question that was remitted by the parties to the expert's decision was the determination of the average room rate, and he accepted that any disputes of interpretation that arose would have to be solved on the way to that determination. He identified the nature of the mistake as one of assessing the average published room rate rather than the average charged room rate, and he submitted in accordance with that that Mr Lawrence had, in effect, done the wrong thing, which was in principle the same as valuing the wrong number of shares, to use the example that Dillon LJ had adopted in his judgment in the Jones case.

The issue, in my judgment, comes down to whether Mr Lawrence has assessed the wrong subject-matter as a result of the mistake, which I assume for present purposes that he made, or whether he did do the very task which was entrusted to him but reached an erroneous conclusion as a result of that assumed mistake."

55. In *Jones* (supra) Dillon LJ pellucidly outlined that a valuation could not be impeached simply on the basis that the expert had interpreted the agreement wrongly. The thrust of the Court's decision was premised upon an understanding that for a certificate to be invalidated on the ground that it was not made in accordance with the contract, the error must have been premised on the certifier's departure from his instructions. Examples of mistakes were also identified by the Court and these all related to circumstances where the expert did not do that which he was appointed to do.

56. In **Macro v Thompson (No 2) [1996] BCC 707**, the Court of Appeal overturned a decision to strike out a claim that an expert valuation of shares should be set aside on the basis that the valuer did not do what he had been instructed to do. The valuer was instructed to value the worth of a share in a company using the value of its assets, but in so doing the valuer used the value of assets of another company.

57. In **John Barker Construction v London Portman Hotel (1996) 50 ConLR 43**, the court found that an architect's determination of an extension of time was "invalid" because, although there was no bad faith or excess of jurisdiction on the part of the architect, his determination of the extension of time *"was not a fair determination, nor was it based on a proper application of the provisions of the contract"*. In that case, the court made wide-ranging and extensive criticisms of

the architect's approach, which went far beyond a mere failure to reach a determination in accordance with the contract. The court found that the architect:

a. did not carry out a logical analysis in a methodical way;
b. made an impressionistic, rather than a calculated, assessment of the time which he thought was reasonable;
c. misapplied the contractual provisions; and
d. allowed time for relevant events which bore no logical or reasonable relation to the delay caused.

Neither Campbell v Edwards (supra) nor Jones v Sherwood (supra) were cited by the court in *John Barker*.

58. In **Burgess and another v. Purchase and Sons (Farms) Ltd and others [1983] Ch 216** it was not argued that the setting aside of the valuation should be retrospective. Rather, as Nourse J recorded at page 220: *"A cheque for £29,291.70, being the correct amount of the purchase price of the shares as valued by the auditors, was deposited in an account in the name of the company on behalf of the plaintiffs. It remains there to this day, the plaintiffs having refused to accept payment. However, they accept for the purposes of this application that the sale and purchase were duly completed in accordance with the provisions of article 7 before the commencement of these proceedings."* Notably, the actions which were taken in reliance upon the valuation were accepted as having been valid at the time and the completion of the transaction was accepted as having taken place.

59. In **Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Ltd [1999] 1 AC 266** at 275-276, Lord Hoffmann said the following (in support of a presumption of provisional validity):

"If the certificates are not conclusive, what purpose do they serve? If one considers the practicalities of the construction of a building or other works, it seems to me that parties could reasonably have intended that they should have what might be called a provisional validity. Construction contracts may involve substantial work and expenditure over a lengthy period. It is important to have machinery by which the rights and duties of the parties at any given moment can be at least provisionally determined with some precision. This machinery is provided by architect's certificates. If they are not challenged as inconsistent with the contractual terms which the parties have agreed, they will determine such matters as when interim payments are due or completion must take place. This is something which the parties need to know. No doubt in most cases there will be no challenge."

60. **Due deference should generally be extended to arbitral awards so as to preserve party autonomy in the resolution of commercial disputes and judicial intervention should be cautiously exercised. Awards must however be read in a manner which is reasonable, practical and consistent with commercial viability. Consequently, the decision to set aside an award should primarily be limited to a circumstance where there is an error of law on the face of the award.**

61. In **Government of Kelantan v Duff Development Company [1923] AC 395**, Viscount Cave at page 409 stated as follows:

"If it appears by the award that the arbitrator has proceeded illegally – for instance, that he has decided on evidence which in law was not admissible or on principles of construction which the law does not countenance, then there is error of law which may be ground for setting aside the award, but

the mere dissent of the Court from the arbitrator's conclusion on construction is not enough for that purpose."

62. Viscount Cave at page 410 also cited Channell J's concise statement of the relevant principle in **Re King and Duveen [1913] 2 KB 32** that:

"It is no doubt a well-established principle of law that if a mistake of law appears on the face of the award of an arbitrator, that makes the award bad, and it can be set aside, but it is equally clear that if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside. Otherwise it would be futile ever to submit a question of law to an arbitrator."

63. In **Attorney General for Manitoba v Kelly [1922] 1 AC 268** , Lord Parmoor stated that:

"It shows that where there are real arbitrations, and where the parties have selected their judge, in such cases you have to show a great deal more than mere error on the part of the arbitrator in the conclusion at which he has arrived before the Court can interfere with his award. *And in the Court of Common Pleas, forty years ago, in a case in which the arbitrator had a question of law submitted to him according to the ordinary forms of pleading, the Court, having come to the conclusion that the decision of the arbitrator was, in the sense in which they understood the words, erroneous, in deciding upon a question of law on demurrer,* ***nevertheless held that the parties, having submitted that question to the arbitrator, it was for the arbitrator to determine it; in their own***

language, the parties had agreed to accept the arbitrator's decision upon the question of law, as well as his decision upon the facts*. In the Court of Queen's Bench, thirty years ago, that decision was adopted as being the law which would guide the Court in the decision of such questions." (Emphasis Court's)*

64. Where it is alleged that an error of law occurred on the face of the award, the Court must consider whether the erroneous decision was specifically referred to the arbitrator. Where it has, then heightened caution has to be exercised.

65. This Court does accept the Defendant's submission that once a specific question of law was referred that it cannot be set aside even if same was premised upon an evident error of law. The critical and distinguishing feature which has to be established is that the decision wasn't merely erroneous but that it was premised upon fundamentally flawed and/or incorrect settled principles of law.

66. The Tribunal found that the Contract did not enable AECOM to determine (even on a provisional basis) whether any deduction or adjustment was permitted under Clause 14.6 of the Contract and/or Clause 5 of Addendum 2. The purported basis for this finding was that the Contract made no express provision for AECOM to make such a provisional determination and that no such provision should have been implied.

67. Pursuant to Clause 14.6 of the Contract, AECOM had to issue IPCs which contained the amounts determined by the Engineer as being due. To arrive at these sums it is reasonable to conclude that the Engineer had to evaluate and understand the Contract so as to ascertain, *inter alia*, the scope of work completed, the

outstanding work and determine whether the completed work was effected in accordance with the Contract.

68. In its decision at paragraph 311 the Tribunal stated as follows:

> "311. The Tribunal considers NIDCO to be correct to submit that there are limited circumstances in which an interim payment certificate issued under a contract, such as this, will be found to be invalid and are confined to; (a) fraud, (b) situations in which the Engineer was disqualified or lacked jurisdiction and (c) where it is established that the payment certificate was not issued in accordance with the Contract. OAS does not contend that IPC was procured by fraud or that the Engineer was disqualified or lacked jurisdiction. However, OAS does contend that IPC 55 was not issued in accordance with the Contract in that (a) the valuation ignored the claims that were waived by Addendum 2 and (b) the certificate contained deductions and adjustments that did not comply with Clause 14.6."

69. It appears based on the aforesaid extract that the Tribunal did not find that the Engineer acted without jurisdiction.

70. In accordance with the legal position outlined in ***Campbell*** (supra), it is plausible to conclude that a reasonable tribunal who properly applied the law would have likely found that AECOM's determinations were provisionally binding even if the contract contained no such express enabling provision. In issuing IPCs, AECOM was required to determine issues which required an interpretation of the Contract and Addendum 2. In the absence of any evidence which established that the Engineer acted outside the delegated area of judgment as authorised by the Contract, mistakes made in the discharge of his duties, as a matter of law, should not invalidate the decisions made. In like manner, an error as to the construction

of the Contract is not a circumstance which could be used to invalidate the generated certificate.

71. The Tribunal accepted at [310] and [575] of the Award that the IPCs issued by AECOM were provisionally binding upon the parties however it formed the view that AECOM's remit and construction of the contract invalidated the validity of the determinations made.

72. The position adopted by the Tribunal was inconsistent with the settled approach which ought to have been engaged as outlined in the above referenced authorities. In the circumstances, this Court adopts the view that the Tribunal's finding on this issue appears to be unsound as there was a failure to properly explain how it evaluated and applied the relevant law. In addition, the ruling appears to be irrational as it leads to consequences which led to a result which occasions an outcome which is commercially absurd.

73. If AECOM did not have the power to make provisionally binding determinations as to the construction of the Contract, such a circumstance would create uncertainty as neither party would be able to effect project decisions without first commencing lengthy arbitral proceedings to resolve disputes surrounding issues of construction.

74. In its submissions the Claimant posited that if the Tribunal's construction was correct, then as at January 2016, NIDCO would have had no way of knowing whether it was obliged to pay OAS in respect of outstanding sums under IPCs 50-54.

75. The Tribunal outlined that by making deductions or adjustments that were not permitted by Clause 14.6 and/or by failing to take into account claims that had

been mutually waived under Clause 5 of Addendum 2, AECOM "departed from their instructions in a material respect".

76. Guided by the authorities it is possible to conclude that a reasoned approach by the Tribunal necessitated its regard to the contractual intent of the parties. Clause 14.6 required AECOM to issue IPCs which "shall state the amount which the Engineer fairly determines to be due". Notably there was no prescription as to the method which the Engineer had to employ with respect to matters of construction of the Contract.

77. There appears to have existed very little evidence which were capable of supporting the Tribunal's conclusions that AECOM failed to do the thing which it was instructed to do and a more detailed and cogent analysis of the evidence was required so as to explain the position arrived at.

78. The Tribunal treated AECOM's error in interpreting the meaning of Clause 5 of Addendum 2 (and/or its erroneous application of Clause 5 of Addendum 2 to the deductions/adjustments in issue) as itself constituting a departure from instructions. This position is difficult to comprehend as it contradicts the approach outlined by the authorities. In fact, the approach engaged by the Tribunal was the very approach which was expressly deprecated in Jones v Sherwood (supra).

79. The Tribunal's position to declare IPC 55 as being void *ab initio* is one which seemingly is not anchored in law and notably no authority was cited and/or analysed in support of its decision to retrospectively invalidate IPC 55.

80. The Claimant also contends that the Tribunal's decision as to Clause 16.1 was based either on misinterpretation of Clause 16.1, such that it amounted to an

error of law on the face of the Award; and/or a finding that was unsupportable based on the material before it and/ or represented a finding that no reasonable arbitrator could have reached properly applying the law, the evidence and the provisions of the Contract.

81. To resolve this aspect of the Claimant's challenge a determination has to be made as to the contractual meaning of the term 'immediately' as referenced under Clause 16.1.

82. The Claimant in its Closing Submissions advanced the following argument:

> *"Further still, even if OAS was at all material times entitled to suspend or reduce the pace of work and validly exercised that right, that would not entitle it to abandon the Works entirely. On the contrary, clause 16.1 of the Contract expressly provided that, upon payment, "the Contractor [i.e. OAS] shall* ***immediately recommence performance of the Works****" (emphasis added). That plainly meant that, even if it was suspending or reducing the pace of work, OAS was required to remain mobilised on site and maintain sufficient resources to resume normal working upon payment by NIDCO. OAS's conduct was wholly inconsistent with that requirement."*

83. At the arbitration the Claimant referenced the fact that during the period of the purported suspension, OAS laid off workers, sold equipment, racked up debts with suppliers and subcontractors which it would have been unable to pay, even if it was paid in full by NIDCO. The Claimant further advanced that the Defendant advised the Engineer that it only retained certain of its staff in order to proceed with a smooth "demobilisation" from the Project.

84. The Defendant argued before this Court that the course it adopted had to be viewed against the backdrop of a mutual attempt to arrive at an amicable resolution. The Defendant further argued that it operated under a circumstance where it was owed substantial funds and there could have existed no reasonable expectation that it could reasonably continue to maintain all its staff at the location. In addition, the Court was asked to hold that the word "immediately" did not impose an obligation that work had to resume at the precise moment at which payment by NIDCO was made.

85. The Tribunal referenced and resolved the Clause 16.1 issue in the Award at paragraph [283] as follows:

> *"This argument fails because the actions taken by OAS after its October 2015 notices were inconsistent with its abandonment of the Project or its demonstration of an intention not to continue the performance of its obligations. First, OAS did continue to work on the project, as illustrated by the fact that, after its October 2015 notices, it continued to submit IPCs that were certified by AECOM. Thus, on 17 May 2016, AECOM approved and certified IPC 57 for the work that OAS performed between 29 January 2016 to 28 February 2016, IPC 58 for the work that OAS performed between 29 February 2016 to 28 March 2016, and IPC 59 for the work that OAS performed between 29 March 2016 to 28 April 2016. On 12 June 2016, OAS submitted a draft IPC 60 for the work that OAS performed between 29 April 2016 to 28 May 2016. Second, and significantly, OAS renewed its performance bonds in April 2016. These are hardly the actions of a party that had abandoned a project or demonstrated an intent not to continue the performance of its obligations."*

86. **The Tribunal made no finding in relation to the purport of Clause 16.1 nor did it resolve NIDCO's complaint that the clause did not entitle OAS to abandon the works entirely. The Tribunal also made no finding as to the practical implications of and the manner in which the word "immediately" had to be viewed.**

87. **There was a failure to render a proper interpretation of Clause 16.1 in circumstances where it may be reasonable to conclude that the language was pellucid and that no other meaning can be ascribed to the word "immediately" other than its plain and ordinary meaning. If such a position was adopted, OAS had the right to suspend or reduce the rate of work but had no authorisation to abandon the works completely or to demobilise from the site so as to prevent or retard its ability to resume work immediately upon receipt of payment.**

88. **Clause 16.1 required the Defendant to "immediately recommence performance of the Works" upon payment. It is therefore possible to conclude that the Contract contemplated that the Defendant was required to remain sufficiently mobilised on site and maintain sufficient resources to enable it to resume full work on the project upon payment by NIDCO. The resumption of work did not necessarily have to be commenced at the precise moment that payment was received but the use of the term "immediately" signals that the contractual expectation must have been that resumption of work would commence within 24 hours.**

89. **The Tribunal however failed to consider the purpose and effect of Clause 16.1 and did not adequately evaluate the evidence adduced by NIDCO in support of its contention that OAS did not remain mobilised on site as it failed to maintain sufficient resources to resume normal working upon receipt of payment. The requisite information was frontally placed before the Tribunal by virtue of the**

documents which were recited in the Agreed Factual Chronology. These documents were appended to the Award but the Award did not reflect a measured assessment of the said evidence and no reasoned explanation was proffered as to why same was rejected. In the circumstances the position adopted by the Tribunal was fundamentally flawed.

90. **At paragraph [283] of the Award the Tribunal outlined the documents which it said illustrated the fact that OAS continued to work on the Project after October 2015. The Tribunal's position stands in direct conflict with the documentary evidence which was before it and regrettably there was no reasoned reconciliation of the competing positions.**

91. **IPCs 57 and 58 were for nil value, as recorded in the table reproduced in the Award at [566]. The said documents are capable of two meanings namely, 1) that for the period January 29, 2016 to March 20, 2016, the Defendant executed no work on the project or 2) for that period the contractor elected to make no claim for payment. The Award however did not reflect that either position was considered and no finding on this aspect of the evidence was advanced.**

92. **It is also apparent that the Award did not explain or justify how IPCs 59 and 60 were viewed as being reflective of an intention to continue with the discharge of the Defendant's contracted obligations. These documents showed the engagement of de minimis work which given the magnitude of the project, was likely insufficient to establish that OAS was duly mobilised on site or that it maintained sufficient resources to resume normal working immediately upon receipt of payment, as required by Clause 16.1. This was yet another material matter which was not properly addressed in the Award.**

93. **Although OAS renewed its performance bonds in April 2016, the said renewal could have been viewed as being reflective of an intention to continue working but could have also been viewed as a step which simply established that OAS fulfilled one of its contractual obligations (vis. the obligation to maintain performance security pursuant to Clause 4.2 of the Contract). The Tribunal had an obligation to properly evaluate the evidence and issue a reasoned decision as to why one view was preferred over the other and why it concluded that OAS fulfilled its other contractual obligations.**

94. **The documents included in the Agreed Factual Chronology appended to the Award as Annex A, when comprehensively and objectively reviewed are capable of demonstrating that there was no meaningful intent by the Defendant to discharge all of its contracted obligations. The Tribunal had an obligation to critically review all the information before it and to explain why the Claimant's arguments and evidence were rejected however the Award does not reflect that such a measured evaluation of the evidence was engaged.**

95. **On the face of the Award, the Tribunal fell into error and either disregarded or misconstrued the purpose and effect of Clause 16.1 and/or failed to properly evaluate the evidence placed before it.**

96. **Having reviewed the evidence which was before the Tribunal, this Court is resolute in its view that no reasonable arbitrator cognizant of the law and seized of the evidence adduced could have arrived at the position reflected in the Award.**

97. **In the circumstances this Court without fear or hesitation must exercise its inherent jurisdiction and discharge its obligation to defend the rule of law and to protect the public interest. Consequently, the commercial decision reflected**

in the Contract to have disputes determined by the arbitrator has to be overridden and the Court must set aside the Award as same was premised upon findings which were unsupportable on the evidence, inconsistent with the law and are decisions which no reasonable arbitrator could have arrived at.

98. Notwithstanding the position outlined above, the Court thought it prudent to consider whether the Tribunal's decision that NIDCO could not have validly terminated the Contract on the basis of Clause 15.2(e) is one which is sound and unassailable.

99. The Claimant's argument before the Tribunal was primarily premised upon the Defendant's judicial reorganisation and the assertion that the filing for same on March 31, 2015 implicitly meant that OAS was bankrupt. The Defendant however argued that NIDCO waived its right to advance the said argument by virtue of the agreement in Addendum 2.

100. The Tribunal did not accept NIDCO'S position and premised its conclusion that NIDCO had waived the right to terminate under Clause 15.2(e) on two bases:

> *Firstly it construed NIDCO's letter of 28 April 2015 as meaning that, providing a suitable arrangement could be made, NIDCO would no longer retain the right to exercise its rights under clause 15 of the Contract deriving from the fact of OAS's judicial reorganisation. The Tribunal construed clause 5 of Addendum 2 as constituting such a "suitable arrangement".*
>
> *Secondly it construed the mutual waiver in clause 5 of Addendum 2 as extending to cover NIDCO's right to terminate by reason of the judicial reorganisation.*

101. Ultimately, the rationale adopted by the Tribunal involved an issue of construction in relation to Clause 5 Addendum 2.

102. On this issue of construction, the Tribunal at paragraphs [258]- [259] of the Award stated as follows:

> *"258. The Tribunal also rejects NIDCO's contention that Addendum 2 left NIDCO's right to terminate unaffected. The words of Clause 5 are extremely broad. Insofar as a right to terminate had arisen at the point of Addendum 2, this falls within (on NIDCO's side) the language of a 'claim …' and (on OAS's side) a 'liability' 'of whatsoever kind or nature arising… from any events that occurred on or before the date….'.*
>
> *259. Even if there were any ambiguity in this regard, which there is not, the Tribunal would have regard to the factual matrix evidence in order to construe the words in line with the Parties' intentions. It is not necessary to look beyond the facts stated in the Recitals within Addendum 2 itself to ascertain that the very purpose of the amendment to the Contract was to re-baseline the project specifically in light of — amongst other things — the judicial re-organisation of OAS. It would be absurd to suggest that immediately following the negotiations and re-structuring of the Contract through Addendum 2, NIDCO could terminate the Contract unilaterally on the basis of the pre- existence of OAS' judicial reorganisation."*

103. On the face of the Award it is apparent that the Tribunal did not properly consider the position that only the operative facts which predated the signing of the Contract could properly be applied to Clause 5 of Addendum 2.

104. After the Addendum was executed there unfolded a series of material and unforeseen developments. The Claimant outlined that these developments activated the right of termination pursuant to Clause 15.2(e). These events were referenced in the Claimant's submission before this Court as follows:

a. OAS publishing its audited accounts for y/e 31 December 2015 and y/e 31 December 2016, which showed that it was comprehensively balance sheet insolvent; and

b. OAS compounding with its creditors when the Plan was approved on 11 January 2016.

105. In the Award, the Tribunal concluded that the aforementioned matters were part of the continuum which commenced in March 2015.

106. **Having considered the wording of Clause 15.2 it seems likely that a Tribunal acting reasonably and rationally should have attached serious weight to the argument that each individual event referenced in Clause 15 may have been able to independently trigger the right of termination especially since the language of the clause made no provision for the consideration of a 'continuum of events'.**

107. **On the 11 January 2016, the Defendant compounded with its creditors. This event was material and such a circumstance is expressly referred to in Clause 15.2(e) as being an event which can trigger termination.**

108. **Prior to January 11, 2016, the Claimant could not have activated termination on the ground that the Defendant had compounded with its creditors and by logical extension, the Claimant could not have waived this contractual entitlement premised on an event which was unknown as between 2nd to 4th September 2015 when Clause 5 Addendum 2 was executed. The clause specifically outlined that it applied to claims which arose from any events that occurred on or before the date of the signing of the Contract Addendum. On the face of the Award there was no proper consideration as to the purport and effect of Clause 15.2(e) nor was there due consideration to the chain of unforeseen events which unfolded. In the circumstances the Tribunal's handling of this issue was fundamentally flawed and unsound.**

109. **As an arbiter of fact, the Tribunal ought to have clearly and comprehensively explained why it rejected NIDCO's evidence and submissions that the compounding of OAS's creditors was a circumstance which gave to NIDCO a right to terminate under Clause 15.2 (e). This obligation was evidently more heightened given that the Tribunal's findings appear to contradict both the evidence and the likely intent of the said clause.**

110. Consequently, and for the reasons outlined this Court hereby orders and declares as follows:

a. Pursuant to Section 18 of the Arbitration Act and/or the inherent jurisdiction of the Court the Award issued by the Tribunal is hereby set

aside and the issues initially referred to the Tribunal are hereby remitted for reconsideration by the Tribunal.

b. The Defendant shall pay to the Claimant the cost of this claim which is to be assessed by a Master in default of agreement.

_____

FRANK SEEPERSAD

JUDGE