SUPREME COURT OF QUEENSLAND

CITATION:	*PT Arutmin Indonesia v PT Thiess Contractors Indonesia* [2013] QSC 332
PARTIES:	**PT ARUTMIN INDONESIA** (applicant) v **PT THIESS CONTRACTORS INDONESIA** (respondent)
FILE NO:	BS 3007 of 2013
DIVISION:	Trial Division
PROCEEDING:	Originating application proceeded with as if started by claim
DELIVERED ON:	6 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	4 – 6 and 8 November 2013
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1 the claims made by the application and the amended statement of claim are dismissed.** **2 the applicant pay the respondent's costs of those claims.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – IMPOSSIBILITY OF PERFORMANCE – IN WHAT CASES PERFORMANCE EXCUSED – FRUSTRATION – where parties entered into contracts for provision of mining services in Indonesia – where change to Indonesian mining law requires that mining services be provided by an Indonesian national or local mining services company – where the contract provides for a change of the mining services to be provided necessitated by a change in authorisation – whether the contracts are frustrated for supervening illegality and impossibility of performance due to a party's inability to provide part of the agreed mining services PRIVATE INTERNATIONAL LAW – GENERAL PRINCIPLES – GENERALLY – where parties entered into contracts for provision of mining services in Indonesia – where change to Indonesian mining law requires that mining services be provided by an Indonesian national or local mining services company – where Indonesian government

department authorised to provide guidance as to operation of change to Indonesian law – whether guidance amounts to Indonesian State Administrative Decision – whether Court should determine validity of guidance under Indonesian law

Mann, *The Sacrosanctity of the Foreign Act of State* (1943) 59 LQR 42
Nygh, *Nygh's Conflict of Laws in Australia*, 8 ed, 2012
Treitel, *Frustration and Force Majeure*, 2 ed, 2004

Ardee Pty Ltd v Collex Pty Ltd [2001] NSWSC 836, cited
Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd [1988] HCA 25; (1988) 165 CLR 30, cited
Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd [1982] HCA 53; (1982) 149 CLR 600, cited
Buttes Gas & Oil Co v Hammer (No 3) [1982] AC 888, cited
Callide Coalfields (Sales) Pty Ltd v CS Energy Limited & Anor [2008] QCA 408, cited
Claude Neon Ltd v Hardie [1970] Qd R 93, cited
Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales [1982] HCA 24; (1982) 149 CLR 337, cited
Ginsberg v Canadian Pacific Steamship Co Ltd [1940] 66 Ll Rep 206, cited
Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5) [2002] UKHL 19; [2002] 2 AC 883, cited
Lucasfilm Ltd v Ainsworth [2011] UKSC 39; [2012] 1 AC 208, cited
Moti v The Queen [2011] HCA 50; (2011) 245 CLR 456, cited
Petrotimor Companhia de Petroles SARL v Commonwealth [2003] FCAFC 3; (2003) 126 FCR 354, cited
Ralli Bros v Compagnia Naviera Sota Anzar [1920] 2 KB 287, cited
Scanlan's New Neon Ltd v Tooheys Ltd [1943] HCA 43; (1943) 67 CLR 169, cited
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; (2004) 219 CLR 165, cited

COUNSEL: J Lockhart SC and D Turner for the applicant
J Bond QC, T Bradley and L Clark for the respondent

SOLICITORS: Bartley Cohen for the applicant
Minter Ellison for the respondent

[1] **JACKSON J**: The applicant ("Arutmin") is the operator of a number of coal mines at South Kalimantan, on the island of Borneo in the Republic of Indonesia. It claims declarations that a long term contract it has with the respondent ("Thiess"), for Thiess to provide services to conduct the operations, is frustrated because it has become illegal for the parties to perform it under changes made to Indonesian law. A potential distinction was drawn between discharge of a contract by "frustration" or by "supervening illegality" in the language deployed in the amended statement of

claim in the proceeding and in Arutmin's final submissions. However, it is not necessary to distinguish between them in these reasons for judgment. The single term "frustration" can be used as the relevant classification in the taxonomy of the law of contract under the common law of Australia to capture the relevant case law and principles.[1]

[2] The issues joined between the parties include questions as to the operation of the relevant Indonesian laws, their application to the parties or their contracts, the effect of administrative action by an Indonesian Government department and the consequences of all those matters upon the contracts made between the parties under the common law of Australia as to frustration of contracts.

[3] Where a relevant Indonesian law is set out or referred to below, the text is an English translation. The parties were agreed on the translations, but it is not to be forgotten that there is always the risk of loss of meaning by translation, or that the construction of a translated text carries added uncertainty. That potential difficulty extends to some of the English translations of correspondence involving a relevant Indonesian Government department which was tendered in evidence.

Arutmin and the CCOW

[4] Arutmin is a company incorporated under Indonesian law.

[5] Arutmin has six coal mines, including open cut mines at Senakin and Satui at South Kalimantan. Arutmin's entitlement to win coal and to the product is derived from a contract it has with the Government of Indonesia, styled the "Coal Contract of Works". The Government, originally through a state owned entity, has entered into such contracts with a number of miners. In relevant legislation, in the dealings between the parties and in evidence such a contract is sometimes identified by the abbreviation "CCOW".

[6] Arutmin is a major producer and exporter of coal from Indonesia. Its sales for the year ending 31 December 2012 exceeded USD$1.9 billion, resulting in a profit before tax approximating USD$187M. Excluding contractors, it employs about 500 people.

Thiess, the Restated Strategic Agreement and the AROAMS

[7] Thiess is a company incorporated under Indonesian law. Ninety-nine per centum of the shares in Thiess are owned by a company incorporated in Singapore.

[8] Since 2000, Thiess has provided mining services to Arutmin at the Senakin and Satui mines under two contracts, originally styled the "Strategic Agreement" and the "Operating Agreement Mining Services". Those contracts have been amended from time to time, and on 9 February 2009 were further amended and restated.

[9] Since 9 February 2009, they have been styled the "Revised and Restated Strategic Agreement" ("Restated Strategic Agreement") and the "Amended and Restated Operating Agreement Mining Services". The latter agreement is referred to as the

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1 *Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337 at 359.

"AROAMS" by the parties in their dealings and in evidence. In the AROAMS, Thiess is called the "PSC" and Arutmin is called the "Company".

[10] Broadly speaking, the Restated Strategic Agreement and AROAMS provide for Thiess to provide services to carry out the mining operations to the earlier of the expiry of the CCOW or the end of the mines' economic life.

[11] The Restated Strategic Agreement contains a number of provisions reflecting the cooperative bases of the long term relationship under the contracts. In particular, clause 1.1(a) and the objectives contained in the Statement of Corporate Intent, read together with clause 4.1 do so. However, in the view I take of the contractual issues to be decided it is not necessary to focus on the Restated Strategic Agreement further.

[12] In due course, it will be necessary to set out some provisions of the AROAMS in detail. For the present, it is sufficient to identify that by clause 3.1 of the AROAMS "[Arutmin] engage[d] [Thiess] to provide the Services…" and that the "Services" as defined, means "the construction mining washing and materials handling services… as set out in Schedule 1." Schedule 1 provides in part that Thiess "must provide all plant, equipment, facilities, services, materials, supplies… labour and management required to carry out the Services contained in the following parts of the Schedule…"

[13] Part 1 of Schedule 1 identifies those Services under numbered items headed "Mining", "Treatment", "Handling", Transporting" and "General". Items 1, 2 and 3 are as follows:

> "**1. Mining**
>
> The PSC must throughout the Term:
>
> (a) plan the mine, its development and its construction;
> (b) clear land, remove and store topsoil for re-use;
> (c) strip overburden;
> (d) mine and extract coal in accordance with the Production Plan prepared in accordance with Part 4 of this Schedule;
> (e) rehabilitate land (on an on-going basis) as soon as possible after completion of mining in each area of the Site to a best practice standard and to a standard that is acceptable to the Company and complies with any Authorization or Requirement of any relevant Government Authority;
> (f) provide and maintain all pumps and pipe works necessary to de-water the working areas in the Property;
> (g) provide and maintain all access ways and haul roads in and around the Property;
> (h) carefully control blast hole layouts, with drilling and firing of product and waste.
>
> **2. Treatment**
>
> The PSC must throughout the Term:

(a) maintain and operate treatment facilities;
(b) wash coal and blend coal;
(c) ensure quality and grade of washed and/or blended coal meets requirements of this Agreement.

3. Handling

The PSC must throughout the Term:

(a) stockpile coal on the Property in sufficient quantities and grades to satisfy the requirements of this Agreement;
(b) maintain stockpiles of raw and product coal adequate to smooth out fluctuations and reliability to meet Production Schedules; the levels of such stockpiles to be set from time to time by the parties by agreement;
(c) not stockpile coal on the Property in locations or in quantities exceeding those maximum quantities nominated from time to time by the PSSC and approved by the Company."

[14] Between 2004 and 2013, Thiess invested in excess of USD $500M in asset purchases to provide the Services. The assets include excavators, dump trucks, bulldozers, graders, loaders, service trucks, fork lifts, cranes, water carts and workshops. Thiess employs 4,000 full-time employees across both the Senakin and Satui projects.

[15] During the year ended 31 December 2012, Arutmin paid $345,249,735 to Thiess under the AROAMS for the Services. For the period ending in April 2013, the amount paid was $92,068,296.

[16] The Senakin mine is located on a 16,106 hectare area. Thiess has provided mining services at seventeen coal pits. The Satui mine is located on a 6,100 hectare area. Thiess has provided mining services at fourteen coal pits.

Authority for and regulation of coal mining in Indonesia

[17] Before January 2009, the mining law of Indonesia comprised or included Law Number 11 of 1967 On The Basic Provisions of Mining Law. There was also a relevant law identified as Law Number 1 of 1967 On Foreign Capital Investment.

[18] The CCOW was granted to Arutmin on 2 February 1981 by decree of the Minister of Energy and Natural Resources. Arutmin's original counterparty was an entity owned by the Indonesian State. On 1 July 1997, the Government of Indonesia was substituted as the counterparty.

[19] The CCOW was approved by the Indonesian Parliament, the President and the Minister of Mines and Energy. Its status under Indonesian Law is not entirely clear on the evidence but that was not of importance to the parties' contentions. They both proceeded on the footing that it had at least contractual effect. Thiess did not contend that any of the laws considered later in these reasons was invalid or ineffective if it was inconsistent with any provision of the CCOW.

[20] On 12 January 2009, the Indonesian Parliament promulgated Law Number 4 of 2009 Concerning Coal Mineral And Coal Mining ("Law 4"). Law 4 revoked and declared Law Number 11 of 1967 to be no longer in effect, but the laws and regulations implementing the earlier law remained in effect, to the extent they did not contradict the provisions of Law 4.

Law 4

[21] There are several provisions of Law 4 which were relied on by the parties.

[22] First, Article 169a of Law 4 provides that a CCOW which existed prior to the promulgation of Law 4 will remain valid until the expiry of the contract. However, Article 169b continued:

> "The provisions stipulated in the… coal contract of works… must be adjusted…except regarding state revenues."

[23] Article 169b provides for the adjustment to be made within the period of 1 year. Both parties tendered evidence showing that the period has been extended to next year. As yet, the Government of Indonesia and Arutmin have not finalised the terms for the "adjusted" CCOW. In the meantime, the CCOW is both unadjusted and valid according to its terms.

[24] Secondly, Articles 34 and 35 of Law 4 provide that the category of Mining Business of Coal Mining is to be carried out in the form of a Mining Business Permit identified by the acronym "IUP" or Special Mining Business Permit identified by the acronym "IUPK". IUPs are divided into the categories of Exploration IUPs and Production IUPs under Article 36. Article 39(2) of Law 4 sets out provisions that an IUP must contain. There are similar provisions for an IUPK.

[25] Thirdly, Article 90 of Law 4 provides that an IUP holder or IUPK holder may carry out all or part of the phases of a mining business. Article 93 confers the right on the holder to possess coal which has been produced if the royalties have been paid.

[26] Fourthly, some provisions of Law 4 impose obligations upon the holder of an IUP or IUPK. Relevantly to this case, Article 124 of Law 4 provides that an IUP or IUPK holder "must employ a local and/or national mining services company."

[27] Fifthly, Article 127 of Law 4 provides that: "Further provisions on mining services as referred to in Articles 124, 125 and 126 are to be stipulated under ministerial regulation."

[28] Sixthly, Article 139(4) of Law 4 provides that the Minister is responsible for providing guidance on the implementation of mining business carried out by the holder of an IUP or IUPK.

Regulation 28

[29] On 30 September 2009, Regulation of the Minister of Energy and Resources Number 28 of 2009 ("Regulation 28") was stipulated and promulgated under

Indonesian law. It appears to have been made pursuant to the regulation making authority in Article 127 of Law 4.[2]

[30] Article 5 of Regulation 28 ("Article 5") provides for an IUP or IUPK holder to give preference in acquiring services to companies classified as either a Local Mining Services Company or a National Mining Services Company. On 9 October 2012, Article 5 and other articles of Regulation 28 were amended by Regulation of the Minister of Energy and Mineral Resources Number 24 of 2012 ("Regulation 24"). Where Regulation 24 has amended a relevant article of Regulation 28, I will refer to the article by its number and "as amended". Article 5, as amended, provides:

> "Article 5
>
> (1) In carrying out its business activity an IUP holder or an IUPK holder may use mining services after obtaining approval of the work plan in respect of its activities from the Minister, governor or regent/mayor in accordance with their respective authority.
>
> (2) An IUP or IUPK holder referred to in paragraph (1) must use a Local Mining Services Company and/or a National Mining Services Company.
>
> (3) If there is no Local Mining Services Company and/or a National Mining Services Company referred to in paragraph (2) available, an IUP holder or an IUPK holder may use an Other Mining Services Company.
>
> (4) An IUP holder or an IUPK holder may use the Other Mining Services Company referred to in paragraph (3) after announcing through the local and/or national mass media but no Local Mining Services Company and/or National Mining Services Company is financially and/or technically capable.
>
> (5) If the Other Mining Services Company obtains work in the mining services sector referred to in paragraph (4), the Other Mining Services Company must give part of the work which they obtain to a Local Mining Services Company as a sub contractor in accordance with its competence.
>
> (6) In using the Other Mining Services Company referred to in paragraph (4) an IUP holder or IUPK holder must apply the principles of appropriateness, transparency and reasonableness."

[31] "Local Mining Service Company", "National Mining Service Company" and "Other Mining Service Company" are expressions defined in Article 1 of Regulation 28 ("Article 1") as follows:

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[2] A statement was made in oral evidence by the expert called by Thiess that Regulation 28 is invalid. However, that contention was not pleaded or raised by the expert reports. I do not consider it further.

"21. Local Mining Services Company (*Perusahanna Jasa Pertambangan Lokal)* is a services company in the form of an Indonesian legal entity or non legal entity, established in a regency/municipality or province, the entire capital of which originates from within the country and that operates within the territory of the relevant regency/municipality or province.

22. National Mining Services Company is a company established under the laws of Indonesia in the form of an Indonesia legal entity the entire capital of which originates from within the country and that operates within the territory of the Republic of Indonesia or outside the territory of the Republic of Indonesia.

23. Other Mining Services Company (*Perusahaan Jasa Pertambangan Lain*) is a company established under the laws of Indonesia in the form of an Indonesia legal entity the capital of which is partly or entirely owned by foreign parties."

[32] Article 1 also defines a Mining Services Business Permit ("IUJP") as a permit which is granted to a Services Business Provider to carry out mining services business activity. Article 15 of Regulation 28, as amended, provides that a mining services provider, which is any one of those categories of company, may carry out its activities after obtaining an IUJP from the relevant authority.

[33] Article 1 defines a Certificate of Registration ("SKT") as a certificate of registration that is issued to a Non-Core Mining Services Business Company. Article 16 of Regulation 28 provides that a Non-Core Mining Services Provider may carry out its activities after obtaining an SKT from the relevant authority.

[34] Article 10 of Regulation 28 ("Article 10") deals with mining activity that a Production Operation IUP or IUPK holder must do for itself, on the one hand, and the work that it may delegate to contractors, on the other hand.. As amended, it provides:

"Article 10

(1) Holders of Production Operations IUP or IUPK must carry out their own Mining activities.

(2) Production Operations IUP or IUPK holders may delegate some of their Mining activities to a Mining Service Company, limited to activities in regard to the stripping of waste rock/overburden.

(3) The stripping of waste rock/overburden as referred to in paragraph (2) consists of digging, loading and stripping of waste rock/overburden with or without prior blasting.

(4) To develop and empower local communities, and to optimize the utilization and conservation of alluvial tin natural

resources, in the implementation of sedimentary excavation of alluvial tin, IUP or IUPK holders that are BUMN or BUMD can assign their work to local Mining Companies or communities around the mine through a partnership program, after obtaining the approval of the Minister.

(5) IUP or IUPK holders who use subsurface mining methods to dig tunnels/shafts for access to vein ore/seam coal, drainage and ventilation can contract their work to Mining Construction Service Companies in the Tunnelling Sub-sector.

(6) The holder of an IUP or IUPK can use equipment from SKT-holding companies through a heavy equipment rental mechanism."

[35] Article 27 of Regulation 28 ("Article 27") provides for the Minister to provide guidance to an IUJP holder or SKT holder, as follows:

"Article 27

(1) The Minister will provide guidance to the governor and the regent/mayor in administering mining services business.

(2) The Minister may delegate to the governor to provide guidance to the regent/mayor in administering mining services business.

(3) The Minister, governor or regent/mayor in accordance with their respective authority will provide guidance to the IUJP holder and the SKT holder.

(4) The guidance referred to in paragraph (3) is carried out by way of:

a. providing counselling on mining services laws and regulations;

b. providing information, training and guidance regarding the provisions on mining engineering, mine occupational health and safety and the mining environmental protection.

c. evaluating orderly administration and utilization of mining services business."

[36] Article 31 of Regulation 28 ("Article 31"), as amended, provides for the Minister to impose administrative penalties upon an IUJP holder or an SKT holder who commits identified violations, including conducting any activities that are not in accordance with the IUJP or SKT. The penalties may take the form of a suspension of the mining services business activities or a revocation of the IUJP or SKT.

[37] Article 36 of Regulation 28 ("Article 36") makes transitional provision. It provides:

"Article 36

(1) Upon this Ministerial Regulation coming into effect, any IUJP which was issued prior to the promulgation of this Ministerial Regulation will remain in effect until the permit period expires and the implementation of which must adjust to the provisions of this Ministerial Regulation.

(2) Upon this Ministerial Regulation coming into effect, the holder of a Mining Authorisation, Contract of Work, and Coal Contract of Work that used a mining services company under the laws and regulations prior to the promulgation of this Ministerial Regulation must adjust to comply with this Ministerial Regulation within a maximum period of 3 (three) years.

(3) Upon this Ministerial Regulation coming into effect, the holder of a Mining Authorisation, Contract of Work, and Coal Contract of Work that will use mining services must follow the provisions of this Ministerial Regulation.

(4) Upon this Ministerial Regulation coming into effect, any application for an IUJP that is currently in process must be processed in accordance with the provisions of this Ministerial Regulation."

Thiess's IUJP

[38] Under the laws as described above, the Ministry of Energy and Mineral Resources ("ESDM") regulates the activities of mining businesses and mining services providers. The Directorate General of Minerals and Coal ("DGMC") operates for that purpose within the ESDM.

[39] On 13 October 2009, the DGMC granted a Mineral, Coal and Geothermal Mining Services Licence to Thiess in the form of an IUJP for a term of two years.

[40] On 17 March 2011, the Indonesian Minister of Energy and Mineral Resources issued a decree extending Thiess's Mining Services Licence or IUJP. The extended IUJP was issued for a term of three years. It provides that Thiess may carry out the activities of mining construction (subsector mining roads), stripping of overburden, truck transportation and post-mining reclamation (subsector reclamation and mine closure) in mineral and mining projects.

Thiess's SKTs

[41] On 20 April 2011, the South Kalimantan Provincial Mining Department issued an SKT to Thiess ("Provincial SKT"). The Provincial SKT notified Thiess of its registration to carry out Non-Core Mining Services Business activities in mineral and coal mining in the field of "heavy machinery leasing/plant hire."

[42] On 2 April 2012, the DGMC issued an SKT to Thiess ("Central SKT") for the period to 27 June 2014. The Central SKT licensed Thiess to perform Non-Core Mining Services Business activities (within mineral and coal projects) including leasing of heavy machinery, carrying out construction for supporting facilities and maintenance of processing facilities.

Provisions of the AROAMS in more detail

[43] The AROAMS consists of "Terms of Agreement" in 23 clauses comprising 47 pages, together with Schedules 1 to 7. As already stated, Schedule 1 provides for the Services, including Part 1, Items 1 to 3.

[44] Schedule 2 provides for "Pricing and Payment", in Parts 1 to 3B. Schedule 7 provides for the "Responsibility/Risk Assessment & Allocation Matrix for Life of Mine Contract".

[45] Also as already stated, under clause 3.1 of the AROAMS Arutmin engaged Thiess to provide the Services. By clause 3.3, Thiess is to provide the Services during the Term. The Term is defined to be the earlier of the expiry of the CCOW or when all of the economical coal reserves have been exhausted. By clause 3.5, commencing on 1 July 2012, the parties were to engage in a process over six months described as a "Reset Review". The process was to be started by a "document outlining the scope of the Services for the next 5 years." The parties were then to "jointly undertake a review of the scope of the Services as proposed… and… the escalation formula and its components…" The Reset Review process is to be repeated at 5 yearly intervals.

[46] Clause 4 contains a general statement of Thiess's obligations and warranties. By clause 4.1, Thiess promised to provide the Services competently and in accordance with the law. By clause 4.2, the Services to be provided are those "set out in Schedule 1 and any variations to the Services agreed by the parties pursuant to this Agreement."

[47] Clause 4.3 provides:

> "4.3 Compliance with Statutory Requirements
>
> The PSC will comply with the provisions and requirements of any Authorization and directions of a Government Authority in accordance with Schedule 1 Part B.
>
> If any change to an authorization necessitates a change to the Services, any additional cost or saving to the PSC shall be valued and paid for in accordance with Clause 8."

[48] The terms "Authorisation" and "Government Authority" are defined in clause 1 as follows:

> "'**Authorization**' means the CCOW and all consents, authorizations, permits, licences and permissions thereunder and any other consent, authorisation, registration, filing, lodgement, notification, agreement, certificate, commission, lease, licence, permit, approval or exemption

> from, by or with a Government Authority (including without limitation the mining lease under which the Company is entitled to carry on the Project;
>
> …
>
> '**Government Authority**' means a government minister, a government department, an institution or other authority constituted for a public purpose, a holder of an office for a public purpose, a local authority, a court, tribunal or board or any officer or agent of any of the above acting a such; "

[49] Part 8 of Schedule 1 provides, inter alia, that Thiess "must at all times during the Term strictly comply or ensure strict compliance with all applicable Statutes, Authorizations and Requirements of any Government Authority" and that "[w]ithout limiting the above, [Thiess] must fully and promptly with (sic) and carry out all Obligations relevant to [Thiess] or the Property under any statute or Authorisations regulating or otherwise relating to mining activities…"

[50] Clause 5.1 provides that Arutmin will "obtain and maintain the Authorisations which [Arutmin], as operator of the Sites, must obtain and maintain to permit continued legal operation of the Sites and the Site Improvements." Clause 5.3 provides that "[s]ubject to [Thiess's] obligation to load the Product Coal [Arutmin] must make arrangements at its cost for removal of Product Coal from the loading facility in accordance with the Production Requirements."

[51] Clause 7 provides for payment for provision of the Services. There is a complex formula to be followed in the calculation of the amount of the monthly "Services Fee". The initial step involves "multiplying the Coal **tonnes barged** each calendar month from each Pit by the respective rates" in Schedule 2 and by "multiplying the actual bank cubic metres of pre-strip (or waste) removed each calendar month from each Pit by the respective rates" in Schedule 2. (emphasis added) Clause 7.3 provides that, in consideration of Thiess providing the Services in accordance with the AROAMS, Arutmin agrees to pay the Services Fee during the Term. Clause 7.4 provides for a monthly payment claim process.

[52] Clause 8.1 provides for variations to the Services, in part, as follows:

> "8.1 Variations to the Services
>
> The PSC shall not vary the Services under the Contract except as directed by the Company or approved in writing under this Clause by the Company. If the PSC requests the Company to approve a variation for the convenience of the PSC, the Company may, in its absolute discretion, do so in writing.
>
> Subject to Clause 9, the Company may direct a change to the work, including a direction to:
>
> (a) increase, decrease or omit any part of the Services;
> (b) execute additional Services; or
> (c) change the method of performing the Services;

provided that, the Company shall not direct the PSC to carry out Services under this Agreement beyond the capacity of the Site Improvements, the PSC Supplied Plant and Equipment, the Company Supplied Fixed Plant and Company Supplied Mobile Plant and Equipment.

The Company may notify the PSC in writing of any proposed variation. Upon receipt of such a notice the PSC shall advise the Company in writing the effect which the PSC anticipates that the variation will have on the Services and of the anticipated price for the variation.

Unless the Company and the PSC agree upon the price for the variation, any variation directed or approved shall be valued under Clause 8 2.

..."

[53] Clause 14.1 provides as follows:

"14.1 Company to Obtain

The Company shall obtain and maintain throughout the Term all Authorizations required for:

(a) the Project to be lawfully carried on; or
(b) the Services to lawfully provided;

including any Authorizations which are required to be held by or in the name of the Company, which the PSC shall obtain and maintain on the Company's behalf, unless the Company otherwise requires but excluding any Authorizations which relate to the Company's ownership or right to occupation or use of the Site."

[54] Clause 14.3 provides as follows:

"14.3 Loss of Statutory Authorizations

Where an Authorization required for the Project to be lawfully carried on or the Services to be lawfully performed:

(a) cannot be obtained despite the best endeavours of the PSC or the Company;

(b) is revoked, withdrawn, cancelled or terminated or expires, or otherwise ceases to exist for reasons other than any neglect or default by the PSC or the Company: in circumstances where a replacement or renewed Authorization cannot be obtained despite the best endeavours of the PSC or the Company; or

(c) is issued on or varied to include terms and conditions which the parties agree are unsatisfactory in circumstances where satisfactory terms and conditions cannot be obtained despite the best endeavours of the PSC or the Company,

the Company or PSC may by notice in writing to the other raise the issue of the Authorizations as an issue to be resolved by the PMG in accordance with Clause 18 (taking into account alternative means by which the Project may be carried on and the Services lawfully provided) and failing resolution of the issue to the satisfaction of both parties within sixty (60) days after the giving of the notice raising the Issue, a Termination Event shall be deemed to occur."

[55] Clause 18 provides for a process of dispute resolution by mediation and valuation. Summarising for brevity, the parties agree that until a party has complied with that process, the party shall not commence any court proceeding in respect of an issue. Clause 18.2(c)(iv) provides, in effect, that after the process is exhausted the parties may commence a proceeding in this Court.

[56] By clause 1.5, each Schedule to the AROAMS is incorporated by reference into the AROAMS. Schedule 7, as previously stated, deals with the "Responsibility/Risk Assessment & Allocation Matrix For Life of Mine Contract". Part 8, on page 7, bears the heading "Central & Regional Government Considerations". Item 8.4 under that heading is identified as "Changes in and new Government Decrees/Acts Regulations & Like". Those matters are allocated as a "Joint" responsibility and the "Action Required" is stated to be "As per current Operating and Agreement and current approved CVs."

[57] Clause 1.4 provides:

"1.4 Severance

If any provision of this Agreement is ineffective, void, voidable, illegal or unenforceable, or if this Agreement would, if a particular provision were not omitted, be ineffective, void, voidable, illegal or unenforceable that provision (without in any way affecting the effectiveness, validity, legality and enforceability of the remainder of this Agreement) shall be severable from this Agreement and this Agreement shall be read, construed and take effect for all purposes as it that provision were not contained in it."

Dealings from October 2009 to April 2012

[58] Perhaps the parties thought in late 2009 that Regulation 28 did not yet apply to Arutmin as the holder of a CCOW and that Thiess's 13 October 2009 IUJP permitted it to carry out the Services it had agreed to provide under the AROAMS.

[59] However, from May 2010 the parties engaged one another over the potential effect of the new mining laws. Further, a letter from the ESDM to Arutmin dated 3 May 2011 requested that Arutmin immediately carry out coal mining activities on its own.

[60] On 13 May 2011, Thiess wrote to Arutmin stating that the DGMC was working with mining services companies to achieve a solution to enable them to perform their existing contracts.

[61] On 25 May 2011, Arutmin wrote to the DGMC stating that it was preparing to perform its own coal getting activities.

[62] The parties discussed a "wet rental" arrangement for coal getting activities, under which Thiess would provide machines to Arutmin to be fuelled, maintained and operated by Thiess's employees.

[63] On 17 February 2012, Thiess wrote to Arutmin advising that Thiess's IUJP "no longer covers coal extraction or processing activities." (In fact, it seems that was the position from 17 March 2011, when the extended IUJP was issued.) Thiess requested "a variation to the Services pursuant to clause 8.1 of the Contract as follows:

- Deleting coal extraction and processing from the Services provided by the PSC under the Contract.

- Replacing the Schedule of Rates with new rates for waste removal.

- Entering into a new agreement to lease heavy equipment."

[64] On 28 February 2012, the parties discussed the issue of coal processing at a Project Management Group ("PMG") meeting. Like coal getting activities, the IUJP no longer authorised Thiess to carry out coal processing activities. No further solution was proposed then or has been proposed since, except that coal processing activities should be omitted from the Services.

DGMC's Guidance

[65] On 19 April 2012, Arutmin wrote to Thiess enclosing a draft contract variation for omitting coal getting activities from the Services and a draft wet rental agreement.

[66] On 23 May 2012, Thiess wrote to Arutmin stating, in effect, that representatives of the ESDM had confirmed that Regulation 28 would not apply to their arrangements. The letter seems to have overlooked that, in any event, Thiess did not have an IUJP which permitted it to provide that part of the Services comprising either coal getting or coal processing activities.

[67] On 28 May 2012, Arutmin wrote to Thiess stating that a written assurance from the Minister was required by Arutmin to confirm that Thiess would be permitted to lawfully continue to provide the mining services after 30 September 2012, when the new law (meaning Regulation 28) was due to take effect.

[68] On 5 July 2012, Arutmin wrote to Thiess enclosing a Reset Review notice under clause 3.5 of the AROAMS. The Reset Renew notice proposed changing the Services to be provided by Thiess under the AROAMS by a contract variation to deal with coal getting services, on the premise that neither party would be penalised as a result. The notice also proposed that Arutmin would become responsible for the operation of wash plants (coal processing) by a contract variation.

[69] On 20 July 2012, Thiess wrote to the DGMC requesting, inter alia, clarification of the status of the AROAMS at the end of the transitional period under Article 36(2), "especially with regard to Article 5 of [Regulation] 28…"

[70] On 23 July 2012, Arutmin wrote to the DGMC as to the implementation of Regulation 28 in relation to Thiess's provision of mining services comprising stripping and removal of overburden, crushing, hauling and coal loading and its position as an "Other services Mining Company." The letter provided, in part:

> "We hereby seek your kind opinion whether or not subsequent to 30 September 2012 Arutmin would still be allowed to use Thiess services as a mining services provider despite its status as a non-National Mining Services Company or non-Local Mining Services Company…"

[71] On 11 September 2012, the DGMC wrote a response to Arutmin. The letter somewhat delphically provided, inter alia:

> "1. Based on article 36 Paragraph (2) of [Regulation 28]… contracts between the holders of [CCOW]'s… and mining services companies [made] before the issue of… [Regulation 28] are still valid but their activities must be adjusted as regulated in article [5] paragraph 2 no later than 3 (three) years from the issue of [Regulation 28]…
> .2. Thiess may engage in activities based on the licences held, namely [the IUJP]… [and SKTs]…
> 3. When PT Arutmin Indonesia gives new work to mining services companies, the process must be in accordance with the provisions of Article 5 of [Regulation 28]…
> 4. If in future it is found that the Mining Services Company which works at… Arutmin… does not do so in accordance with the… [IUJP] and… SKT… they hold, then sanctions will be imposed according to the provisions of the legislation and regulations and the Inspector of Mines may halt the activities."

[72] On 12 September 2012, the DGMC wrote to Thiess in similar terms.

[73] On 30 September 2012, the parties executed a variation to the AROAMS ("Contract Variation 54" or "CV 54"). It provided for the omission of coal getting services from the Services to be provided under the AROAMS and for Thiess to supply to Arutmin the required equipment for coal getting, fully serviced, including operators, maintenance and supervision at an hourly rate equal in value to that part of the Services to be omitted under an agreement. The agreement was styled "Wet Rental Agreement".

[74] The Wet Rental Agreement originally covered the period from 1 June 2012 to 30 September 2012, even though it was only executed on the latter date. It was subsequently extended by agreement from 30 September 2012 to 31 December 2012 and from then to 28 February 2013.

[75] Not surprisingly, Arutmin sought clarification of the DGMC's 11 September 2012 letter. On 15 October 2012, Arutmin wrote again to DGMC. The letter provided, in part:

> "Our understanding… is as follows:
>
> "1 Despite the fact that… [Thiess] has the status… categorised as [O]ther Mining Services Company… [Arutmin] may still be allowed to continue to using Thiess services which have been agreed prior to the effectiveness of [Regulation 28] (not new works).
>
> 2 Arutmin may still continue using Thiess's services with it being relieved from the obligation set out in Article 5 of [Regulation 28], rendering it unnecessary for Arutmin to make media announcement in order to look for local services companies or National Services companies…"

[76] The further response from DGMC was clearer. On 5 November 2012, the DGMC wrote to Arutmin, including the following:

> "1 According to Article 36… Arutmin may continue to utilise the service contract with [Thiess] however the activities must be in line with the stipulation of the provision of Article 10…
>
> 2 In the event [Arutmin] assigns new works to the Other Mining Services Companies… the process must be in accordance with the provisions of Article 5…"

[77] On 12 November 2012, at the PMG meeting following receipt of that letter, the agenda item relating to the application of the new mining law was resolved to be closed.

Progress of Reset Review

[78] As already stated, on 5 July 2012 Arutmin had sent a Reset Review Notice to Thiess. Contrary to its present position, Thiess's initial response to the Reset Review Notice disputed whether the Reset Review process was apt to deal with changes to the scope of the Services, such as those caused by omission of coal getting or coal processing activities.

[79] On 11 December 2012, Arutmin wrote to Thiess enclosing a Revised Reset Review Notice. The Revised Notice proposed changes "as a result of omitting coal getting and processing from the work", including deleting all of "Part 1, Section 2 Treatment" from Schedule 1.

[80] On 5 March 2013, Arutmin sought the appointment of an independent expert for mediation of the Reset Review process.

[81] On 25 March 2013, the participants at the PMG meeting discussed the progress of the Reset Review process.

[82] On 28 March 2013, Thiess wrote to Arutmin about the Reset Review, proposing that Arutmin maintain and operate the coal treatment facilities, wash and blend coal and carry out transport and coal loading activities.

[83] On 4 April 2013, IAMA nominated Graeme Robertson to act as independent expert for the purpose of the Reset Review.

[84] The Reset Review process has not progressed since then. Thiess claims it is ready and willing to continue with the process.

Litigation and suspension

[85] On 2 April 2013, Arutmin filed the originating application in this proceeding. The order sought at that time was confined to a declaration that a "Termination Event" had occurred under clause 14.3 of the AROAMS. It was by later amendment that Arutmin added its claim that the AROAMS is frustrated or made void by supervening illegality. During the hearing, Arutmin abandoned its claim for a declaration that a "Termination Event" had occurred under clause 14.3.

[86] On 26 April 2013, Thiess suspended performance of the Services under the AROAMS on the ground that Arutmin had failed to remedy a failure to comply with the payment processes under the AROAMS for services provided in earlier months. The parties' dispute as to the validity of the suspension is the subject of Thiess's counterclaim in the present proceeding, which the parties agreed to separate from the trial of Arutmin's claim.

Arutmins's case theory

[87] Arutmin's pleading contends that the continuing performance of the AROAMS involves contraventions of the provisions of Regulation 28, as follows:

(a) first, since 1 October 2012, performance of any of the Services by Thiess under the AROAMS contravenes Article 5 of Regulation 28;
(b) secondly, since 1 October 2012, performance of the Services (except perhaps stripping of waste rock or overburden and use of equipment through a heavy equipment rental mechanism) under the AROAMS contravenes Article 10 of Regulation 28; and
(c) thirdly, since 17 March 2011 performance of the part of the Services comprising coal processing activities contravenes Thiess's IUJP (having regard to Article 15(1) and Article 31(1)(a)).

[88] Arutmin's pleaded contention is that each of the contraventions leads to the conclusion that the AROAMS is frustrated, by reason of supervening illegality. Although Arutmin focuses solely on the AROAMS, if the AROAMS is frustrated, so must be the Restated Strategic Agreement.

[89] With two exceptions, Thiess challenges each of the allegations of illegality. The exceptions are that Thiess does not challenge that it can not lawfully provide that part of the Services comprising coal getting or coal processing activities. As to coal getting, Thiess says it can provide nearly all of the relevant part of the Services under a "wet rental" agreement to provide the relevant plant or machines, as it has done under the Wet Rental Agreement. Arutmin appears to accept the equivalence

of that part of the Services and the carrying out of activities under a "wet rental" arrangement, for the purposes of Arutmin's second and third contentions. As to coal processing activities, Thiess says that omission of that part of the Services is provided for or contemplated under the AROAMS and that does not frustrate the AROAMS and Restated Strategic Agreement.

Article 5 as a ground of frustration

[90] Arutmin's contention is that from the expiry of 3 years from the promulgation of Regulation 28 (30 September 2012) Arutmin must comply with Article 5, because that is the effect of Article 36. It contends that under Article 5 Arutmin is prohibited from using Thiess to provide the Services, because Thiess is an Other Mining Services Company. Performance by Arutmin of its obligations to permit Thiess to carry out all or nearly all the Services under the AROAMS is illegal, because Article 5 provides that Arutmin must use a Local Mining Services Company and/or a National Mining Services Company to provide any such services.

[91] In considering this argument, I put to one side whether Article 10 permits Arutmin to use a mining services provider to carry out the activities comprised in some of the Services, in any event. Arutmin raised that question separately from the operation of Article 5. At this point, the argument assumes that Arutmin might otherwise employ a mining services provider for the Services.

[92] Thiess defends Arutmin's contentions based on Article 5 by a cascade of points. I have rearranged the order of presentation of the points, but that does not change their substance. First, Thiess contends that irrespective of the operation of Article 36, it is "not clear" whether Article 5 applies to Arutmin's engagement of Thiess under the AROAMS as a pre-existing contract. Alternatively, Thiess contends that it is not clear that Article 5(2) and Article 5(3) apply to Non-Core Mining Services provided under an SKT.

[93] Secondly, Thiess contends that the effect of the DGMC's Guidance is that Arutmin does not have to comply with Article 5 in relation to Thiess's engagement under the AROAMS. As part of that, Thiess contends that the DGMC's Guidance is a State Administrative Decision under Indonesian law, which binds Arutmin until Arutmin establishes invalidity by the curial process provided for that course in Indonesia.

[94] Arutmin replies that the DGMC's Guidance is inconsistent with Articles 36 and Article 5, is invalid and is not binding. Arutmin says that the DGMC's Guidance is not binding as guidance (for the purpose of Article 27 or Article 139(4) of Law 4 or otherwise) and is not a State Administrative Decision.

[95] Thirdly, Thiess contends that even if the DGMC's Guidance is invalid because it is inconsistent with Article 36 and Article 5 read together, this Court will as a matter of law decline to pronounce upon that validity.

[96] Fourthly, Thiess contends that, if otherwise applicable, Article 5(3) requires a tender to determine whether there is a Local Mining Services Company and/or a National Mining Services Company "available". Under Article 5(4), if no such company has "fulfilled the classification and qualifications required by" Arutmin, after making an announcement to that effect, Arutmin may use Thiess to supply Mining Services as

an Other Mining Services Company. Arutmin has not sought to let a tender to determine whether there is a Local Mining Service Company and/or a National Mining Services Company available. Thiess contends that in those circumstances Arutmin may not rely on Article 5 as frustrating the AROAMS. Arutmin responds that it is inevitable that a Local Mining Services Company and/or a National Mining Services Company will be available so that it is not required to go to tender to establish that matter.

[97] Fifthly, Thiess contends that after 30 September 2012 Arutmin continued to perform the AROAMS by permitting Thiess to perform all the Services, perhaps with the exception of coal getting which was provided under Contract Variation 54 and the Wet Rental Agreement. Arutmin continued to pay Thiess for the provision of the Services (and for the heavy equipment rental mechanism under the Wet Rental agreement) until March 2013. Thiess contends that conduct is "fatally inconsistent" with Arutmin's frustration case. Arutmin responds that there is no principle of election or waiver that operates as an answer to the frustration of a contract by supervening illegality, including illegality in the place of performance.

[98] Arutmin's contention as to the application of Article 5 and Thiess's first, second and third contentions in response involve disputed questions as to the operation of the law of Indonesia. Both parties tendered expert evidence as to that law by way of reports supplemented by cross-examination of the experts. Some of that evidence was contradictory but much of it was common ground. The most difficult point in dispute is whether the DGMC's Guidance is binding on Arutmin as guidance or a State Administrative Decision. The resolution of that question will constitute a finding of fact as to the foreign law of Indonesia.

[99] Thiess's defence pleads that Article 5 does not apply to the AROAMS because under Indonesian law, Article 5 is to be construed as applying to new work not to work carried out under an existing contract such as the AROAMS. But, as previously stated, the final submission it made was that it was "not clear" whether Article 5(2) and Article 5(3) apply to existing work, meaning work carried out under arrangements existing at the time when Article 5 came into effect.

[100] Thiess relies on the operation of other Laws of the Republic of Indonesia. Particularly, it relies on the provisions of Law 25 of 2007 that the Government of Indonesia warrants legal certainty, business certainty and business security to any investors, including in the licensing process pursuant to the rule of law.[3]

[101] Given that Law 4 and Regulation 28 are specifically directed to requiring the use of the services of Local Mining Services Companies and National Services Mining Companies, it is difficult to accept as a matter of generality that their intended operation in that way should be restricted by Law 25 of 2007.

[102] Thiess relies on the principle of Indonesian law stated by the expert called by Thiess that new laws apply prospectively and do not affect existing legal rights and obligations. This opinion was stated to apply to Article 5 in relation to Arutmin and the AROAMS but the point was not developed or analysed in detail.

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[3] The defence and the expert called by Thiess also referred to a treaty identified as the Agreement between Indonesia and Singapore concerning the Promotion and Protection of Investments dated 16 February 2005. However, no reference was made to the treaty in final submissions.

[103] On the other hand, both experts accepted that Article 10 regulates the activities that the holder of a Production Operating IUP or IUPK must carry out by itself and that Article 10 applied to Arutmin as holder of a CCOW from 30 September 2012. This involves acceptance that the requirements under Article 10 are engaged in relation to work that is carried out under the AROAMS as a contract existing at the time when Article 10 came into effect. The reasons for the differences of opinion as to the operation of Article 5 and Article 10 were not explored. However, that must derogate from Thiess's general contentions that existing legal rights and obligations are not affected by Regulation 28 and that Regulation 28 must be read as adjusted by Law 25 of 2007.

[104] Thiess's contention is consistent with the DGMC's Guidance that "PT Arutmin Indonesia may continue to utilise the service contract with PT Thiess Contractors Indonesia". In giving that guidance, DGMC was "providing counselling on mining services laws and regulations" under Article 27. However, that view of the operation of Article 5, and the distinction drawn by it between the operation of Article 10 and Article 5, is not explained by the evidence, so I cannot assess whether there is any matter on which it turned that was not raised by the experts' opinions tendered in evidence in this case.

[105] In oral evidence, the expert called by Thiess as to the operation of Indonesian law said this:

> "Thank you. Now, I take it in the course of preparing your reports, you have considered the provisions of article 5?---Yes, Counsel.
>
> Thank you. And **by reference to article 5 paragraphs 2 and 3**, is it your opinion that a CCOW must, within three years from the coming into force of the regulation, adjust its position **in respect of any existing engagements entered into under the old law** so that it, after three years, no longer is using the services of what's described as other mining service companies as opposed to national or local mining service companies?---**That's my understanding of article 36**." (emphasis added)

[106] There is no escaping that evidence as supporting the factual conclusion that under Indonesian law Article 36 applied Article 5 to arrangements existing when Article 5 came into effect. In the case of a CCOW holder that used a mining services company under the prior laws and regulations, it provided for a maximum period of three years to adjust those arrangements to comply with Regulation 28, including Article 5.

[107] I have not overlooked Thiess's many criticisms of the expert witness called by Arutmin on this and other questions. It is unnecessary to recount them. I thought some of the criticisms were uncalled for. But on this point, in the end, there was no substantial disagreement between the experts' opinions as to the operation of Article 5. As well, Thiess did not offer any explanation which deflected the force of the oral evidence of the expert witness called by Thiess as set out above.

[108] I am conscious that Thiess's contentions sought to leave the question of the application of Article 5, as a matter of fact, on the footing that it is "not clear" that it applies. That contention could be supported by reference to the DGMC's Guidance,

to the description of the expert called by Arutmin that there is a "lacunae" or "issue" as to whether Article 5 applies in respect of services performed under an existing arrangement at the time when Regulation 28 came into effect, and to the guarded approach of the expert called by Thiess in the reports he made before he gave the oral evidence set out above. He dealt with the question only indirectly in paragraphs 17.12 of his first report and paragraph 8 of his third report. Nevertheless, it seems to me that it is necessary to make a finding on the question because it is a material fact on which Arutmin founds its case of frustration and on which the parties called contradictory evidence.

[109] In my view, the evidence to be preferred is that which concludes that as a matter of Indonesian law Article 5 does apply to the arrangements between Arutmin and Thiess. In my view, Article 36 is intended to operate as a transitional provision under which compliance with Regulation 28 is generally required within a maximum period of three years, including Article 5.

[110] It is convenient to decide Thiess's fourth contention next. On the assumption that after 30 September 2012 Article 5 applies to Arutmin and to its use of mining services provided by Thiess under the AROAMS, Arutmin contends that it is not required to tender to determine whether a Local Mining Services Company or National Mining Services Company is available, within the meaning of Article 5(3). The expert called by Arutmin dealt with the subject matter in his first report, saying that:

> "Arutmin **has not**, in my opinion **complied** with [Article 5]. This is **because Arutmin has not (1) held a tender** to determine whether or not there is an Local Mining Services Provider (sic) or National Mining Services Provider (sic) "available" to do the work covered by the AROAMS in place of Thiess…" (emphasis added)

[111] He was asked about the subject matter in oral evidence and said this:

> "Mr Sullivan, you've expressed the view in your report that whether a local or a national mining service company is available **in order to determine that it is necessary for the [I]UP or [I]UPK holder to conduct a public tender**. Is that so?---That is the position being taken by the Director-General of Minerals and Coal at this point in time.
> Is that your opinion?---That's – that's my opinion as to what the guidance available from the Director-General says." (emphasis added)

[112] Arutmin's evidence on the point, otherwise, is confined to a statement by one of its senior employee managers as follows:

> "There are a number of local and national contracting companies that could provide these services to Arutmin including [6 named companies]… [a]ll of which can and do perform very well."

[113] Under clause 5.1(e) of the AROAMS, Arutmin is contractually obliged to "obtain and maintain the Authorisations which [Arutmin] as operator of the Sites must obtain and maintain to permit continued legal operation of the Sites and the Site

Improvements." And under clause 5.4, Arutmin promises to "grant to [Thiess] such possession of the Sites as may be necessary to enable [Thiess] to perform the Services in accordance with the requirements of this Agreement." Thirdly, under clause 3.1, Arutmin "engages [Thiess] to perform the Services in accordance with this Agreement and [Thiess] accepts that appointment.

[114] Critically, clause 14.1 of the AROAMS provides:

> "**[Arutmin] shall obtain and maintain** throughout the Term **all Authorisations required for:**
>
> the Project to lawfully carried on; or
> **the Services to be lawfully provided…"** (emphasis added)

[115] In my view, Arutmin's contention that it is not required to tender to determine whether a Local Mining Services Company or National Mining Services Company is available, fails to recognise the promises it made to Thiess, in effect, to act so as to enable Thiess to obtain the right to lawfully provide the Services.

[116] If Article 5 applies to the engagement of Thiess under the AROAMS after 30 September 2012, and it is at all possible that Arutmin could comply with Article 5 in a way that permits Thiess to provide the Services as an Other Mining Services Company, in my view Arutmin is obliged to exhaust that possibility before claiming that Article 5 is engaged in a way that frustrates the AROAMS.

[117] That conclusion follows from the principle of Australian common law that a contract is not frustrated if the state of facts (which causes the alleged frustration) is brought about by the default of the party relying on frustration.[4]

[118] In my view, it is not enough for Arutmin merely to tender evidence of the opinion of one of its managers that there are companies that could provide the services the subject of the AROAMS to Arutmin. That does not prove that Thiess cannot lawfully perform the Services under the AROAMS by reason of the application of Article 5.

[119] Having regard to that conclusion, it is not strictly necessary to decide more in order to dispose of Arutmin's claim that the AROAMS is frustrated by reason of the application of Article 5. However, as the other questions were fully argued, I return to Thiess's second and third contentions, as to the effect of the DGMC's Guidance. It is not necessary to do so in the detail which the parties' submissions and evidence addressed those questions.

[120] First, there does not seem to be any dispute that the DGMC's Guidance advised Arutmin and Thiess that Article 5 would not apply to the continued performance of the AROAMS by Thiess after 30 September 2012.

[121] Secondly, in the end, there does not seem to be any dispute between the experts that the DGMC's Guidance did constitute guidance for the purposes of Article 27 of Regulation 28. There was a dispute about whether it constituted guidance under Article 139(4) of Law 4 which it is not necessary to resolve.

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4 *Scanlan's New Neon Ltd v Tooheys Ltd* [1943] HCA 43; (1943) 67 CLR 169 at 186, 209.

[122] Thirdly, as well, Thiess contended that the DGMC's Guidance was a State Administrative Decision. A State Administrative Decision is defined as follows:

> "A written order rendered by a state administrative agency or official, which contains state administrative action under the prevailing laws and regulations, [and] is concrete individual and final, resulting in legal consequences to a person or private legal entity."[5]

[123] The State Administrative Court has jurisdiction to review a State Administrative Decision, including where the petitioner asserts that the decision is invalid because the decision maker lacked the power to make it.

[124] If the DGMC's Guidance was a State Administrative Decision, then there does not seem to be any dispute between the experts that it has binding effect under Indonesian law until set aside by the appropriate Indonesian court. The expert witness called by Arutmin expressed the views that the DGMC's Guidance was not final (because not expressed or written in terms of a formal decision), or was not made about the particular facts and therefore did not determine rights, with the consequence that it was not a State Administrative Decision.

[125] In my view, the contrary opinion of the expert called by Thiess is preferable on these points. The DGMC's Guidance was clearly given in the specific context of Arutmin's questions whether Thiess could continue to provide the Services under the AROAMS after 30 September 2012. The response to the questions was in part directed to whether Article 5 applied. In substance, the response directed that Article 5 did not apply but that Article 10 did apply.

[126] As the party alleging illegality under the foreign law, the onus of proof on that question lies on Arutmin. No-one identified what about the directions in the DGMC's Guidance was not final or was not directed to the particular parties, or their arrangements, or their rights and liabilities, as a matter of fact. The DGMC's responses dated 11 September 2012 and 5 November 2012 appeared to provide a determination by the DGMC upon the mining services laws and regulations which applied. In my view, as a matter of fact, they constituted a State Administrative Decision.

[127] Arutmin's reply that the DGMC's Guidance is nevertheless invalid is based on the rule of Indonesian law, accepted by both parties, that if guidance under either Article 27 or Article 139(4) is inconsistent with a requirement of Regulation 28 or Law 4, the guidance is invalid and liable to be set aside. Thus Arutmin contends that the DGMC's Guidance is inconsistent with the requirements of Article 5, properly applied, so that the DGMC's Guidance cannot validly decide to the contrary.

[128] Thiess repels this argument by three points. First, that since the application of Article 5 was "not clear", it was within the power of the DGMC to issue guidance as to its application. Secondly, that the guidance which issued is not liable to be set aside as a State Administrative Decision under Indonesian law except by recourse to the appropriate Indonesian court. Thirdly, that in those circumstances the

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5 Article 1(9) of Law Number 5 of 1986.

Australian common law of private international law will not decide whether the DGMC Guidance is invalid as inconsistent with the requirements of Article 5.

[129] Both parties accepted that the last question is to be decided in accordance with the decision of the High Court in *Moti v The Queen*.[6] Thiess submits that the recognition given in *Moti*[7] to an article written by F A Mann,[8] "The Sacrosanctity of the Foreign Act of State",[9] should lead to the acceptance of the opinions of that author, in deciding this case. Those opinions, as set out in the article, include relevant passages that:

(a) "…the foreign act of State ought to be recognised and allowed effects in this country if it is done subject to or is recognised by that legal system which governs the legal relationship concerned";[10]

(b) "[t]he performance of an English contract may become impossible owing to a supervenient act of State at the place of performance… In these and similar cases, the foreign act of State is merely an incidental fact. Consequently neither the question of its recognition nor that of its validity can arise";[11]

(c) "[n]o judicial review of any kind is permissible where a foreign act of State is relevant merely as a fact in the sense mentioned above;"[12]

(d) "[i]f… a foreign act of State appears to be material… [and] is recognisable here, an issue may be raised as to its validity under the law of the country in which it was carried out";[13]

(e) "Had the foreign Government or its agent **power to…grant** the alleged, licence or concession…? **It is believed that it is perfectly in order to raise these questions** and that the answers must be supplied by the 'proper law' applicable to the particular matter under review".[14] (emphasis added)

[130] However, the decision in *Moti* does not go so far in terms of any statement of principle. It rejected the broadly expressed principle that every foreign "act of State" is immune from examination in an Australian court as part of the common law of Australia. It decided that the:

> "…fact that the decision of the foreign official is called into question does not of itself prevent the courts from considering the issue. Here the question of the lawfulness of the appellant's removal from Solomon Islands, although effected by the Solomon Islands

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6 [2011] HCA 50; (2011) 245 CLR 456.

7 At [52] and fn 88.

8 Dr Francis Mann died in September 1991. He was an outstanding academic writer, although he never had an official academic position in England. He was awarded the Grand Cross of the Order of Merit from the Federal Republic of Germany, an honorary DCL from Oxford University, made an honorary QC and elected an honorary Bencher of Gray's Inn. He was "one of the last survivors of those outstanding lawyers who were forced to flee Germany… after the advent of Hitler…": Collins, "Dr F A Mann: His Work and Influence", (1993) 64 British Yearbook of International Law 55.

9 (1943) 59 LQR 42, 155, republished in FA Mann, *Studies In International Law* (Oxford, Clarendon Press, 1973), at 420-465.

10 At 438.

11 At 440.

12 At 455.

13 At 442.

14 At 449.

> Government, was a 'preliminary' to the decision whether a stay should be granted. The primary Judge was not right to conclude that '[i]t is not for this court to express an opinion on the decisions made by the Solomon Islands government.'"

[131] No definitive statement of the scope of the circumstances where the decision of a foreign official may or may not be called into question was made in *Moti*. In my view, it is simply not clear from *Moti* whether this Court should or should not decline to express an opinion on whether the DGMC's Guidance was inconsistent with Article 5 and therefore invalid as a matter of Indonesian law.

[132] Therefore, in my view, the question in this case should be answered by paying close attention to the particular facts. It is true that the answer to the question would be "preliminary" to whether the AROAMS is frustrated by the application of Article 5, but that conclusionary statement does not provide a workable test for whether this Court should or should not decline to express an opinion on the question whether Article 5 is inconsistent with the DGMC's Guidance under Indonesian law.

[133] In my view, the answer to the question emerges from the status of the DGMC's Guidance as a State Administrative Decision. A State Administrative Decision binds the parties under Indonesian law until it is set aside by a lawful authority. This Court has no power to set aside a State Administrative Decision as invalid under Indonesian law. Until found to be invalid, the DGMC's Guidance will continue to operate as a matter of Indonesian law. There is no occasion otherwise to determine the question whether the DGMC's Guidance is inconsistent with Article 5 and therefore invalid.

[134] The evidence did not reveal any reason why Arutmin was prevented from invoking the jurisdiction of the relevant Indonesian court vested with the power to determine whether the DGMC's Guidance, as a State Administrative Decision, is invalid. Instead of doing that, Arutmin seeks to have this Court decide that question which Indonesian law reserves to a particular Indonesian court.

[135] Arutmin was not put in the position where it had to invoke this Court's jurisdiction to have the question decided. This Court's jurisdiction is engaged because the law of Queensland (and the Australian common law) is the proper law of the AROAMS. The parties chose that law to govern their contract and expressly agreed, in effect, that a proceeding between them in connection with the contract could be brought in this Court. Thus, Arutmin was entitled to start a proceeding in this Court claiming relief in connection with the contract.

[136] But that does not detract from the fact that the DGMC's Guidance operates, whether validly or not, as a matter of Indonesian law. That country's laws regulate mining activity in that country and govern the administrative laws regulating the exercise of executive power by the department of a Minister of State in relation to mining activity in that country. They operate in the further context of that country's laws by way of judicial review by the courts of that country of the validity of such an exercise of power.

[137] It is not to be expected that this Court will rush to the consideration of the validity of such an exercise of power, at the urging of a party which is a company incorporated and carrying on business in that country but which has chosen not to

have the question determined in its natural jurisdiction. In my view, it might follow that this Court should decline to decide whether the DGMC's Guidance is invalid as inconsistent with Article 5.[15]

[138] The strongest contrary view is found in F A Mann's opinion set out above that it is perfectly in order to raise the question whether a foreign Government or its agent had power to grant an alleged licence or concession. In support of that opinion, F A Mann relied[16] on *Ginsberg v Canadian Pacific Steamship Co Ltd*.[17] It was held in that case that the Third Reich's Ministry of Economics had no power to revoke a licence previously granted to permit a steamship company to carry on business of contracting with customers for a voyage on the company's luxury cruise liner so as to frustrate a contract made between the plaintiff who was a non-resident German Jew and the company. The contract was governed by English law. The place of business from where the transaction was made and where the plaintiff had paid for the fares was Germany. The company alleged that the revocation of the licence frustrated the contract. It was held that the licence was not invalidated under German law and that the contract was not frustrated under English law. Atkinson J said:

> "I am satisfied that the [Ministry of Economics] had no power to interfere with a transaction which was already a binding bargain."[18]

[139] The question decided in *Ginsberg* is in some respects analogous to the question to be decided about the validity of the DGMC's Guidance in the present case. It was a question of power of the foreign authority to make the decision relied upon as having a legal effect. In F A Mann's view, such a question is one "it is perfectly in order to raise".[19] Yet that respected author considers that there is "a very serious problem" which arises when the question is not as to the power to make the decision but whether it is "impeachable on the merits".[20] In my view, a distinction drawn between review of the power to make an administrative decision under foreign law and review of the merits of the decision made under foreign law is likely to prove unsatisfactory, notwithstanding the analogous distinction drawn between jurisdiction and merits in the case law relating to recognition of a foreign judgment in a proceeding in the forum.

[140] Doing the best I can to adhere to the reasoning of the High Court in *Moti*, it seems to me that the better view of the evidence in the present case is that the DGMC's Guidance as a State Administrative Decision is binding under the law of Indonesia

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15 Compare, *Moti* at [52]; *Lucasfilm Ltd v Ainsworth* [2011] UKSC 39; [2012] 1 AC 208 at [81]-[86], *Petrotimor Companhia de Petroles SARL v Commonwealth of Australia* [2003] FCAFC 3; (2003) 126 FCR 354 at [33]-[63]; *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19; [2002] 2 AC 883 at [24], [113] and [135], *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* [1988] HCA 25; (1988) 165 CLR 30 at 40-44; and *Buttes Gas & Oil Co v Hammer (No 3)* [1982] AC 888 at 925 and 930-938.

16 At 449.

17 [1940] 66 Ll Rep 206 at 223.

18 At 226. See also at 223.

19 Dr Mann's view is hardly surprising, since he gave evidence in *Ginsberg* as to German law, which was accepted by Atkinson J. Also of passing interest is that the plaintiff was represented by Sir Holmes Valentine QC. Dr Mann was formally admitted as a solicitor in England after WWII, and practised successfully in litigation. He regularly briefed Sir Holmes Valentine QC, who described Mann as "the best instructing solicitor in London."

20 At 449.

until it is set aside by the State Administrative Court, and that this Court should not decide whether it would be found invalid if a proceeding to set it aside were started in Indonesia.

[141] In my view, for the reasons set out above, the AROAMS was not frustrated because Article 5 creates a supervening illegality and impossibility of performance which operated to discharge the contracts between Arutmin and Thiess.

Frustration by reason of Thiess's inability to provide that part of the Services comprising coal processing activities

[142] Arutmin's final submissions contended that the AROAMS is frustrated because Thiess does not have an IUJP authorising it to engage in the activities to provide that part of the Services comprising coal processing. It is common ground that Thiess does not have that authorisation under its IUJP and will not be able to obtain it. Arutmin contends that this lack of authorisation frustrated the AROAMS, from 17 March 2011, when Thiess's IUJP was amended to remove the authority to carry out coal processing activities.

[143] The legal consequence of Thiess lacking that authorisation under Indonesian law was not precisely identified in the evidence,[21] beyond the assertion that it prevented Thiess from lawfully performing the coal processing part of the Services. For completeness I observe that, reading Article 15(1) and Article 32(1)a of Regulation 28 together, Thiess would appear to be exposed to administrative penalties if it conducts activities not in accordance with its IUJP or SKTs. Also, the DGMC's Guidance clearly intimated that Thiess's operation would be liable to be ordered to be ceased by the Mining Inspector if it did so.

[144] Arutmin's pleaded case also relied on the operation of Article 10. However, Article 10 is not mentioned in Arutmin's final submissions as the basis of its contention that the AROAMS is frustrated because of Thiess's inability to engage in coal processing activities.

[145] It is common ground between the experts that Article 36 applies Article 10 from 30 September 2012. That was also the position taken in the DGMC's Guidance. Although the experts did not descend to this detail, on an ordinary reading of Article 10, it is structured as an obligation for a Production Operations IUP holder to carry out their own Mining activities, subject to exceptions. First, a Production Operations IUP holder may delegate stripping of waste rock/overburden activities, consisting of digging, loading and stripping with or without prior blasting, to a Mining Services Company. On the face of it, that would permit Arutmin to delegate that part of the Services to Thiess. Secondly, an IUP holder can use equipment from SKT-holding companies through a heavy equipment rental mechanism. As previously stated, it seemed to be common ground between the parties by the time of final submissions that the Wet Rental Agreement arrangements made between Arutmin and Thiess fell within this exception.

[146] From 30 September 2012, neither of those exceptions would apparently permit Thiess to carry out the Mining activities comprising coal processing as part of the

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[21] I put to one side the experts' opinions as to the effect on the AROAMS as a contract under Indonesian civil law, as not relevant to whether the contract is enforceable under the common law of Australia.

Services under the AROAMS without there being a contravention by Arutmin of Article 10, in failing to carry out its own Mining activities.

[147] I note that the amendment of Article 10 by Regulation 24, as promulgated on 9 October 2012, made another change which may be relevant. The original Article 10 permitted a Production Operation IUP holder to assign transportation of minerals or coal to a mining services provider. The amended Article 10 makes no reference to delegating transport. That may raise a question whether under Article 10 Arutmin is required to carry out its own Mining activities of transportation. However, Arutmin did not raise this question as a basis for its contention that the AROAMS was frustrated. Its final submissions limited its case on these points to Thiess's inability to perform that part of the Services comprising coal processing activities.

[148] Thiess does not challenge the contention that it cannot lawfully perform that part of the Services comprising coal processing activities. It defends the contention that the AROAMS is thereby frustrated. Thiess contends that there is no frustration because the AROAMS provides for what is to happen if a change to an authorisation necessitates a change to the Services. It contends that the parties are bound under the provisions of both the AROAMS and the Restated Strategic Agreement to vary the Services by omitting the coal processing activities and joining in the process to reach agreement upon the price for the variation, failing which the process for valuing the reasonable rates or prices for the variation, in accordance with the AROAMS, must be followed.

[149] Arutmin replies that the provisions of and the processes under the AROAMS do not oblige it to agree to a variation of the Services caused by Thiess's inability to perform the coal processing part of the Services. It contends that absent an agreed variation, the AROAMS is frustrated.

How the AROAMS deals with Thiess's inability to provide the part of the Services comprising coal processing activities

[150] Thiess contends that item 8.4 of Part 8 of Schedule 7 expressly contemplates that there may be a change of Indonesian mining law and regulations which will affect the allocation of risk under the AROAMS and that such changes are to be dealt with under the AROAMS.

[151] Thiess also contends that by clause 4.3 of the AROAMS it is agreed that any change to an Authorisation, including its IUJP, that necessitates a change to the Services is to be dealt with by contract variation under clause 8.

[152] Arutmin contends that although Arutmin has the power to direct a variation omitting that part of the Services comprising coal processing under clause 8.1 of the AROAMS, it is not obliged to do so. Consistently with that, Arutmin contends that clause 4.3 is not engaged because there has been no change to an authorisation that necessitates a change to the Services.

[153] In my view, Arutmin's contentions must be rejected as a matter of construction of the parties' contract, upon a close consideration of both the text and context of the relevant provisions. It is unnecessary to refer to authority on the approach to be

taken, beyond the oft cited passage from *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*:[22]

> "The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction."

[154] Clause 4.3 does not confer a power upon Arutmin to change the Services. It is directly engaged "if" a change to an authorisation "necessitates" a change to the Services. The Services are those matters Thiess is engaged to provide under clause 3.1 of the AROAMS and promises to provide under clause 4.2 of the AROAMS. The comparison to be made is between the Services and what is authorised. What may have to be changed is the scope of the Services. The change "to" the Services is agreed to be made "if" the change to the authorisation "necessitates" it. That agreement for change is not expressed to be contingent on Arutmin directing the change. Such a change to the Services is one which may cause either "additional cost or saving" to Thiess. Where the relevant change is that part of the Services are to be omitted, there may be a saving.

[155] Under clause 8.1 of the AROAMS, a variation occurs where Arutmin directs "a change to the work, including a direction to… increase, decrease or omit any part of the Services." Thus, under clause 8.1 an omission of part of the Services is expressly a "change" to the work. Putting aside that the parties agreed under clause 4.3 that a change must be made where the change in the authorisation necessitates it, whereas under clause 8.1 the change occurs where Arutmin requests it, there is no distinction to be drawn between what can be the subject of a change to the "work" under clause 8.1 and what can be the subject of a change to the "Services" under clause 4.3. The "work" under the AROAMS is or includes Thiess's performance of the Services.

[156] In my view, the deletion of coal processing activities from Thiess's IUJP is a change to an authorisation that necessitates a change to the Services within the meaning of clause 4.3, by omission of that part of the Services comprised in coal processing activities. It follows that the change to the Services necessitated by the change to Thiess's IUJP **is** to be valued under clause 8 as directed by clause 4.3. Although at one point in oral argument Arutmin contended that the process of valuing a variation under clause 8 was unenforceable, that contention was expressly withdrawn.[23] That is how the AROAMS expressly deals with Thiess's inability to provide that part of the Services comprising coal processing activities.

[157] Thiess advanced other grounds in support of its contention that the AROAMS was not frustrated. First, in support of its contention as to the operation of clause 4.3, it relied upon the severance clause in clause 1.4. Secondly, it relied upon the terms of the Restated Strategic Agreement and clause 19.7 of the AROAMS as obliging Arutmin to direct a variation under clause 8.1 of the AROAMS. In a similar vein,

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22 [2004] HCA 52; (2004) 219 CLR 165 at [40].

23 In any event, see *Callide Coalfields (Sales) Pty Ltd v CS Energy Limited & Anor* [2008] QCA 408 at [56]-[58]. See also *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* [1982] HCA 53; (1982) 149 CLR 600.

Arutmin explored the possible operation of an implied obligation of that kind in its written submissions. Thirdly, Thiess relied upon clause 3.5 and the Reset Review process as providing for a means for reducing the "scope of the Services".

[158] It is unnecessary that I deal with these alternatives, given my findings as to the proper construction of clause 4.3 and its operation in relation to Thiess's inability to perform that part of the Services comprising coal processing activities.

Frustration by reason of Thiess's inability to provide that part of the Services comprising coal getting

[159] Although Arutmin pleaded that the AROAMS was also frustrated by Thiess's inability under the IUJP to perform that part of the Services comprising coal getting activities, as previously stated that contention was abandoned in Arutmin's final submissions. They stated as follows: "Arutmin no longer presses a case of frustration relating to the inability of the parties to strike a long-term wet rental agreement."

[160] This statement impliedly accepts that Thiess's inability to provide that part of the Services comprising coal getting activities can be sufficiently dealt with by a Wet Rental Agreement. It may be implicit in that view of matters that the necessary change in the Services can be dealt with under clause 4.3 of the AROAMS, but that contention was not positively advanced by Thiess and it is unnecessary to pursue it further.

Conclusions

[161] Arutmin's founding principle of law is that a contract of which the proper law is the common law of Australia is invalid and unenforceable if the performance of the contract in a foreign country is unlawful under the law of that country.[24] The bases of the principle are sometimes differently expressed, but in my view they may be summarised for present purposes as a principle of discharge for frustration by supervening illegality and impossibility of performance under foreign law.

[162] That principle of discharge by supervening illegality and impossibility of performance under foreign law "can clearly be excluded by express provisions in the contract which specify the effect of the supervening event on the contractual obligations of the parties."[25]

[163] Analogously, the principle of frustration by supervening illegality and impossibility of performance within the jurisdiction under Australian law can be excluded if the contract has sufficiently provided for what is to happen in the event which has actually occurred.[26]

[164] In my view, for the reasons set out above, neither Thiess's inability to provide that part of the Services comprising coal processing activities nor Thiess's inability to

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24 *Ralli Bros v Compagnia Naviera Sota Anzar* [1920] 2 KB 287 at 291, 295 and 300; *Nygh's Conflict of Laws in Australia*, 8 ed, 2012 at [19.75]; Treitel, *Frustration and Force Majeure*, 2 ed, 2004 at [8.054].

25 Treitel at [8-055].

26 *Claude Neon Ltd v Hardie* [1970] Qd R 93 at 98; cf *Ardee Pty Ltd v Collex Pty Ltd* [2001] NSWSC 836 at [44]-[45].

provide that part of the Services comprising coal getting activities has the effect in law that the AROAMS is frustrated. The AROAMS' express provisions sufficiently provide for what is to happen in the events which have occurred.

Orders

[165] The conclusions in paragraphs [116]-[118], [140], [156] and [164] above are sufficient to dispose of Arutmin's principal claims for relief. The claims for declarations that the parties were discharged from their obligations to perform the AROAMS by reason of frustration for supervening illegality must be dismissed.

[166] The claim that a "Termination Event" exists pursuant to clause 14.3 of the AROAMS was abandoned by Arutmin during the hearing and must also be dismissed.

[167] The order to be made is that the claims made by the application and the amended statement of claim are dismissed. Costs should follow the event. The applicant should be ordered to pay the respondent's costs of the proceeding of those claims.