International Court of Arbitration of the International Chambers of Commerce

ICC Case No 19335/AGF/ZF

VENCO IMTIAZ CONSTRUCTION COMPANY (Afghanistan)

Claimant

-and-

SYMBION POWER LLC (U.S.A)

Respondent

FINAL AWARD

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I. GLOSSARY

Abbreviation	Term
AIRP	Afghanistan Infrastructure Rehabilitation Programme
BOP	Balance of Plant
CO	Change Order
FAR	U.S. Government Federal Acquisition Regulation
KPP	Kabul Power Plant
LOC	Letter of Contract
PI	Progress Invoice
PO	Purchase Order
PR	Progress Report
QCDR	Quality Control Daily Report
RFP	Request for Proposal
SWO	Stop Work Order

II. DRAMATIS PERSONAE: PERSONS AND ENTITIES INVOLVED OR ASSOCIATED WITH ISSUES ARISING IN THIS ARBITRATION

Name	Role
AHMAD, FAYYAZ	PROJECTS AND DESIGN COORDINATOR, VICC
AKBAR, MOHAMMED	FINANCE MANAGER, VICC
ANIS, SAFIULLAH	ASSISTANT DIRECTOR, VICC
BARYALAI, USTAD RAHIMULLAH	CO-FOUNDER AND VICE-PRESIDENT OF VICC. LATER PRESIDENT OF VICC.
BELL, BOB	PROGRAM DIRECTOR, LBG/B&V
BOEHLER, MICHAEL	TASK ORDER 9 PROJECT MANAGER (KANSAS CITY), LBG/B&V
CONE, ROBERT	TASK ORDER 9 MANAGER (INTERIM), LBG/B&V
COPELAND, DEL	PROJECT MANAGER (PRE-OCTOBER 2008), DIRECTOR OF CONSTRUCTION (POST-OCTOBER 2008)
CORDNER, KARL	PROJECT MANAGER, VICC

CURRIE, JACK	TASK ORDER 9 MANAGER, LBG/B&V
DOHERTY, PAT	MANAGEMENT, LBG/B&V
DRANNAN, MICHAEL	PRESIDENT, VICC
DUNNING, ABEL	CONTRACTS MANAGER, SYMBION
GOEDJEN, DON	ENGINEERING MANAGER, SYMBION
HINKS, PAUL	CEO, SYMBION
JAENISCH, STEVE	CONTROL MANAGER, (PRE-OCTOBER 2008) PROJECT MANAGER (POST-OCTOBER 2008), SYMBION
KILLORAN, BILL	ENGINEER, SYMBION
MANE, PRAMOD	ACCOUNTANT, SYMBION
MOITRA, SANTANU	MANAGEMENT, LBG/B&V
O'BRIEN, BRENDAN	CONSULAR OFFICER, US EMBASSY IN AFGHANISTAN
SHAW, GLEN	ENGINEER, SYMBION
VAN DYKE, WILLIAM	PRESIDENT, B&V FEDERAL SERVICES DIVISION
WHIPPEN, JACK	DEPUTY CHIEF OF PARTY AND ENERGY SECTOR LEAD, LBG/B&V
WOLF, LEIGH	CIVIL ENGINEER, LBG/B&V
ZOTZMAN, LES	TASK ORDER 9 STARTUP MANAGER, LBG/B&V

III. INTRODUCTION

1. This Arbitration comes before us, Mr Stephen R. Bond, Mr Jesse B. Grove III (replacement arbitrator) and The Lord Hacking ('**President**') as the Tribunal ("**the Tribunal**") under the Arbitration Rules ("**the ICC Arbitration Rules**") of the International Chamber of Commerce ("**the ICC**") as in force from 1 January 2012. This

arbitration centres on the building and construction of a power station located in Afghanistan, the Kabul Power Plant ("**KPP**") in which the Claimant was a sub-subcontractor and the Respondent the main subcontractor.

2. The building and construction of the **KPP** was part of the US aid programme for Afghanistan referred to as 'the Afghanistan Infrastructure Rehabilitation Programme' ("**AIRP**"). The works at the **KPP** were therefore funded through a program headed up by the United States Agency for International Development ("**USAID**")."

3. The Claimant claims US$5,416,458.99 as money due to them under invoices submitted to the Respondent and interest[1] and the Respondent counterclaims for US$13,550,130 for the tortious interference of its contract with the main contractor in the construction of the **KPP** and/or for a breach of an implied covenant of good faith and fair dealing relating to its contract with the main contractor, and the sum of US$249,355 for malicious prosecution and abuse of process arising out of allegations of wrongfully involving the Afghan Attorney General's Office and the Afghanistan police to detain and harass two employees of the Respondent when such employees were seeking to leave Afghanistan. The Respondent also claims punitive damages in the sums of US$40,650,390 in respect of tortious interference and US$748,067 in respect of malicious prosecution.[2]

4. The **ICC Court**, pursuant to Article 30(2) of **the ICC Arbitration Rules**, has extended the time for rendering this Award until 29 July 2016.

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[1] CPHB §238
[2] RPHM §175

IV. TERMS OF REFERENCE AND PLEADINGS

5. On 15 March 2013, the Claimant filed its Request for Arbitration, dated 13 March 2013. On 22 March 2013, the Claimant filed a Revised Request for Arbitration, dated 20 March 2013. On 3 July 2013, the Respondent filed its Answer to the Request for Arbitration and Counterclaim, dated 1 July 2013. On 7 August 2013, the Claimant filed its Reply, dated 7 August 2013.

6. After consultation with the parties the Tribunal issued its Terms of Reference on 7 March 2014 which was subsequently signed by Counsel on behalf of the Claimant and on behalf of the Respondent. The Tribunal refers to these Terms as Reference in their entirety. Amongst other matters recorded in the Terms of Reference was the Arbitration Agreement, the place of the arbitration, the applicable law, the language of the arbitration and the applicable procedural rules.

7. It was therefore recorded in the Terms of Reference that the place of the arbitration is London, England, the procedural law being English law, and the ICC Arbitration Rules (in force as from 1 January 2012 [**"The ICC Rules"**]) are the rules under which this arbitration is being conducted. The governing law of this arbitration is an issue to be determined by the Tribunal in this Award.

V. THE ARBITRAL TRIBUNAL

8. As recorded in the Terms of Reference the Secretary General of the ICC International Court of Arbitration confirmed on 7 November 2013 the appointment of Mr Donald P. Arnavas as Co-Arbitrator upon the Claimant's nomination and the appointment of Mr Stephen R. Bond as the Co-Arbitrator upon the Respondent's nomination.

9. As is also recorded in the Terms of Reference Lord Hacking was confirmed on 18 December 2013, on the joint nomination of the Co-Arbitrators, as President of the Arbitral Tribunal.

10. Thus the Tribunal, as originally constituted, consisted of:-

Lord Hacking (President)

LITTLETON CHAMBERS

3 King's Bench Walk North

Temple

London EC4Y 7HR

Tel: +44 20 77 97 86 00

Fax: +44 20 77 97 86 99

Email: dhacking@littletonchambers.co.uk

Donald P. Arnavas, Esq. (Co-Arbitrator)

207A East Dover Street

Easton, MD 21601

U.S.A.

Tel: +1 443 385 0401

Email: dpa612@goeaston.net

Stephen R. Bond , Esq. (Co-Arbitrator)

COVINGTON & BURLING LLP

265 Strand

London WC2R 1BH

United Kingdom

Tel: +44 20 70 67 2024

Email: sbond@cov.com

11. It was further recorded in the Terms of Reference that the parties had agreed to the appointment of Miss Charlotte Davies as Administrative Secretary of the Tribunal.

Charlotte Davies (Administrative Secretary)

LITTLETON CHAMBERS

3 King's Bench Walk North

Temple

London EC4Y 7HR

Tel: +44 20 77 97 86 00

Fax: +44 20 77 97 86 99

Email: charlottedavies@littletonchambers.co.uk

12. Subsequently on 2 April 2015 Mr Donald P. Arnavas resigned as Co-Arbitrator in this arbitration and, on the nomination of the Claimant, the ICC Court of Arbitration on 6 May 2015 confirmed Mr Jesse B. Grove III as the Co-Arbitrator to replace Mr Arnavas:-

Jesse B. Grove III, Esq.

P.O. Box 158

270 Jackson Street

Scottsville, VA 24590

U.S.A.

Tel 434-286-4840

Email: barrygrove@earthlink.net

13. Since 6 May 2015 the Tribunal has consisted of Mr Stephen R. Bond, Mr Jesse B. Grove III and The Lord Hacking (President).

VI. THE PARTIES AND COUNSEL IN THE ARBITRATION

14. The parties' details and representatives are set out in the Terms of Reference as follows:-

Claimant - Venco Imtiaz Construction Company

Street 15, Lane 2, House 52

Wazir Akbar Kahn

Kabul

Afghanistan

Claimant's Representatives

Louis D. Victorino, Esq.

Christopher M. Loveland , Esq.

SHEPPARD MULLIN RICHTER & HAMPTON LLP

1300 I Street, N.W., 11th Floor East

Washington D.C., 20005

U.S.A.

Tel: +1 202 218 000

Fax: +1 202 312 9432

Email: cloveland@sheppardmullin.com

lvictorino@sheppardmullin.com

Respondent - Symbion Power LLC

1919 Pennsylvania Avenue, N.W.

Suite 775

Washington, D.C., 20006

U.S.A.

Respondent's Representatives

R. Scott Greathead, Esq.

WIGGIN & DANA LLP

450 Lexington Avenue, 38th Floor

New York City, 10017-3913

U.S.A

Tel: +1 212 490 1700

Fax: +1 212 490 0536

Email: sgreathead@wiggin.com

Timothy A. Diemand, Esq.

Erik H. Beard, Esq.

WIGGIN & DANA LLP

CityPlace 1

185 Asylum Street

Hartford, CT 06103

U.S.A.

Tel: +1 860 297 3700

Fax: + 860 252 9380

Email: tdiemand@wiggin.com

ebeard@wiggin.com

15. On 2 January 2015 Sheppard Mullin Richter & Hampton LLP resigned as Counsel for the Claimant and were replaced by Smith Pachter McWhorter plc as follows:

Mark E. Hanson Esq.

Edmund M. Amorosi Esq.

D. Joe Smith Esq.

Zachary D. Prince Esq.

Laura A. Semple Esq.

SMITH PACHTER MCWHORTER PLC

8000 Towers Crescent Drive

Suite 900

Tysons Corner

VA, 22182-6221

Tel: 703-847-6300

Email: mhanson@smithpachter.com

eamorosi@smithpachter.com

16. Christopher M. Loveland, Esq. of Sheppard Mullin Richter & Hampton LLP remained as Counsel to the Claimant in this arbitration.

VII. THE MAIN PARTIES IN THE CONSTRUCTION OF KPP

17. In the building and construction of the **KPP, USAID** (as recorded in paragraph 2 above) was the funder of the programme. The main or prime contractor was a joint venture of two US construction companies, the Louis Berger Group ("**LBG**") and Black & Veatch ("**B&V**"), called the Louis Berger Group/Black & Veatch Joint Venture ("**LBG/B&V**"). As recorded in paragraph 1 above, the Respondent was the main subcontractor and the Claimant was a sub-subcontractor. In order to constitute these arrangements **Symbion** entered into a Balance of Plant contract with **LBG/B&V** ("**the BOP Contract**") dated 14 June 2008. The principal role of **VICC** as sub-subcontractor at the **KPP** site was on the civil works needed at the site. Thus the contract, which is the subject of this arbitration, was the subcontract between **VICC** and **Symbion** ("**the VICC Sub-Contract**") dated 14 August 2008.

18. In due course the Tribunal will be referring to both of these contracts.

VIII. ARBITRATION CLAUSE

19. The arbitration clause in **the VICC Sub-Contract** in its Sub-Clause 20.6 provides as follows:

"Arbitration.

Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:

(a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,

(b) the dispute shall be settled by three arbitrators appointed in accordance with these Rules, and

(c) the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 [Law and Language].

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB, relevant to the dispute. Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute.

Neither party shall be limited in the proceedings before the arbitrator(s) to the evidence of arguments previously put before the DAB to obtain its decision, or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties, the Engineer and the DAB shall not be altered by reason of any arbitration being conducted during the progress of the Works."

20. Further, the **VICC Sub-Contract** in its Sub-Clause 20.8 provides as follows:

"If a dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise:

(a) Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply; and

(b) The dispute may be referred directly to arbitration under Sub-Clause 20.6 [Arbitration]."

21. The DAB (the Dispute Adjudication Board) played no part in this dispute between the parties and therefore under sub clause 20.8 this dispute went straight to arbitration.

IX. GOVERNING LAW CLAUSE

22. The governing law of the **VICC Sub-Contract** is set out in sub clauses 1.1.6.5 and 1.4 of the Particular Conditions as follows:-

Sub-Clause 1.1.6.5 of the Particular Conditions of the VICC Sub-Contract

"Laws" means any applicable national, federal, municipal or state statute, ordinance or other law (including applicable federal Acquisition Regulation ("FAR") provisions pertinent to this Contract), regulation or by-law or any rule, codes or direction or any license, consent, permit, authorization or other approval including any conditions attached thereto (whether relating to the environment or otherwise) of Afghanistan or any part thereof; or of the United States of America; or of any Governmental Authority, public body or authority, local or national agency, department, inspector, ministry, official or public or statutory person (whether autonomous or not) which has appropriate jurisdiction over this Contract, the Works or the Project, excluding provisions pointing to the laws of another jurisdiction.

Sub-Clause 1.4 of the Particular Conditions of the VICC Sub-Contract

The Works and the Project shall be governed by the Laws, except that interpretation of this contract shall be construed under the laws of the State of Nevada, U.S.A. The governing language under this Contract shall be English, unless otherwise expressly specified."

X. EARLIER ARBITRATION

23. There was an earlier arbitration between **LBG/B&V** and **Symbion** in ICC Case No 16383/VRO, arising out of disputes under the **BOP Contract** ("**the BOP Contract Award**"). This arbitration was conducted by Lord Goldsmith QC, Mr Eric Schwartz (Co-Arbitrators) and Mr Henry Alvarez QC (Chairman) who issued their Award on 24 October 2012. The full text of this Award has been put in front of the Tribunal by both parties[3]. The determination of that Tribunal are binding as between the parties to that arbitration. It has, however, been suggested by both parties (relating to different sections of **the BOP Contract Award**) that some of the findings in that Award could be of guidance to the Tribunal, although not binding on it. In this regard we do note later

[3]Ex. R-28

in this Award (in paragraph 166) certain consistencies between this Award and **the BOP Contract Award** but otherwise do not refer to **the BOP Contract Award**. There is also an issue relating to a claim by the Respondent to be reimbursed certain costs which arose in this prior arbitration. However, as these costs are claims as damages in respect of Counts I and II of its Counterclaims, this issue only arises if the Respondent succeeds on either of those claims.

XI. PAYMENT PROVISIONS IN VICC SUB-CONTRACT

24. The **VICC Sub-Contract** contained the following relevant clauses relating to payment[4]:

Section II Conditions of Contract
Part I: General Conditions

14.1 The Contract Price

Unless otherwise stated in the Particular Conditions:

(a) the Contract Price shall be agreed or determined under Sub-Clause 12.3 [Evaluation] and be subject to adjustments in accordance with the Contract;

...

14.3 Application for Interim Payment Certificate

The Contractor shall submit a Statement in six copies to the Engineer after the end of each month, in a form approved by the Engineer, showing in detail the amounts to which the Contractor considers himself to be entitled, together with supporting documents which shall include the report on the progress during this month in accordance with Sub-Clause 4.21 [Progress Reports].

...

14.6 Issue of Interim Payment Certificates

No amount will be certified or paid until the Employer has received and approved the Performance Security. Thereafter, the Engineer shall, within 28 days after receiving a Statement and supporting documents, issue to the Employer an Interim Payment Certificate which shall state the amount which the Engineer fairly determines to be due, with supporting particulars.

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[4]SOC, Ex. C-4

However, prior to issuing the Taking-Over Certificate for the Works, the Engineer shall be bound to issue an interim payment certidicate in an amount which would (after retention and other reductions) be less than the minimum amount of Inteirm Payment Certificates (if any) stated in the Appendix to Tender. In this Event, the Engineer shall give notice to the Contractor accordingly.

An Interim Payment Certificate shall not be withheld for any other reason, although:

(a) if anything supplied or work done by the contractor is not in accordance with the Contract, the cost of rectification or replacement may be withheld until rectification or replacement has been completed; and/or

(b) if the Contractor was or is failing to perform any work or obligation in accordance with the Contract, and has been so notified by the Engineer, the value of this work or obligation may be withheld until the work or obligation has been performed.

The Engineer may in any Payment Certificate make any correction or modification that should properly be made to any previous Payment Certificate. A Payment Certificate shall not be deemed to indicate the Engineer's acceptance, approval, consent or satisfaction.

14.7 Payment

The Engineer shall pay to the Contractor:

(a) the first instalment of the advance payment within 42 days after issuing the Letter of Acceptane or within 21 days after receiving the documents in accordance with Sub-Clause 4.2 [Performance Security] and Sub-Clause 14.2 [Advance Payment], whichever is the later;

(b) the amount certified in each Interim Payment Certificate within 56 days after the Engineer receives the Statement and supporting documents; and

(c) the amount certified in Final Payment Certificate within 56 days after the Engineer receives this Payment Certificate.

Payment of the amount due in each currency shall be made into the bank account, nominated by the Contractor, in the payment country (for this currency) specified in the Contract.

14.8 Delayed Payment

If the Contractor does not receive payment in accordance with Sub-Clause 14.7 [Payment], the Contractor shall be entitled to receive financing charges compounded monthly on the amount unpaid during the period of delay. This period shall be deemed to commence on the date for payment specified in Sub-Clause 14.7 [Payment], irrespective (in the case of its sub-paragraph (b)) of the date on which any Interim Payment Certificate is issued.

Unless otherwise stated in the Particular Conditions, these financing charges shall be calculated at the annual rate of three percentage points above the discount rate of the central bank in the country of the currency of payment, and shall be paid in such currency. The Contractor shall be entitled to this payment without formal notice or certification, and without prejudice to any other right or remedy.

...

15.3 Valuation at Date of Termination

As soon as practicable after a notice of termination under Sub-Clause 15.2 [Termination by Employer] has taken effect, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine the value of the Works, Goods and Contractor's Documents, and any other sums due to the Contractor for the work executed in accordance with the Contract.

Section III
Part II: Conditions of Contract
Conditions of Particular Application

...

14 – CONTRACT PRICE AND PAYMENT

SUB-CLAUSE 14.1 – THE CONTRACT PRICE
"the Contract Price shall be $2,237,843.85, (USD) subject to modification only as provided under this Contract."

...

Section VI
Schedule 9.6 – Payment Management

...

9.6.2 Progress Payment Determination
Subcontractor and Symbion Power shall establish payment milestones based on the approved Project Schedule attached. The initial distribution of the lump sum price on a percentage of the total basis to the individual months, when completed by the Subcontractor, shall be submitted for Symbion Power review for reasonableness and acceptance.

Symbion Power will make bimonthly progress payments for the Work based on subcontractor attainment of the payment milestones identified. Symbion Power reserves the right to make partial provisional percentage payment on disputed payment milestone completions pendng reconciliation or alternate work progress. Determination of attainment of each payment milestone will be by the Symbion Power. The amount of Subcontractor's payment shall be calculated by applying the percentage for the month

against the total Subcontract Price and then deducting applicable retention and backcharge.

9.6.3 Revisions to the Subcontract Price

In determining the amount of increase or decrease in the Subcontract Price on account of any revision issues by Symbion Power in accordance with the provisions of the Subcontract, the following Subcontract Revision payment articles shall apply where appropriate.

...

9.6.5.1 Bi-Monthly Payments

Subcontractor invoices shall be prepared and submitted for Symbion Power's review and approval as described in Invoicing Instructions hereof. Symbion-Power will make bi-monthly progress payments for the Work installed in accordance with Progress Payment Determination article. Symbion-Power will pay Subcontractor after Symbion-Power's receipt of an approved invoice, submitted in accordance with the requirements of the article titled Invoicing Instructions, with Symbion-Power withholding ten percent of the approved invoice amount as retention until Final Completion. Symbion-Power may retain or deduct from any payment to Subcontractor any sums as Symbion-Power may be entitled to retain or deduct under the provisions of this Subcontract. Any or all payments to Subcontractor hereunder shall not be construed to be an acceptance by Symbion-Power of the Work.

...

9.6.5.3 Invoicing Instructions

Subcontractor shall prepare all invoices in a form satisfactory to and approved by Symbion-Power. Submitted invoices shall be complete with all supporting documentation as required.

Each invoice shall be itemized by Subcontract line item and shall show the invoiced amount, Retention, if applicable, the net amount due, Project name, Subcontract number, invoice number and, if applicable, the billing period. If invoices do not conform to these requirements, Symbion-Power may either return such invoices to Subcontractor for correction and re-submittal or will request Subcontractor to submit documentation to remedy the deficiencies.

Subcontractor shall submit invoices complete with supporting documentation to Symbion-Power at the following address:

Symbion-Power, LLC
House No. 1024, Street 15, Lane 6,
Wazir Akbar Khan,
Kabul, Afghanistan

A Subcontractor's authorized representation shall sign each invoice certifying that all Work covered by the invoice is complete and that the invoice is correct, authentic, and the only one issued for the Work described therein.

XII. PROCEDURAL ORDERS

25. The Tribunal issued altogether twenty four Procedural Orders during the course of this arbitration. At the outset the Respondent made an application that the Claimant should, in an order of Interim Measures under Article 28 of the ICC Arbitration Rules, provide security for the Award which the Respondent was seeking on its Counterclaims. At the same time the Claimant made an application for Counts I and III of the Respondent's Counter Claim to be struck out on the grounds that the Tribunal did not have jurisdiction to make an award under these two Counterclaims. In Procedural Order No 3 the Tribunal dismissed the Claimant's application for Counts I and III of the Respondent's Counter Claim to be struck out on the grounds that the appropriate time for such a decision on jurisdiction was after the evidence had been put before the Tribunal at the Evidential Hearing. On the Respondent's application for Interim Measures the Tribunal, in Procedural Order No 3, set out the criteria in which it intended to decide whether the Respondent was entitled to Interim Measures and required further submissions from both parties in relation to this application. Thereafter a substantial number of the subsequent Procedural Orders were directed to the various stages, as put before the Tribunal, on the Interim Measures issue. The issue over the Respondent's application for Interim Measures was eventually resolved in Procedural Order No 22.

26. In outline the Procedural Orders directed as follows:-

Number	Date	Summary of content
PO1	7 March 2014	Procedural rules for the arbitration.
PO2	7 March 2014 (subsequently revised)	Provisional timetable for the arbitration.
PO3	2 July 2014	Order relating to Claimant's application for dismissal of Counts I and III of Respondent's Counterclaim, and of Respondent's application for security on the Award from Claimant. Parties ordered to respond to questions set out in Schedule to the Procedural Order.
PO4	28 July 2014	Order relating to Claimant's application for a protective order, request for draft of order and for Respondent's comments.
PO5	28 July 2014	Decision to issue a Protective Order, and ordering date for provision of information ordered in PO3.
PO6	5 November 2015	Various orders relating to Respondent's application for security from the Claimant.
PO7	13 November 2014	Various orders relating to production of documents.
PO8	24 November 2014	Order regarding Respondent's request for leave to obtain documents and testimony from non-party B&V.
PO9	4 February 2015	Decision to order security from the Claimant and directing the parties to attempt to agree a form of bond.
PO10	16 February 2015	Order postponing evidential hearing as fixed forApril 2015.
PO11	9 March 2015	Order relating to Claimant's request for an extension of time to respond to PO9, and Respondent's request for a default award.

PO12	28 March 2015	Order granting Claimant's request to file a Reply in relation to its request for an extension of time to respond to PO9.
PO13	27 May 2015	Various orders relating to the appointment of Mr Jesse B. Grove III as Co-Arbitrator and fixing the evidential hearing for 2-13 November 2015.
PO14	19 June 2015	Order relating to the Claimant's motion to amend PO9 and its request for interim measures dated 3 April 2015.
PO15	19 June 2015	Order relating to discovery and expert testimony.
PO16	19 June 2015	Revised timetable.
PO17	3 July 2015	Order relating to Claimant's request for additional time to obtain a bank guarantee complying with the criteria set out in PO14.
PO18	12 August 2015	Various orders relating to Claimant's default in providing security, expert reports and discovery.
PO19	12 August 2015	Revised timetable.
PO20	23 September 2015	Order relating to adjustments for the evidential hearing.
PO21	24 September 2015	Order regarding location of the evidential hearing.
PO22	28 September 2015	Order denying Respondent's request for a peremptory order in relation to Claimant's provision of security and holding that the Claimant had produced sufficient security.
PO23	21 October 2015	Order relating to directions for the evidential hearing.
PO24	18 November 2015	Order relating to the submission of Post Hearing Memorials and Replies.

XIII. PARTIES' SUBMISSIONS IN THE INTERIM MEASURES ISSUE

27. Both parties made numerous submissions relating to the Interim Measures issue but, since this issue was eventually resolved, the Tribunal, in this Award, will only refer to the parties' submissions on the interim measures issue as they are relevant to the decisions which the Tribunal has had to take in this Award particularly relating to costs (see paragraphs 224 to 232 below). There is the further matter of the security on the Respondent's Application for Interim Measures. Pursuant to the Tribunal's Procedural Order No 9 of 4 February 2015 the Claimant submitted as security on the Respondent's Application for Interim Measures (at a later date and at a lesser sum than ordered – such lesser sum being accepted by the Tribunal in its Procedural Order No 22 of 28 September 2015) the sum of US$500,000 which the Claimant paid to **the ICC** and which continues to be held in escrow by **the ICC**. Depending which party succeeds in this arbitration this money should be reimbursed to the Claimant or the Respondent.

XIV. WRITTEN SUBMISSIONS OF THE PARTIES

28. In the course of this arbitration, the parties have made the following written submission:

    28.1. Claimant's Request for Arbitration, 13 March 2013;

    28.2. Claimant's Amended Request for Arbitration, 20 March 2013;

    28.3. Respondent's Answer and Counterclaims, 1 July 2013;

    28.4. Claimant's Reply to Counterclaims, 7 August 2013;

    28.5. Claimant's Statement of Claim, 30 May 2014;

    28.6. Respondent's Statement of Defense and Counterclaims, 8 August 2014;

    28.7. Claimant's Responsive Memorial, 21 September 2015;

    28.8. Respondent's Responsive Memorial, 16 October 2015;

28.9. Claimant's Post Hearing Brief and Application for Award of Costs, 22 January 2016;

28.10. Respondent's Post-Hearing Memorial and Post-Hearing Request for Costs, 22 January 2016;

28.11. Claimant's Reply to Respondent's Post-Hearing Memorial and Claimant's Reply to Respondent's Post-Hearing Request for Costs, 22 February 2016;

28.12. Respondent's Reply to Claimant's Post-Hearing Brief and Respondent's Reply to Claimant's Request for Costs, 22 February 2016.

XV. EVIDENTIAL HEARING

29. The evidential hearing took place between 2 and 11 November 2016 in Washington, D.C., London remaining the place of the arbitration. At that hearing, the Claimant was represented by Mr Edmund M. Amorosi, Mr D. Joe Smith, Mr Zachary D. Smith and Ms Laura A. Semple. The Respondent was represented by Mr R. Scott Greathead, Mr Timothy A. Diemand and Mr Erik H. Beard.

XVI. WITNESSES

30. The Tribunal received declarations from a number of witnesses of fact, as well as reports from experts relating to both quantum and the issue of Afghan law. Each of these witnesses also gave oral testimony and were subject to cross-examination.

31. The witnesses of fact who gave testimony to the Tribunal were:

31.1. Karl Cordner (declarations dated 29 May 2014 and 14 September 2015);

31.2. Michael Drannan (declarations dated 29 May 2014, 19 September 2015). Mr Drannan gave his evidence from Bangkok via video link;

31.3. Steve Jaenish (declarations dated 5 August 2014 and 16 October 2015); and

31.4. Paul Hinks (declarations dated 28 May 2015, 15 June 2015, 4 August 2015, 7 September 2015 and 16 October 2015).

32. The expert witnesses who gave evidence to the Tribunal on the issue of quantum were:

32.1. Stephen J. Kiraly (reports dated 30 June 2015 and 31 July 2015);

32.2. Stephen Pitaniello (reports dated 31 July 2015 and 16 October 2015).

33. The Tribunal heard evidence from Messrs Kiraly and Pitaniello separately, before hot-tubbing both witnesses.

34. The expert witnesses who gave evidence to the Tribunal on the issue of Afghan law were:

34.1. Abdul Shukor Mahjoor (declaration dated 16 September 2015);

34.2. Enayat Qasimi (declarations dated 17 February 2014 and 16 October 2015)

35. The Tribunal heard evidence from both Messrs Mahjoor and Qasimi at the same time, through use of the hot-tubbing procedure. Mr Qasimi gave his evidence from the hearing room in Washington. Mr Mahjoor gave his evidence by telephone from Kabul, via Skype.

XVII. COUNSELS' SUBMISSIONS

36. The Tribunal expresses its gratitude to all Counsel for their assistance in the Pre-Hearing Memorials, in Oral Submissions throughout the Evidential Hearing and in the Post-Hearing briefs. All Counsel have conducted themselves with great thoroughness in citing the detailed evidence and legal authorities . The Tribunal has not, in this Award, always agreed with the conclusions sought by Counsel on behalf of their respective clients but this does not diminish the Tribunal's appreciation of the work of all Counsel in the preparation and delivery of the submissions made to it. The Tribunal has not attempted to address each and every submission made to it – to have done so would have taken this Award to an inordinate length. Rather, the Tribunal has limited itself to the submissions which go to the determinative issues which it has to decide. Counsel are, however, assured that the Tribunal has read and considered every submission.

XVIII. OUTLINE OF FACTUAL BACKGROUND RELATING TO THE KPP PROJECT

37. The **KPP** was a 105 MW powerplant to be constructed in the desert approximately 7 kilometers from Kabul International Airport, overlooked by a military base located on the peak of a nearby mountain. It was initially scheduled to be operational by December 2008, with the intention that it would provide electricity to Kabul over the winter months (hence being dubbed by some as 'Karzai's winter coat'). However, due to delays construction did not start until late summer 2008 and the **KPP** was not operational by December 2008 as originally scheduled.

38. At the time of the **KPP** Project, Afghanistan was an area of significant conflict and conditions were not for the faint-hearted. Those working on the **KPP** Project had to be alert for serious security risks including car bombs, kidnapping and exortion, as well as

frequent mortar attacks in Kabul. Poor infrastructure and difficulties sourcing quality construction materials and skilled workers added to the difficulties. These were compounded by the extreme weather conditions.

39. **USAID** awarded the prime contract for the **KPP** to **LBG/B&V** in May 2007[5]. The Claimant successfully bid for the site clearing contract (the "**Site Clearing Contract**"), which it was awarded on 12 May 2008[6]. The site clearing was subsequently undertaken by the Claimant pursuant to this contract.

40. After submitting an RFP, the Respondent was awarded the **BOP Contract** on 14 June 2008, pursuant to which it was responsible for the design and build of the KKP powerplant[7]. Separately, the Respondent was also awarded a contract for the switchyard (the "**Switchyard Contract**").

41. The Claimant submitted bids for sub-subcontract work in respect of both **the BOP Contract** and the **Switchyard Contract**. Whilst its bid for the **Switchyard Contract** was unsuccessful, it was successful in being awarded civil work in respect of the **BOP Contract** and formally entered into **the VICC Sub-Contract** on 14 August 2008[8]. Performance of this contract began shortly thereafter.

42. The Claimant invoiced the Respondent by way of progress invoices ("PI"). In the course of the **KPP** Project, the Respondent issued a number of change orders ("CO") to the

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[5] Ex. C-430
[6] Ex. R-46
[7] Ex. R-45
[8] SOC, Ex. C-4

Claimant increasing the scope of work under the **VICC Sub-Contract**. In addition, the Claimant was approved to purchase various materials pursuant to purchase orders ("PO").

43. On 4 April 2009, the Respondent issued a stop work order ("SWO") due to an incident in which a crane interacted with an electrical power line[9].

44. On 2 May 2009, Mr Drannan wrote to **LBG/B&V** to provide formal notice of the Respondent's failure to make prompt payment for supplies and services provided by the Claimant[10].

45. On 19 May 2009, the Respondent wrote a letter to **LBG/B&V**, stating that it was giving Notice that **LBG/B&V** was in material breach of **the BOP Contract** for failure to make payment and that as a result the Respondent considered the contract to be at an end[11]. In response, **LBG/B&V** wrote to the Respondent giving it 14 days notice of termination[12]. On or around 1 June 2009, the Respondent notified the Claimant that it had ended **the BOP Contract**. This contract terminated with effect on 2 June 2009.

46. On 11 June 2009, **LBG/B&V** provided the Claimant with a draft Letter of Contract ("LOC") to cover continuing work on the **KPP** Project pending a new contract being issued for civil site construction work after the termination of **the BOP Contract** with the Respondent[13].

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[9] Ex. R-238
[10] SOC, Ex.-C-75
[11] Ex. C-433
[12] Id.
[13] Ex. C-260

47. On 18 June 2009, two of the Respondent's employees, Steve Jaenisch and Del Copeland, were arrested by the Afghan police after Mr Jaenisch had been prevented from boarding a flight to leave the country the previous day. Messrs Jaenisch and Copeland were detained for two days, and after their release sought shelter in the U.S. Embassy. They eventually left Afghanistan on 22 June 2009, on a private aircraft chartered by the Respondent[14].

48. After negotiation, a final **LOC** was issued between the Claimant and **LBG/B&V** on 22 July 2009[15]. Around this time, the Claimant also submitted a bid for remaining BOP-civil work on the **KPP** Project. This bid was successful and it was awarded the BOP-civil contract on 17 September 2009 (the "**BOP-Civil Contract**")[16].

XIX. ISSUES BEFORE TRIBUNAL

49. The issues before the Tribunal are limited. On the Claimant's side the central issue is whether the Respondent has been in breach of contract in not paying PIs and POs remitted to it in connection with **the VICC Sub-Contract**. The Claimant also brings its claim, in respect of the unpaid PIs and POs, under an alleged breach of duty of good faith and fair dealing and on the grounds of unjust enrichment. The fundamental point, however, is whether the Respondent has been in breach of contract by not paying PIs and POs remitted to it. On its side, the Respondent is relying on the assertion that it had a 'pay-if-paid' agreement with the Claimant whereby it would only have to pay the Claimant if **LBG/B&V** paid the Respondent's invoices to it (**LBG/B&V**). It also relies on

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[14] See Declaration of Steve Jaenisch dated 5 August 2014.
[15] Ex. C-277
[16] Ex. C-279 and Ex. R-197

an alleged tortious interference by the Claimant in **the BOP Contract** which it had with **LBG/B&V** and on malicious prosecution and/or abuse of process arising out of the treatment of two of its employees who were allegedly detained and harassed by the Afghanistan authorities – such detainment and harassment being allegedly instigated by the Claimant. The Respondent also relies upon a breach of an implied Covenant of Good Faith and Fair Dealing relating, as the Tribunal understands it, to the alleged tortious interference with **the BOP Contract** but not in relation to the alleged malicious prosecution and/or abuse of process. There is also the Respondent's claim for punitive damages.

50. Initially the Claimant set out its Prayers for Relief in its Requests for Arbitration of 13 and 20 March 2013 and the Respondent in its Answer and Counterclaims of 1 July 2013. These Prayers for Relief evolved as the parties made their substantial Submissions to the Tribunal culminating with their Post Hearing and Reply Post Hearing Submissions of January and February 2016. Thus in its Post Hearing Brief of 22 January 2016 the Claimant merely sought "favor on its claims against Symbion", a dismissal of "Symbion's Counterclaims...[an] award...in actual damages" which it set at USD5,416,458,99 together with "additional interest....and legal fees and costs....and such other relief as the Tribunal deems just and proper". In turn the Respondent in its Post Hearing Memorial of same date merely sought "damages plus interest, costs, attorney's fees and any and all other relief which the Tribunal deems just and proper". In summarizing these claims the Respondent itemised specific sums under each of its heads of damages for the alleged of "tortious interference [of] contract" and "malicious damage" – damages which the Respondent totalled to the sum of USD 41,398,457.46. However, before the Tribunal received the parties' Post Hearing and Reply Post Hearing

Submissions it wanted to be sure that it was addressing all of the issues arising out of the parties' Prayers for Relief and other claims and, through its Administrative Secretary, in emails sent during the end of Evidential Hearing on 6 and 9 November 2015, the Tribunal invited Counsel for both Parties to address , in oral argument, two lists of specific issues. Thus, in this Award, the Tribunal, addresses:-

(1) Whether the Claimant is entitled to be paid in respect of some or all of the PIs and POs it submitted to the Respondent;

(2) Whether the Claimant is entitled to be paid in respect of its work associated with a Stop Work Order;

(3) The Claimant's claims for interest on the unpaid PIs and POs;

(4) What governing law should be applied to the Claimant's claims and the Respondent's counterclaims;

(5) Whether the Claimant, depending on the applicable governing law, tortiously interfered with **the BOP Contract**;

(6) Whether the Respondent, depending on the applicable governing law, is entitled to claim for its losses relating to malicious prosecution and/or abuse of process relating to its two employees who were detained and harassed by the Afghan authorities;

(7) The Respondent's claim for punitive damages;

(8) Costs

and, by carrying out this exercise and noting the parties' Post Hearing and Reply Post Hearing Submissions, the Tribunal believes that it is addressing each and every Prayer for Relief and all other claims which have been presented to it.

XX. GOVERNING LAW FOR CLAIMANT'S CLAIM AND COUNT II OF THE COUNTERCLAIMS

51. The parties agree that Nevada law applies to the Claimant's claims and to Count II of the Respondent's Counterclaims[17]. However, the parties disagree about which law applies to Counts I and III of the Respondent's Counterclaims[18]. This issue is addressed in detail below in paragraphs 121 to 147.

XXI. THE ENTITLEMENT OF VICC TO BE PAID FOR PROGRESS INVOICES AND PURCHASE ORDERS

52. The Claimant claims damages in respect of various unpaid PIs and POs. The Respondent argues the parties agreed an oral modification to the **VICC Sub-Contract** such that it was only required to make payment to the Claimant if it was itself paid by **LBG/B&V**, and that as it was not paid by **LBG/B&V** in respect of the work covered by the Claimant's invoices it was under no obligation to make any payment to the Claimant in respect of those invoices. Further, it argues that even if there was no pay-if-paid modification, the onus is on the Claimant to prove the value of the work it carried out. It says that the Claimant has failed to discharge this burden and therefore no damages should be awarded. By contrast, the Claimant denies that it agreed any pay-if-paid modification. However it argues that even if such a modification was agreed, the condition precedent of payment by **LBG/B&V** has been fulfilled as a result of the award in the Prior Arbitration. Further the Claimant contends that it has sufficiently proved the value of the work in respect of which it is claiming payment.

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[17] See the parties' post-hearing submissions on these claims, in which they both apply Nevada law to the Claimant's claim and to Count II of the counterclaims.
[18] See CPHB §125-133 and RPHM §83-93.

XXII. PAY-IF-PAID MODIFICATION

53. The Tribunal considers that the primary issue for determination in respect of the Claimant's claim for damages is whether the parties agreed a pay-if-paid modification to **the VICC Sub-Contract**.

54. In the view of the Tribunal, Mr Diemand, on behalf of the Respondent, rightly conceded in the oral argument at the end of the Evidential Hearing that there was no pay-if-paid clause in the written contract between the Claimant and the Respondent[19]. Nonetheless the Respondent relies on an alleged oral agreement to modify **the VICC Sub-Contract** to add a 'pay-if-paid' provision: namely that the Claimant could only be paid if the Respondent had been paid under **the BOP Contract** by the main contractor, **LBG/B&V**. The Tribunal notes that whilst reference was made at various points during the hearing to a 'pay-when-paid' clause, it was established that the Respondent is in fact asserting that **the VICC Sub-Contract** was modified to include a 'pay-if-paid' clause; namely that the Respondent would only pay the Claimant if it was itself paid by **LBG/B&V**[20]. This is the basis on which its case was put in Mr Diemand's oral submissions[21] and in the Respondent's Post Hearing Memorial.

55. The contractual position between the parties is therefore that there was no 'pay-if-paid' or similar provision incorporated in **the VICC Sub-Contract**, although there was in **the BOP Contract**, and in the other contracts into which the Claimant had entered with **LBG/B&V** for the clearing of the site (prior to **the BOP Contract**) and into which the Claimant entered with **LBG/B&V** after **the BOP Contract** had been terminated.

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[19] Tr. VIII 2208:4-6
[20] Tr. VIII 2205:2-14
[21] Tr. VIII 2205:10-14

56. In particular:

56.1. **The BOP Contract** contained a pay-if-paid clause at 9.6.2.1 which provided that:

> *Paid as Paid by Owner*
> *Progress payments to the Bidder for the Work will be made for approved payment amounts as Employer is paid by Owner. Owner's payment to Employer for the work is a condition precedent to Employer's obligation to pay Bidder for the Work. Therefore Bidder will only be paid to the extent that Employer receives payment for the Work from Owner.*

56.2. The Claimant's **Site Clearing Contract** with **LBG/B&V** contained the following sub-clause 14.16:

> *Prompt Payment*
> *Notwithstanding any of the above, Employer shall pay the Contractor for satisfactory performance under this Contract not later than 7 days from receipt of the payment out of such amounts as are paid to the Employer under its contract with USAID.*

56.3. The **LOC** between the Claimant and **LBG/B&V** following termination of **the VICC Sub-Contract** with the Respondent contained the following clause:

> *10. Any amounts due for Work performed during the Term will be included in the Purchaser's invoice to Puchaser's client. Purchaser will issue payment to Subcontractor seven days after Purchaser receives payment from Purchaser's client for such amounts.*

56.4. Finally, the **BOP-Civil Contract** between the Claimant and **LBG/B&V** following termination of **the VICC Sub-Contract** with the Respondent contained the following clause:

> *00452.2 Payment Determination*
> *...*
> *Owner's payment to Purchaser for the Work is a condition precedent to Purchaser's obligation to pay Subcontractor for the Work. Therefore, Subcontractor will only be paid if and to the extent that Purchaser receives payment for Work from Owner.*

57. Whether or not the parties agreed to modify the **VICC Sub-Contract** to include a 'pay-if-paid' provision can only be established by an examination of the evidence before the Tribunal.

The evidence on 'pay-if-paid' modification

58. The Respondent asserts that there was an oral agreement between the parties that the **VICC Sub-Contract** was modified to include a 'pay-if-paid' clause. This oral agreement is said to have been reached between Mr Jaenisch and Mr Cordner in conversations held from 14 January 2009 onwards[22]. The Tribunal heard oral testimony from both Mr Jaenisch and Mr Cordner regarding the alleged modification:

58.1. In particular, Mr Jaenisch gave evidence that in a conversation with Mr Cordner, on about 14 January 2009, he was explaining how the Respondent was going to do business in the future[23]. It was his evidence that he never gave much thought to whether he had the authority to actually negotiate a change to the contract terms and conditions, but agreed that he never did negotiate a change to those parts of the contract[24]. He stated that in response Mr Cordner *"grumbled"* about it and said *"I'm not sure I like that"*, but never said no[25]. Mr Jaenisch stated that from that point whenever Mr Cordner asked him when the Claimant would be paid, his response would be *"Well, you'll get paid when we get paid."*[26] He recalled that Mr Cordner never responded that it was unacceptable

[22] RPHM §19-20
[23] Tr. IV 1018:10-21
[24] Tr. IV 1019:4-1020:3
[25] Tr. IV 1034:3-6
[26] Tr. IV 1035:1-13

and that the Claimant would quit. However he also never expressed agreement or stated that the Claimant would accept the modification. Mr Jaenisch explained that to his mind *"they agreed by never saying "No, we're not going to do that" and leaving the project... as long as you keep working, you're agreeing to what I'm telling you."*[27]

58.2. Mr Cordner accepted that this conversation with Mr Jaenisch took place but said it was a discussion about the Respondent having problems getting money from the joint venture, and it was the Respondent's unilateral decision that they were not going to flow money through to the subcontractors until they were paid. He said that he told Mr Jaenisch that the Claimant would not accept this, the contract was with the Respondent and the Claimant expected them to be responsible for their debts[28]. Mr Cordner said that after this initial conversation, whenever the matter was raised again the Claimant would tell Mr Jaenisch that it did not agree to that sort of arrangement and it expected the Respondent to pay. He also said that at every opportunity he continued to press the Respondent to pay, but that the Claimant carried on working in the hope that the Respondent and **LBG/B&V** would sort out their problems and the money would start flowing again[29]. In respect of the later contract negotiations between the Claimant and **LBG/B&V** after the Respondent had terminated **the BOP Contract**, Mr Cordner's evidence was that he objected to **LBG/B&V**

[27] Tr. IV 1036:17-22
[28] Tr. II 359:2-13
[29] Tr. II 360:14-21

relieving themselves of any responsibility for the Respondent's debts at that point and in the future[30].

59. The Tribunal also heard from Mr Drannan, who testified that he never agreed to modify the **VICC Sub-Contract** to include a 'pay-if-paid' provision[31] and would never have agreed to work on the project if such a provision had been included in this Sub-Contract[32]. Mr Drannan also testified that it was his understanding that the Claimant was entitled to prompt payment under the **VICC Sub-Contract** by the inclusion of the U.S. Government Federal Acquisition Regulation ("**FAR**")[33].

60. In addition to the oral evidence, the Tribunal was referred to various documents relating to the issue of payment of the Claimant by the Respondent, including the following:

60.1. On 17 November 2008, Mr Cordner sent an email to Mr Drannan titled "payments using menace" in which he stated that the progress payment problem lay with LBG and *"so me and Symbion are going to pressure them as much as we can to get them to fast track their obligation."*[34]

60.2. On 14 January 2009, in an internal email to Mr Copeland, Mr Jaenisch wrote that *"VICC is curious as to when they will be paid. I had a talk with*

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[30] Tr. II 569:7-10
[31] Tr. III 671:4-10
[32] Tr. III 742:18-22
[33] Tr. III 707:12-20
[34] Ex. C-216

[Cordner], *and we discussed the pay when paid philosophy, which he understands, but he indicates that Mike Dramman (sp) isn't very patient."* [35]

60.3. On 29 January 2009, in an internal email Mr Jaenisch wrote that he was *"pushing as hard as I can to get* [the Claimant] *paid. I've told* [Copeland] *and* [Hinks] *that the work will slow down if we don't pay them immediately."*[36] Two days later, on 31 January 2009, in an internal email to Mr Goedjen and Mr Copeland (of **Symbion**), Mr Jaenisch stated that the Respondent should *"worry how long Venco will stay on the job without being paid."* [37]

60.4. On 3 February 2009, Mr Drannan emailed Mr Cordner and advised that he had spoken to Jack Currie a few days ago and *"Either way we are guaranteed payment from LBG or USAID even if Symbion was to get shafted."*[38]

60.5. On 21 February 2009 Mr Hinks emailed Mr Drannan regarding delayed payments from **Symbion**, and stated *"I thoroughly appreciate that you have been extremely patient... I checked with our finance people and a payment of $800,000 was released this week and I know their intention is to make you whole shortly, when we get paid again."*[39] Mr Drannan responded the next day stating *"We understand most of the issues facing Symbion in this regard and appreciate the situation you are currently exposed to in regards to this project."*[40]

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[35] Ex. C-427
[36] Ex. C-377
[37] Ex. C-378
[38] Ex. R-147
[39] Ex. C-226
[40] SOC, Ex. C-69

60.6. On 12 March 2009 Mr Hinks emailed Mr Drannan stating that the Respondent's cashflow on the project *"has gone haywire"* and that the Respondent had *"been trying to get it resolved for the past 2 weeks with B&V in DC and Kansas... It came to a crunch because B&V stopped our payments because they were worried about a breach of FAR."* On 13 March 2009, Mr Drannan responded stating *"We are aware of the issues you have addressed and appreciate the situation Symbion is in."* Later in the email he stated *"I am only reiterating this information so everyone understands that our ability to support the Symbion project also rests on our ability to provide prompt payment for services."* [41]

60.7. On 30 March 2009 Mr Drannan emailed Mr Baryalai to advise that he had *"already advised karl to quietly let lbg know that we will not wait another month... we can wait another week at the most before we need to receive at a min the long past due invoices..."*[42]

60.8. On 1 April 2009, Mr Drannan wrote to Mr Currie and asked to speak confidentially about the Respondent and said he was about to *"submit a formal notification letter to LBG for non payment so that any future payments to Symbion will be guaranteed to be paid to VICC before being paid to Symbion."*[43] The next day Mr Drannan sent an internal email to Mr Baryalai stating that the purpose of the email to Mr Currie was to find out if the Respondent was paid recently *"so we could get our payment."*[44] Two days later Mr Drannan emailed Mr Cordner

[41] SOC, Ex.C-70
[42] Ex. C-234
[43] Ex. C-235
[44] Ex. C-239

and explained that he was going to prepare a failure letter to LBG which would mean LBG was *"legally obligated to see that we are paid in full if any payment is agreed to be released to Symbion... first... any balance can then be given to Symbion."*[45]

60.9. On 2 April 2009, Mr Hinks emailed Mr Drannan stating *"You've been a good partner for this project so far but it is your prerogative to stop work if you wish."*[46]

60.10. On 11 May 2009, Mr Drannan wrote to Mr Cordner and Mr Baryalai and stated *"Since we have served both symbion and lbg with failure notice, we at least will be guaranteed to have our payment made by lbg directly to us before any money can be released to Symbion."* Mr Cordner replied stating *"Although Symbion have not paid up in a long time, I think that the problem lies with LBG trying to milk the project for everything they can and blame everyone else for not hitting completely unrealistic milestones. I don't like not being paid, but at least Symbion are being honest about their problems and with the direction they have chosen to take (i.e. no cash-flow into Symbion, no cash-flow out of Symbion)."*[47]

60.11. Later in May 2009, after **the BOP Contract** had been terminated, there were further internal emails between Mr Drannan, Mr Cordner and Mr Baryalai including an email on 27 May 2009 in which Mr Drannan stated that he had made **LBG/B&V** aware that the Claimant would be *"holding both lbg and usaid*

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[45] Ex. R-149
[46] Ex. C-238
[47] Ex. C-322

responsible for the amounts due if they terminate Symbion..."[48] In an email on 28 May 2009 Mr Drannan again stated that he could *"guarantee that LBG will end up being responsible"* for the money the Claimant had invoiced to the Respondent[49].

60.12. On 1 June 2009, Mr Cordner wrote to Mr Drannan about a meeting he had held with Mr Baryalai and Mr Copeland and recounted that *"There are no commitments from them other than they will pay when they are paid."*[50]

Claimant's arguments on 'pay-if-paid' modification

61. The Claimant's case is that there was no oral agreement to modify the **VICC Sub-Contract** to include a 'pay-if-paid' provision. It argues that under Nevada law such clauses are strictly construed and disfavoured even where they are written into a contract: the Tribunal should apply particularly strict scrutiny to the alleged oral agreement. It says that to succeed in establishing an oral agreement, the Respondent must show clear and convincing evidence that both parties agreed to the modification and that there was consideration for the modification. The evidence does not establish that the Respondent proposed a 'pay-if-paid' modification, or that the Claimant agreed such a modification either expressly or by conduct. Mr Jaenisch did not propose a 'pay-if-paid' modification, but rather explained a 'pay-when-paid' philosophy. Further, when Mr Jaenisch explained the 'pay-when-paid' philosophy to Mr Cordner, Mr Cordner did not accept it but *"grumbled"* and said *"I'm not sure I like that"*. After this conversation he continued to press for payment. Similarly, Mr Drannan never gave any indication that

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[48] Ex. R-153
[49] Ex. R-152
[50] Ex. C-255

he accepted the alleged modification. In addition, there is no evidence of any consideration for the modification[51].

62. Further, the Claimant argues that its conduct in continuing to work does not prove that it agreed the modification. Under Nevada law and the **VICC Sub-Contract**, the Claimant was entitled either to continue performing or to stop work in response to the Respondent's nonpayment breach. In any event, the Claimant's conduct in continuing to work is capable of other meanings such as forbearance in the face of a continuing breach by the Respondent or supporting Mr Drannan's testimony that he felt the Claimant was protected by the **FAR** provision. Such ambigious conduct does not establish acceptance of a 'pay-if-paid' provision. Further, it argues that the Respondent's own conduct shows that it understood it had an obligation to pay the Claimant even after the conversation on 14 January 2009 (referring to Mr Jaenisch's emails of 29 and 31 January 2009 set out above). Finally, the Claimant stated that even if the evidence established that there was a modification to the **VICC Sub-Contract**, at most this would be a 'pay-when-paid' provision (i.e. requiring payment within a reasonable period) rather than a 'pay-if-paid' provision as contended by the Respondent[52].

Respondent's arguments on 'pay-if-paid' modification

63. The Respondent argues that the evidence is clear and compelling in establishing that the Claimant orally agreed to a 'pay-if-paid' condition. It says that Mr Cordner accepted that Mr Jaenisch explained the 'pay-if-paid' philosophy to him no later than 14 January 2009 and the Claimant was aware that it was the Respondent's position that the

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[51] CPHB §91-94
[52] CPHB §95-99

Claimant would not get paid until the Respondent was paid by **LBG/B&V**. Against this background, the Claimant's conduct in continuing to work for five months without payment is compelling evidence of acceptance of the modification of the **VICC Sub-Contract** and the Respondent clearly and reasonably understood the Claimant's conduct to indicate acceptance of the modification. In addition, the Claimant exerted pressure on **LBG/B&V** to pay the Respondent so that the Respondent could then pay the Claimant; it argues that these are not the actions of a party that does not believe its payment terms have been modified.

64. The Respondent also relies on communications regarding the Claimant's negotiations with **LBG/B&V** after the Respondent's termination. In particular, the Respondent places emphasis on the email of Mr Cordner to Mr Drannan and Mr Baryalai on 13 June 2009, in which he objected to a provision of the draft Letter of Contract from **LBG/B&V** and stated *"Item B.12 (responsibility for Symbion's debt). This clause removes their responsibility for any of Symbion's debt to us – could this be argued that if they refuse to pay Symbion for any outstanding work then they expect Symbion to pay us regardless? This is just a sneaky way of removing themselves from taking on Symbion's debts..."*[53]

65. Thus, the Respondent says that Mr Cordner's own words establish the Claimant's acceptance of the 'pay-if-paid' modification, asserting that the email of 13 June 2009 as referred to above which it says amounts to a admittance that the modification existed and proves the Claimant's understanding of the parties' modified payment terms. It says there is no alternative interpretation of Mr Cordner's words other than that he

[53] Ex. R-190

understood that the Respondent was not obliged to pay the Claimant if **LBG/B&V** did not pay the Respondent[54].

66. In support of the points above, the Respondent contends that the absence of any evidence establishing the Claimant's rejection of the pay-if-paid modification is noteworthy. It also argues that given the Claimant's acquiescence to the modification, under Nevada law the Claimant was obliged to notify the Respondent of its intention to rely on the strict letter of the contract. Further, it says that neither Mr Cordner nor Mr Drannan's evidence about the 'pay-if-paid' modification was credible[55].

The Tribunal's conclusions on 'pay-if-paid' modification

67. As agreed between the parties Nevada law applies to this issue. Under Sub-Clause 1.4 of the Particular Conditions of the **VICC Sub-Contract** (see paragraph 20 above) any interpretation of the contract is to be *"construed under the laws of the State of Nevada, USA"*. Therefore if there is in the **VICC Sub-Contract** a 'pay-if-paid' provision this must be construed under Nevada law. Similarly, if it is to be asserted that, the **VICC Sub-Contract** was modified, as agreed between the parties, to include a 'pay-if-paid' provision then that too must fall under Nevada law.

68. The question, therefore, is whether a 'pay-if-paid' provision is valid and enforceable under Nevada law. Citing Nevada Revised Statutes 624.626 of 2001 the Respondent asserts such provisions are valid and enforceable under Nevada law[56] which the Claimant accepts but asserts only under limited and restricted circumstances. There

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[54] RPHM §21-24
[55] RPHM §25-30
[56] RPHM: §27 and Ex. RL-311

has, however, been cited to the Tribunal by the Claimant the case of **Lehrer McGovern Bovis v Bullock Insulation 124 Nev. 1102**[57] which was heard by Supreme Court of Nevada in 2008. In that case it was held that a 'pay-if-paid' provision was unenforceable under Nevada law on the grounds of public policy because it *"deprives people who work on construction projects of a statutory right"* to a mechanic's lien. The Claimant has also cited to the Tribunal, an article by two construction law attorneys entitled: 'Pay-if-Paid Clauses: Freedom of Contract or Protecting the Sub Contractor From Itself', where it is recorded courts of California and New York have held 'pay-if-paid' provisions are *"void and unenforceable as contrary to public policy"* again taking the point that such provisions adversely affected the 'mechanic's lien' statutes.[58]

69. The logic here is that the prohibition on 'pay-if-paid' and 'pay-when-paid' provisions being valid in Nevada (and elsewhere in the USA) is because it is against public policy to take away the statutory right in US law of the 'mechanic's lien'. However when these provisions are being applied outside the USA where there are no statutory rights relating to the 'mechanic's lien', the public policy issue seems to fall away. On the other hand it can be argued that, while the statutory right under the US law of 'mechanic's lien' does not exist outside the USA, there is still the public policy, which underpins the 'mechanic's lien', of the right of the sub contractor to be paid whether or not the contractor has been paid. Thus, while there may be some room for argument about the enforceability of a 'pay-if-paid' clause under Nevada law when applied abroad, the Tribunal finds it unecessary to determine this issue on its finding below that there was

[57] CRM §479 and Ex. CL-465 (also Ex. RL-313)
[58] Article by William M. Hill and Mary-Beth McComack: "Pay-If-Paid Clauses: Freedom of Contract or Protecting the Sub Contractor From Itself" (2011). Ex. RL-312

no 'pay-if-paid' clause agreed between the parties and hence no defence available to the Respondent in this respect.

70. It is also cited in the above article, that *"the contract must clearly state that payment to the sub-contractor is to be directly contingent upon the receipt by the general contractor of payment from the owner"*. This is relevant here because, in the view of the Tribunal, unless parties in this arbitration clearly and explicitly agreed to a 'pay-if-paid' provision, then such a provision cannot be applied in this arbitration. The starting point, therefore, is: has this been achieved in this dispute between the parties?

71. The relevant payment provisions in the **VICC Sub-Contract** are contained in Section II Conditions of Contract: Part I: General Conditions at clause 14.7. This payment clause is set out in paragraph 24 above to which the Tribunal refers. In doing so it is quite clear that this clause does not contain, in any form, a 'pay-if-paid' provision. This differs from payment clauses contained in other contracts relating to building and construction of the **KPP** which are cited in paragraph 56 above. Thus the only way in which a 'pay-if-paid' a provision can apply in this dispute between the parties is if it can be shown that the parties expressly agreed the modification of clause 14.7 of the **VICC Sub-Contract**. According to the text book of Bruner and O'Connor on Construction Law[59], 'pay-if-paid' or 'pay-when-paid' clauses can only be accepted if *"sufficiently clear and unambiguous"*. The Tribunal accepts that this is to be applied in this arbitration. Moreover the Claimant also cited the 1980 and 1981 Cases in the Supreme Court of Nevada of **Clark County Enterprises v City of Las Vegas 96 Nev. 167**[60] and of **Joseph F. Sanson**

[59] Bruner and O'Connor: Construction Law §5.75 (Ex. CL-1101)
[60] CPHB §39 (Ex. CL-1103)

Investment v C.R. Cleland 97 Nev. 141[61] where it was held that if the Court is to accept a modification or change in a contract there has to be the clearest of evidence that such a modification has been agreed between the parties. In the **Clark County** case it was held *"to justify modification the evidence must be clear and convincing"*. The Tribunal also accepts this proposition should be applied in this arbitration.

72. It is right, therefore, that the Tribunal should apply these criteria in deciding, in this arbitration, whether the parties have agreed to modify the **VICC Sub-Contract** to bring about a 'pay-if-paid' provision in it.

73. On any view the Respondent must be in difficulties in satisfying the Tribunal on this point. Throughout the contemporaneous exchanges of emails during the performance of the **VICC Sub-Contract**, the Claimant is doing no more and no less than reminding the Respondent that monies due to it have not been paid (see paragraph 60 above). Although there are acknowledgements that the Respondent was taking (not in these words) a 'pay-if-paid' position, nowhere in the correspondence does the Claimant accept that the Respondent is entitled to take this position (see again paragraph 60 above). Moreover, in none of the documents placed before the Tribunal in this arbitration is there any evidence of an oral or written agreement of a 'pay-if-paid' provision – let alone any agreement upon the terms of such a provision which, in any way, matches the 'pay-if-paid' or 'pay-when-paid' clauses cited in paragraph 56 above.

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[61] CPHB §39 (Ex. CL-1102)

74. In its Post Hearing Memorial the Respondent makes three principal submissions in its assertion that there is "*abundant evidence* [proving] *that the parties modified the Contract*".[62]

75. The first is that in an email on 13 June 2009, Mr Cordner of **VICC**, relating to the **Letter of Contract** concerning **LBG/B&V** and **Symbion** appears to accept a 'pay-if-paid' clause. Secondly the Respondent relies upon a section of the evidence given at the Evidential Hearing by Mr Cordner as recorded in the transcript.[63] Thirdly the Respondent relies on the Claimant's conduct of continuing to perform the **VICC Sub-Contract**, notwithstanding it was not being paid by **Symbion** and when, according to the Claimant, accruing considerable sums being owed to it by the Respondent.

76. The Tribunal has to state that it does not find these submissions convincing. None of them go anywhere near satisfying the criteria which, as stated in paragraphs 71 and 72 above, the Tribunal believes it is under a duty to apply.

77. Concerning the first of these submissions Mr Cordner is commenting upon a clause in a contract quite separate from the **VICC Sub-Contract** which is not relevant to the payment clause in the **VICC Sub-Contract**. In any event this comment being made on the 13 June 2009 was well after the **BOP Contract** had terminated and after the **VICC Sub-Contract** had ceased to be performed.

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[62] RPHM §11-15
[63] Tr. II principally at 548 and 550

78. The Tribunal does not accept that, at any time during Mr Cordner's testimony before it, he ever conceded that he had agreed to any modification of the **VICC Sub-Contract** enabling any 'pay-if-paid' provision to be included in it. In making this point the Tribunal refers to the exact words of Mr Cordner as appears in the transcript when he was being questioned by Mr Beard for the Respondent.

"MR BEARD:
Q. Do you think it is accurate when Mr Jaenisch told Mr Copeland that you understood the 'pay-when-paid' philosophy?
A. I understood this philosophy, but we didn't agree to this as a modification.
Q. OK. You said every time this came up on the site you told Symbion the same thing, that you don't agree with a 'pay-when-paid' modification, correct?
A. Maybe not using those terms but we always asserted that Symbion would be responsible for their debt to us under the Contract.
Q. Even if Symbion was not paid by the joint venture?
A. Absolutely.

* * * * * *

Q. And on the second page of this email [of 11 May 2009] *you wrote to Mr Drannan and Mr Baryalai and you said, 'although Symbion have not paid up in a long time, I think that the problem lies with LBG trying to milk the project for everything they can and blame everyone else for not hitting completely unrealistic milestones. I don't like not being paid, but at least Symbion are being honest about their problems and with the direction they have chosen to take i.e. no cash flow into Symbion no cash flow out of Symbion'.*
That's what you wrote, right?

A. Yes.
Q. And no cash flow into Symbion no cash flow out of Symbion, that sounds like pay when paid doesn't it?
A. It doesn't sound anything like an agreement to pay when paid. All I am referring to here is that they've been honest that they are not going to pay us until they have been paid."[64]

79. As to the third point made by the Respondent the Tribunal cannot rely on the conduct of the Claimant continuing to perform **VICC Sub-Contract** as evidence that it was accepting a 'pay-if-paid' modification to the Contract. As identified in the Claimant's

[64] Tr. II 548-550

Reply to the Respondent's PHB[65], it seems to the Tribunal there were a number of other reasons why the Claimant chose to continue to perform the **VICC Sub-Contract** although it was not being paid (see paragraph 62 above). Firstly there was a possibility that **LBG/B&V** would resume paying the Respondent as Mr Hinks of the Respondent suggested this was on the way to happening. Secondly it was also reasonable to think that **LBG/B&V** would either start compelling the Respondent to pay the Claimant – something that Mr Drannan of the Claimant was urging them to do - or even make itself a direct payment to the Claimant. Similarly Mr Drannan had some hope that a direct payment could be made to the Claimant under the **FAR** provisions. All of these hopes of payment had to be premised on the Claimant continuing to perform under the **VICC Sub-Contract**.

80. It must, therefore, be the conclusion of the Tribunal that a 'pay-if-paid' provision was never agreed between the parties whether or not that provision was ultimately enforceable under Nevada law as applied in Afghanistan.

XXIII. PROOF OF CLAIMANT'S DAMAGES

81. The Claimant claims damages of $3,148,457 in respect of invoices 6 to 13 (the "Invoices"), and $937,724 in respect of 21 POs[66].

Evidence relating to proof of damage

The Tribunal has had written and oral testimony from both witnesses of fact and expert witnesses on the issue of proof of damage.

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[65] CRRPHB §3
[66] CPHB §118, 120 and Kiraly Report dated 30 June 2015

Progress Invoices

82. Invoices 6-8 cover the periods of 19 December 2008 to 25 January 2009, 26 January to 21 February 2009 and 22 February to 24 March respectively[67]. Each of them was signed on behalf of the Respondent by Mr Goedjen or Mr Jaenisch[68]. The Tribunal was also provided with QCDRs (Quality Control Daily Reports) covering these periods[69]. In respect of the approval of invoices submitted by the Claimant, in cross-examination Mr Cordner accepted that he did not go through invoices line by line with Mr Jaenisch before they were submitted[70]. Mr Jaenisch testified that when approving an invoice he *"could look at what appeared to be the progress in the field and do a comparison. I might talk to someone who worked with me and say "Hey, does this look about right?" "Well, maybe. Not way out of line... Quite honestly, you know, the interim percent completes weren't all that important to me... because at the end of the project, I knew that for all the work performed they would be paid X dollars... And I knew at the end of the project... we would go out and we would verify 100 percent all of the work done."*[71]

83. Invoice 9 covers the period from 25 March to 15 April 2009. On 26 April 2009, Mr Mane of the Respondent emailed Mr Cordner and asked him to revise Invoice 9 in various respects and resubmit it, although he did not dispute that the work had been carried out by the Claimant. Mr Cordner testified that he had discussed the increase in unit prices with Mr Jaenisch who agreed to them. On 10 May 2009, Mr Mane sent an internal email to Mr Jaenisch in which he stated *"Since we have already accepted all their change orders & PO's (except stopped CO's) we can accept their Invoice 9 removing Stop Work order*

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[67] SOC, Ex. C-58, C-59, C-60
[68] Ex. R-184
[69] Ex. C-659 – C-695, C-696-722, C-723-752
[70] Tr. II 531:4-22
[71] Tr. IV 1055: 4-18 and IV 1056:4-16

claim." Further, on 27 April 2009 (i.e. the day after Mr Mane's email raising issues with Invoice 9) Mr Copeland emailed Mr Drannan and stated *"I have reviewed the change orders in detail with our team and we are not in any dramatic dispute regarding percent complete versus invoiced amounts to date. Your overall contract value, including the 19 change orders is approximately $6.5 million."* The Tribunal was also provided with QCDRs covering the period to which Invoice 9 relates.

84. Invoices 10, 11, 12 cover the periods from 16 April to 1 May 2009, 2 May to 15 May 2009 and 16 May to 31 May 2009 respectively[72]. Invoice 13 relates to the Claimant's overhead and profit and demobilization costs following termination of **the VICC Sub-Contract** on 2 June 2009[73]. The Tribunal was provided with QCDRs covering the periods to which Invoices 10 to 13 relate[74]. During his oral testimony, Mr Cordner stated that the hours of heavy equipment on the **KPP** site recorded in the QCDRs from 3 June to 30 June 2009 were *"probably inaccurate"* and he agreed that the QCDRs may not be an accurate representation of what was happening on the site during that period although he maintained that *"Before this period, then they're accurate."* [75] Invoices 10 to 13 were not formally approved by the Respondent, nor were they returned to the Claimant for correction or additional information.

85. The Tribunal was also referred to Change Orders 19 and 20[76]. In respect of Change Order 19, Mr Cordner testified that it was intended to capture any work that had not

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[72] Ex. C-62, C-63 and C-64
[73] Ex. C-65
[74] Ex. C-775 – C-791, C-792 – C-805, C-806 – C-821 and C-822 – C-836.
[75] Tr. Vol II 583:21-584:7
[76] Ex. C-23, C-24

already been documented in change orders as a *"catch-up, true-up"*[77]. Change Order 19 was signed by Mr Jaenisch on 23 May 2009, who wrote "Received" on the document[78]. In respect of Change Order 20, Mr Cordner testified that it was intended *"to get an accurate indication of the work that's been performed and not already captured in other change orders"* and that Serial 7 of that Change Order reflected the final estimate of completion bill of quantities for the project[79]. Change Order 20 was signed by Mr Mane of the Respondent as received on 2 June 2009[80].

86. Further, Mr Cordner testified that in order to accurately capture the amounts included in Change Order 20 he conducted a walk-through of the site with both the Respondent and **LBG/B&V** personnel with the intention of reaching a consensus on the percent complete[81]. He testified that **LBG/B&V** *"weren't really involved"* in the walk through and were *"just observing what was going on"*, that Mr Jaenisch and Mr Copeland would *"visit at periods during the thing, but not for the full time"* and that he could also remember Bill Killoran, Glen Shaw and Pramod Mane (all of the Respondent) being there[82]. He stated that he would present the percent complete and *"if they agreed, we would move on. If they disagreed we would come to a consensus."*[83] Mr Jaenisch testified that upon termination of the Respondent's contract with **LBG/B&V, LBG/B&V** prevented the Respondent from obtaining the full access to the site that was required to perform a proper walk through[84]. Mr Jaenisch also stated that at the date Change Order 19 was presented to him *"...we were locked out of the site. There was no way that I could go and*

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[77] Tr. Vol VII 341, 9-16
[78] Ex. C-23
[79] Tr. Vol II 343:15-344:13, 346:10-20
[80] Ex. C-1070
[81] Tr. Vol II, 533:4-9
[82] Tr. Vol II, 534:1-536:1
[83] Tr. Vol II, 538:6-8
[84] Tr. Vol IV, 1062:8-14

verify anything on this change order..."[85] and as a result the work *"...may have been done, it may not have been done, part of it may have been done, it may have been done halfway. I had no way of verifying."*[86]

Purchase Orders

87. Over the course of **the VICC Sub-Contract** the Claimant submitted 25 POs to the Respondent[87], of which it claims 21 remain unpaid[88]. The POs did not contain terms and conditions. Mr Corder testified that the Claimant understood and expected payment upon delivery of the items or within a reasonable time thereafter[89]. The Tribunal was referred to an early PO executed by Mr Copeland and Mr Cordner on 20 August 2009 which contained a 30 day payment period[90].

88. It is agreed by the parties that all POs through to PO 23 were approved by the Respondent[91]. POs 24 to 27 were not approved, however PO 24 was signed as received by Mr Mane on 14 May 2009[92], and POs 25 and 26 were signed by Mr Jaenisch as received on 23 May 2009[93]. Mr Jaenisch also signed PO 27 on 31 May 2009[94]. However, Mr Jaenisch testified that *"[A]pproving a purchase order doesn't mean it's complete... The approval date is the date that I said "Yes, okay, we can spend this money. It wasn't the day*

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[85] Tr. Vol IV, 1086:5-9
[86] Tr. Vol IV, 1089:8-11
[87] SOC, Ex. C-91 – C-112. The Tribunal notes that these POs do not run in order, for instance there is no PO4 or PO15.
[88] Attachment C1 to Kiraly's Report dated 30 June 2015.
[89] Tr. Vol IV, 868:14-5
[90] Ex. C-1072
[91] The Respondent accepts that POs through to PO 23 were approved, however it says there is a critical difference between POs and Purchase Order Invoices and that it did not concede approval of any Purchase Order Invoices: RRCPHB §39
[92] SOC, Ex. C-109
[93] SOC Ex. C-110 and C-111
[94] SOC Ex. C-112

that we received the last item on the purchase order"[95] and that *"...when I received an invoice of the material on the purchase order with the delivery documents and I would send them to our office and say, "You can pay this."*[96] Mr Jaenisch also stated that he did not personally try to verify any deliveries, and that he could not confirm to the Tribunal that everything contained in the POs was delivered[97].

89. The Claimant did not produce for the record any delivery notes relating to the POs although some POs contained notes or documents indicating the materials had been received[98]. Mr Cordner testified that pipe supports referred to in POs 24 to 26 were delivered to site for use on the **KPP** project[99]. In respect of PO 27, Mr Jaenisch testified that he was able to verify that the relevant test had been performed[100]. The test results were also submitted in evidence by the Claimant[101].

The Claimant's submissions

90. In summary, in respect of the Invoices the Claimant contends that:

90.1. Invoices 6-9 were expressly approved by the Respondent, and that this approval establishes that the work claimed in those Invoices was in fact carried out by the Claimant. This is corroborated by the email of Mr Copeland to Mr Drannan dated 27 April 2009, as further referred to in paragraph 83 above,

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[95] Tr. Vol IV, 1134:3-11
[96] Tr. Vol IV, 1139:8-14
[97] Tr. Vol IV, 1131:17-1132:10
[98] SOC, Ex. C-91 and C-109
[99] Tr. Vol I, 309:19-22
[100] Tr. Vol IV, 1114:3-18
[101] SOC, C-112

which the Claimant contends demonstrates the Respondent's approval of values and percent complete for Invoices 1 to 9[102];

90.2. In breach of contract, the Respondent failed to accept or reject Invoices 10-13. However, the evidence before the Tribunal establishes that the work claimed in those Invoices was carried out by the Claimant, in particular the Quality Control Daily Records ("QCDRs") for the relevant periods[103].

91. In respect of the POs the Claimant contends that the Respondent expressly approved all POs through to PO 23. Further, the evidence establishes that the Respondent accepted and utilized the goods covered by all the POs through to PO 27, and that payment was due on delivery of the goods or within a reasonable time thereafter[104].

The Respondent's submissions

92. The Respondent disputes the evidence on which the Claimant relies, and argues that the QCDRs and Invoices are inaccurate and cannot be relied upon for proof of percent complete, relying in particular on the evidence relating to demobilization of the site and on the expert evidence of Mr Pitaniello who testified that the QCDRs are inadequate to measure the percent complete or the value of the Claimant's work. The Respondent's position is that the QCDRs are meaningless with respect to percent complete without expert testimony to interpret them. It says the parties did not reach a consensus on the percent complete of the Claimant's scope of work under the **VICC Sub-Contract**, and there was no true-up carried out at the end of the **VICC Sub-Contract**. Invoices 9-13

[102] CPHB §9-16
[103] CPHB §26-41, 49-50
[104] CPHB §18-25, 42-45

were not approved by the Respondent. In any event, the Respondent's approval of progress invoices was not binding and instead was a rough estimation of the percent complete. In respect of the POs, the Respondent argues that approval of a purchase order is not the same as approval of payment of a purchase order. In order to establish an entitlement to payment in respect of the various POs, the Claimant has to be able to prove that all items on each of the POs were in fact delivered. It contends that, as the Claimant has not discharged the burden of proving damages for either the Invoices or the POs, the Tribunal should not award any damages[105].

The Tribunal's conclusions on proof of Claimant damage

93. The payment regime under the **VICC Sub-Contract** for base work (General Conditions Section 14) contemplated invoices based on estimates of percentage of completion of each of the subcategories of work set forth in a schedule of values (the line items of each PI). Consequently the Claimant (Mr Cordner) would make its line item estimates for each pay period and submit a draft PI to the Respondent (Mr Jaenisch) for review. Upon gaining approval (perhaps after negotiated modification) the PI was to be processed and paid by the Respondent.

94. The estimates of percentage of completion were just that. They represented judgments of how far along the work on each subcategory had progressed. Such judgments were necessarily based on contemporaneous observation. Since the status of the work was constantly changing, it is not possible to retroactively form a different judgment for a past pay period. That is why the Respondent now says it cannot be sure the percentage

[105] RPHM §48-71 and Pitaniello's Reports dated 31 July 2015 and 16 October 2015

estimates were reasonable, and that is why it was important for the parties to agree the percentages of completion contemporaneously with the end of the pay period.

95. PI's 6 through 8 were signed and approved by the Respondent in the normal course, even though the Respondent did not intend to pay those invoices until its cash flow from **LBG/B&V** had been restored. As to these invoices Mr Jaenisch agreed that he approved them although he said he did not give them much scrutiny because he knew that the Claimant could not be paid more than the full contract price at the end of the day. The Tribunal concludes that these invoices were and are due and payable regardless of Mr Jaenisch's failure to determine their accuracy.

96. **Symbion's** approval of Invoice 9 (covering the period from 25 March 2009 through 15 April 2009) came through a 27 April 2009 email from Mr Copeland to Mr Drannan. Mr Copeland (see paragraph 83 above) stated: *"I have reviewed the change orders in detail with our team and we are not in any dramatic dispute regarding percent complete versus invoiced amount to date. Your overall contract value, including the 19 change orders is approximately $6.5 million."*[106] **Symbion's** detailed review of VICC's percent complete as of this date should also be seen as corroborating VICC's progress claimed under Invoices 6, 7, and 8 as the percent complete claimed in Invoice 9 builds on progress claimed in previous invoices. The Tribunal concludes that PI 9 was and is due and payable within 56 days of submission because the progress claimed therein had been verified by **Symbion** thus triggering the payment obligation under Sub-Contract General Conditions Section 14.7.

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[106] Ex. C-74.

97. That leaves PIs 10 through 12 (PI 13 is not based on percentage of completion and will be dealt with separately below) all issued in May 2009 when **Symbion** knew its contract with **LBG/B&V** was coming to a close, meaning that it was important to establish the interim stage of completion of all the work. Mr Cordner asked Mr Jaenisch to participate in a final walk through for the express purpose of establishing percentages of completion[107] and Mr Cordner testified that Mr Jaenisch or other representatives of Symbion did participate to some extent. Mr Jaenisch, however, said he did not participate because he was prevented from doing so by **LBG/B&V**. Mr Jaenisch's testimony is contradicted in the 27 May 2009 letter from **LBG/B&V** to Mr Jaenisch expressly granting permission for **Symbion** to *"take photographs and video footage of the project site"*, and noting that two **Symbion** staff members had already been doing so *"over the last few days."*[108] The Tribunal concludes that whether or not **Symbion** did so, it had the contractual obligation (under Sub-Contract General Conditions Section 14.6) and the opportunity to review and approve PIs 10 through 12. **Symbion's** uncertainty was self-induced.

98. The Tribunal is aware that the QCDR's do not establish percentages of completion, but they do show that substantial amounts of work were accomplished during the pay periods covered by the unpaid PIs.

99. The evidence before the Tribunal therefore is Mr Cordner's testimony that the unpaid PIs were based on reasonable estimates of percentage of completion, buttressed by **Symbion's** approval of all but the last four. **Symbion** does not point to any particular

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[107] Ex. C-324
[108] Ex. C-1074

inaccuracy in these PIs, only saying it cannot be sure of accuracy because it chose not to verify it contemporaneously. The Tribunal does not find **Symbion's** uncertainty to be a reason for denying payment for work most likely performed. PIs 6 through 12 are accepted as representing amounts that the Respondent should have paid, and must now form the basis for an award in favour of the Claimant.

100. PI 13 was for overhead, profit and demobilization costs in amounts taken directly from line items in the original Subcontract[109]. Thus the issue of accuracy of percentage completion does not arise. The Tribunal finds that this PI was and is due and payable except for demobilization (for which the invoice amount is $17,522.00). While the QCDR's do show that Claimant reduced its workforce on site in June 2009, the testimony of Mr Cordner was to the effect that **VICC** retired to a base camp near the site and then promptly returned to perform work under the LOC with **LBG/B&V**. There does not appear to have been a true demobilization.

101. Also unpaid are POs issued by **Symbion** to **VICC** for the purchase of needed plant and material. As to these Counsel for Symbion stipulated that all POs through PO 23 had been approved, but did not agree that **VICC** had proved actual delivery of the goods ordered by the POs pointing to the lack of evidence such as delivery receipts. Notwithstanding that, there is evidence that **Symbion** considered the amounts stated in the unpaid POs up to PO 23 to be due and payable. There is an email from Mr Jaenisch to **VICC** dated 5 February 2009 in which he states *"there are no issues with the invoices you have submitted."*[110] POs 1 through 19 had been submitted by then. There is also an

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[109] Tr. Vol IV 936:2-17
[110] Ex. C-224

internal **Symbion** email in which Mr Mane advises Mr Jaenisch of amounts considered by **Symbion** to be outstanding as of 5 April 2009[111]. The amount stated for POs is exactly the amount now claimed for POs 9 and 11 through 23. Moreover, the aforementioned email of 10 May 2009 (see paragraph 83 above) stated that **Symbion** had no quarrel with PO's submitted as of that date. All POs through PO 23 had been submitted by then. The Tribunal considers that if any question about delivery had existed for the goods and services ordered by POs up through PO 23 that would have been indicated by Mr Mane or Mr Jaenisch. The Tribunal concludes that the unpaid PO's through PO 23 represent amounts that the Respondent should have paid, and must now form the basis for an award in favor of the Claimant.

102. POs 24 through 26 for pipe supports were issued and submitted in May 2009. Mr Jaenisch testified that he could not verify delivery of these pipe supports[112] but Mr Cordner testified that they were all delivered and installed[113]. Moreover, the QCDR's for May[114] indicate some pipe support work being done. The Tribunal concludes that these POs were and due and payable because the materials were ordered and the evidence indicated they were delivered.

103. PO 27 was for water testing. Jaenisch testified that he approved this PO[115]. Moreover the water test result is in evidence[116]. The Tribunal concludes that this PO was and is due and payable because the evidence is undisputed that the services were ordered and delivered.

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[111] Ex. C-398
[112] Tr. Vol VII 1747: 8-20
[113] Tr. Vol I 309:19-22
[114] Exhibits C-791 *et seq.*
[115] Tr. Vol IV 1114:3 – 1115:4
[116] Exhibit C-801

104. In summary, Claimant is entitled, as damages, to recover US$3,130,935.00 for PIs (demobilization having been disallowed) and US$937,724 for POs for a total of US$4,068,659.00.

XXIV. THE STOP WORK ORDER ("SWO")

105. The Claimant also claims separate damages of $85,262 in respect of a Stop Work Order ("**SWO**")[117] which was issued on 4 April 2009[118] and lasted five days[119]. The costs of the **SWO** were initially included in CO 19 (claimed by the Claimant in Invoice 9), however they were subsequently removed from that Invoice and invoiced separately on 19 April 2009 in the sum of $107,554.74[120]. The Claimant denies that it operated unsafely such that there were grounds for the **SWO**, but contends that in any event the Respondent gave no notice of the cause of the suspension in breach of its obligations under Sub-Clause 8.9 of the **VICC Sub-Contract** and therefore it was still obligated to compensate the Claimant[121].

106. The Respondent argues that there are three separate provisions in the **VICC Sub-Contract** (sections 4.8.2, 8.9 and VII) which make the Claimant responsible for any costs associated with safety incidents[122]. It refers to a report about the incident written by Mr Cordner on 5 April 2009, in which he sets out various actions for the "longer term safety"[123]. In respect of the Claimant's reliance on sub-clause 8.9 of the **VICC Sub-**

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[117] CPHB §46-48 and Kiraly's Report dated 31 July 2015
[118] Ex. R-238
[119] Declaration of Karl Cordner dated 29 May 2014 §59
[120] CPHB §14 and SOC, Ex. C-120
[121] CPHB §46-48 (including internal references to CRM)
[122] RRCPHB §44-50
[123] Ex. C-325

Contract, it contends that it does not apply to sections 4.8.2 or Section VII of the **VICC Sub-Contract** both of which provide an independent basis for the Claimant's liability for safety hazards[124]. In any event, it argues that the Respondent did provide the requisite notice to the Claimant and the Claimant knew that it considered it a safety concern, referring to an email from Mr Cordner to Mr Drannan on 5 April 2009 in which he stated that the Claimant had been *"banned from working until the Respondent conducts some safety training"* due to the incident[125]. Accordingly, it denies that the Claimant is entitled to payment for the period of the **SWO** as claimed.

The Tribunal's conclusions on the SWO

107. The Tribunal has considered whether the Claimant should succeed on this claim. It is true that in this incident, which involved a crane and a power line on the **KPP**, the crane did not actually hit the electric power line, rather an arc of electricity jumped from the electric power line to the crane, and nobody was injured[126]. Nonetheless, in the view of the Tribunal, this appears to have been a safety issue which brought into play Sub-Clause 4.8 of Section II of **the VICC Sub-Contract**. Hence, in the view of the Tribunal, the Respondent was entitled to issue this **SWO**.

108. Concerning the requirement under Sub-Clause 8.9 of Section 2 of **the VICC Sub-Contract**, the Tribunal takes the point that the requirement for the Respondent to have given this notice only related to the preceding Sub-Clause 8.8 where a general power exists to suspend work on site. Since the Sub-Clause 8.9 notice was not required, the

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[124] RRCPHB §45-46
[125] Ex. C-240
[126] See report of Mr Cordner: Ex. C-240

Tribunal is satisfied that the **SWO** was properly issued and that that Claimant is bound by it. Accordingly this claim of the Claimant fails.

XXV. INTEREST ON THE CLAIMANT'S CLAIM

109. The Claimant claims interest in the sum of $1,245,015.99[127].

The Claimant's submissions

110. The Claimant contends that it is entitled to interest on any damages awarded by the Tribunal, pursuant to Sub-Clause 14.8 of the **VICC Sub-Contract** as follows:

110.1. In respect of damages relating to Invoices 6 to 13, it argues that interest began to accrue 15 days after submission based on Sections 9.6.2 and 9.6.3 of the Conditions of Particular Application of Section VI of the **VICC Sub-Contract** which provided for bi-monthly payment. On this basis, it calculates the interest due on Invoices 6 to 13 as $941,854.55 up to 15 February 2016[128];

110.2. In respect of interest relating to the **SWO**, it argues that it is calculated on the same basis and amounts to $24,460.55 for the same period to 15 February 2016[129];

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[127] CHPB §123-124 pp.41-42. The figure of $1,245,015.99 is the sum of interest claimed on the PIs ($941,854.55), SWO ($24,460.55) and POs ($278,700.89).
[128] CPHB §123 and Ex. C-1125
[129] CPHB §123 and Ex. C-1125

110.3. In respect of damages relating to the POs, the Claimant asserts that payment was due upon invoicing and calculates the amount as $937,724 up to 15 February 2016 based on a 30 day payment period[130].

111. For the above figures, the Claimant relies on revised calculations submitted with its Post Hearing Brief, rather than the calculations attached to Mr Kiraly's Expert Report dated 30 June 2015 which were based on a 56 day payment period (in respect of the Invoices) and the date that POs were issued rather than invoiced[131]. In the evidential hearing, Mr Kiraly testified that he had been told by the Claimant's counsel to use a 56 day payment period in respect of the Invoices and that he was not aware of the 15 day payment period[132].

The Respondent's submissions

112. The Respondent contends that the Claimant's interest calculation is without merit for two reasons:

112.1. First, it argues that under Nevada law interest does not accrue unless and until the Tribunal determines any amount due and owing, on the basis that Nevada law provides that money damages do not became due until their value is ascertainable. In this case, as the Claimant's invoices are in dispute, damages could not be known to the Respondent prior to the decision of the Tribunal and therefore pre-award interest is inappropriate[133].

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[130] CPHB §124 and Ex. C-1125
[131] Ex. C-1125
[132] Tr. Vol VII 1783:5-1784:6
[133] RPHM §76-78

112.2. Second, it says that even if pre-award interest is accruing, the Claimant's argument as to the date interest should begin to accrue is contradicted by the terms of the **VICC Sub-Contract** and Mr Kiraly's expert analysis. In respect of both the Invoices and POs, the Respondent says that Section 14.7 of the **VICC Sub-Contract** applies, which provides for a 56 day payment period. It relies on the fact the Claimant has repeatedly used the 56 day period for its calculations, including in Mr Kiraly's Expert Report[134].

113. In respect of the revised calculation of interest submitted with the Claimant's Post Hearing Brief, the Respondent submits it is improper as it has not had the opportunity to cross-examine Mr Kiraly about the document and requests that it be struck from the record and disregarded by the Tribunal. It says that the revised calculation goes beyond correcting a date, and in any event only casts further doubt on the applicable payment periods[135].

Tribunal's conclusions on interest

114. The particular issues for determination in respect of the Claimant's claim for interest are: (1) is the Claimant entitled to pre-award interest, (2) if so, what payment period applied to the PIs and the POs[136] and (3) what amount of interest is due to the Claimant?

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[134] RPHM §79-81
[135] RRCPHB §47-50
[136] The Claimant also claims interest in respect of costs incurred as a result of the SWO, however for the reasons set out in this Award the claim relating to the SWO is not upheld and therefore there can be no award of interest.

115. In respect of (1) above, Nevada law provides that pre-judgment interest is to be awarded *"from the time it* [the debt] *becomes due"* and money damages become due when their *"value is ascertainable by mathematical calculations"*[137]. In the Tribunal's view the amounts due for PIs and POs were readily ascertainable by the Respondent at the time they were submitted for payment and, for the most part, were contemporaneously approved. This is not a case where the debtor could not know how much was owed until adjudication.

116. In respect of (2) above, the Tribunal concludes that on a proper interpretation of the **VICC Sub-Contract**, the applicable payment period for PIs was 56 days based upon the 56 day period contained in Sub-Clause 14.7 of the **VICC Sub-Contract**. By contrast, the POs contained no condition. In the absence of any express term as to payment of POs, the Tribunal considers that there was an implied term that payment would be provided within a reasonable period after presentation of each PO invoice and that in the circumstances, 30 days was a reasonable period taking into account normal commercial practice for the payment of invoices (see submissions in paragraphs 87 and 110.3 above). The Tribunal adds, in reference to the Claimant's submission in paragraph 110.1 above, that the bimonthly payments under the cited Sub-Clause 9.6.2 does not mean the payment period itself is reduced to 15 days. Concerning the PIs, the Tribunal notes that there has been a significant change in the payment period used by Mr Kiraly since the Evidential Hearing but believes that the end of the 56-day period is the right date for the commencement of the interest calculations for PIs. In reaching this conclusion, the Tribunal has noted with care the submissions contained in the Respondent's Reply to

[137] RPHM §77

the Claimant's Post-Hearing Brief[138] but does not think that the Respondent has been put to a disadvantage with the interest period for PIs being set to commence from the end of the 56 day period. Moreover it is noted that while the Respondent objects to the admission of Mr Kiraly's new calculations[139] on the basis that they advance different payment periods than those previously argued by the Claimant, it does not challenge the accuracy of the underlying calculations. The Tribunal recognises that the Respondent has not had the opportunity to cross-examine Mr Kiraly on his new calculations but having established, as the Tribunal has, that the right payment period for PIs is a 56 day period and for POs a 30 day period, and on the Respondent not disputing the figures, the Tribunal believes it is fair and practical to proceed forward without giving the Respondent cross-examination rights.

117. Coming to issue (3) above, the Tribunal is guided by the interest calculations set out, as identified above, in Mr Kiraly's new calculations[140]. In doing so, it notes that the basic interest rate of the US Federal Reserve has been 1% per annum from January 2016, and does not anticipate any change in this interest rate which will impact on the interest calculations in this Award. Under Section II Part I Clause 14.8 of the **VICC Sub**-Contract (see paragraph 24 above) the Claimant is entitled to *"financing charges compounded monthly... calculated at the annual rate of three percentage points above the discount rate of the central bank in the currency of payment."* Since all payments in the contractual documents are calculated and set in US Dollars, the Tribunal applies the interest rate of the US Federal Reserve. Accordingly it sets the interest rate on all unpaid damages, due

[138] RRCPHB §47-50
[139] Ex. C-1125
[140] Ex. C-1125

to the Claimant as arising in this Award, at the interest rate of 4% per annum compounded monthly.

118. Thus for the past interest due to the Claimant for the unpaid PIs and POs, the Tribunal adopts the calculations contained in Mr Kiraly's new schedule. For PIs, with a commencement date for interest becoming due on 56 days after submission of the invoice, the figure obtained from Mr Kiraly's new calculations, as at 30 April 2016, is US$959,863,30[141]. It is to be noted that the Claimant cites different figures allegedly taken from Mr Kiraly's new calculations for interest for PIs[142], but the Tribunal believes that it should take all figures exactly as appear in Mr Kiraly's new calculations.

119. There has, however, to be adjustment on the interest calculations due on the unpaid PIs because the Tribunal has held that the figure of US$17,522 is not recoverable under PI No 13 (see paragraph 100 above). This sum constitutes 15.57% of the total claimed in PI No 13 of US$112,551.74[143]. Absent further calculations provided by the Claimant, the Tribunal thinks that the use of this percentage leads to a reasonable calculation for ascertaining the total interest on the PIs. The exercise, therefore, is to reduce the cumulative total for interest (in the sum of US$32,254.74) due on PI No 13 by 15.57% (namely by US$5,022.06) and, thereby, to reduce it to US$27,232.68 and, at the same time, to deduct the same sum (US$5,022.06) from the cumulative total for interest on all PIs (as shown in Mr Kiraly's calculations to be in the sum of US$959,863.30[144]) reducing this figure to US$954,841.24. The Tribunal recognises this is not a perfect calculation

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[141] Ex. C-1125 Attachment E – Invoices [56 day calculations] page 10 of 10.
[142] CPHB §123
[143] Ec. C-1125 Attachment E – Invoices [56 day calculations] page 1 of 10
[144] Ex. C-1125 Attachment E – Invoices [56 day calculations] page 10 of 10

but, in the absence of better information before it, the Tribunal believes this is the fairest figure upon which to rely. The need for this calculation only arose quite late in the writing of this Award, when the Tribunal was assessing the sums claimed by the Claimant for PIs and POs, and the Tribunal decided against asking the parties for any further calculations because of the delay and extra costs this would have involved in an arbitration in which the costs have become quite disproportionate to the sums in dispute.

120. The position in respect of POs is straightforward, as the Tribunal has found that the Claimant is entitled to damages for the full amount of the unpaid POs. It is therefore able to identify, from Attachment E of Ex. C-1125, that the interest due to the Claimant up to and including 30 April 2016 (and based on a 30 day payment period) amounts to $288,739.54[145]. Accordingly the Tribunal holds, as of 30 April 2016, there is interest due to the Claimant in the sums of US$954,841.24 for PIs and US$288,739.54 for POs, totalling US$1,243,580.78. It is to be noted that since Mr Kiraly's new calculations, which the Tribunal has accepted (see paragraph 116 above), only go up to 30 April 2016, the Tribunal has to calculate the further interest due thereafter to the Claimant and does so on the same basis as Mr Keraly's new calculations up to 30 April, namely at 4% per annum compounded monthly.

XXVI. GOVERNING LAW FOR COUNTS I AND III OF THE COUNTERCLAIMS

121. There is a dispute between the parties as to which governing law applies to Counts I and III of the Respondent's Counterclaims, with the Claimant contending that the law of Afghanistan applies and the Respondent contending that Nevada law applies. Related to

[145] Ex. C-1125 Attachment E – Purchase Orders page 10 of 10

this, there is a further dispute as to whether the causes of action relied upon by the Respondent exist in Afghan law.

Evidence on governing law

122. As set out above, on the issue of Afghan law, the Tribunal had before it expert written testimony from Mr Mahjoor on behalf of the Claimant and Mr Qasimi on behalf of the Respondent. It also heard together extensive oral testimony from both experts, on the last day of the Evidential Hearing, using the procedure known as 'hot tubbing'.[146].

The Claimant's submissions

123. The Claimant contends that Afghan law applies to Counts I and III of the Respondent's Counterclaims; it argues that this is the proper interpretation of Sub-Clause 1.1.6.5 and Sub-Clause 1.4 of the **VICC Sub-Contract**, and that the reference to Nevada law within those clauses is limited to the interpretation of contract claims. Had the parties intended a broader application of Nevada law they could have said so. The reference to Nevada law does not encompass extra-contractual (i.e. tort) claims, nor the application of Nevada choice of law analysis. The Claimant argues that instead the doctrine of *lex loci delicti* applies, and that Sub-Clause 1.1.6.5 specifies the law of Afghanistan for Counts I and III as that is where the alleged tortious conduct occurred[147]. Further it contends that Afghan law follows the *lex loci delicti* doctrine, relying on Mr Mahjoor's declaration dated 16 September 2015.

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[146] Tr. Vol VIII 1975-2132
[147] CPHB §125-128

124. In the alternative, the Claimant argues that even if Nevada choice of law analysis applies, the most significant relationship test heavily favours the law of Afghanistan. It says the only current nexus with Nevada is that the Sub-Contract is to be interpreted under its law, while all other factors require the application of Afghan law[148].

125. Further, the Claimant contends that neither tortious interference with contract nor malicious prosection/abuse of process exist as causes of action in Afghan law. In particular:

125.1. In relation to tortious interference with contract, the Claimant states that both its own expert, Mr Mahjoor, and the Respondent's expert, Mr Qasimi, agreed that the concept of tortious interference is a common law principle that does not exist in Afghan law. References in the Afghan Civil Code to "property" are references to tangible property, not intangible things such as contractual rights. It argues that Mr Qasimi later attempted to "circumvent his own admission" by drawing inferences from Shari'a law and other sources outside the Afghan civil code which were unsupported. It also argues that Mr Qasimi's conclusion is contrary to the decision of the Court of Appeals of Texas in **Bridas Corp. v Unocal Corp., 16 S.W. 3d 893 (Ct. App. Texas, 2000)** which stands as strong authority for concluding that there is no cause of action under Afghan law for tortious interference. Further, it contends that even if the Tribunal were to find a cause of action for tortious interference under Afghan law, Mr Mahjoor's testimony established that the damages claimed by the Respondent

[148] CPHB §129-133

fall outside those available under Afghan law as the civil code does not extend to allow recovery for damages to intangibles such as a contract[149];

125.2. In relation to Count III, the Claimant again relies on the expert testimony of Mr Mahjoor that there is no cause of action of malicious prosecution/abuse of process under Afghan law. In addition it says that even if there were such a cause of action, no compensation would be paid by the tortfeasor as damages are limited to non-monetary relief. The penalty for making a false accusation would be punishment by the Government, not compensation paid by the wrongdoer to the accused. Further, the wrongdoer must be the direct actor of the tort rather than merely the person who directed the wrongdoing; in this case it says the direct actor was the police who detained Mr Jaenisch and Mr Copeland, rather than anyone from the Claimant. Finally, it relies on Mr Mahjoor's testimony that it is not a crime or a wrongful act to file a case or application in a court that may not have jurisdiction, and that the Claimant's action in filing an action with the Attorney General's Office was not an abuse of process[150].

The Respondent's submissions

126. By contrast, the Respondent says that Nevada law applies to these Counterclaims. It argues firstly that this is a case of a false conflict, as the same result would in fact be reached regardless of whether the Tribunal applies Afghan or Nevada law. This argument is based on Mr Qasimi's testimony that tortious interference and malicious

[149] CPHB §134-141
[150] CPHB §142-143

prosecution are recognised causes of action in Afghanistan, and thus even if Afghan law applies these claims are actionable. The Respondent asserts that where there is a false conflict, Nevada requires application of its own law. Secondly, it argues that even if there is not a false conflict then properly applying Nevada's Second Restatement's on Conflict of Laws (see paragraph 127 below) most significant relationship test leads to the conclusion that Nevada law governs both Counts I and III. More generally it says that it is not open to the Claimant to argue that the Second Restatement's choice of law rules do not apply, on the basis that the parties have previously agreed they do apply and this agreement is binding.[151]

127. In particular in relation to Count I, it states that the circumstances of this case mean that any attempt by the Tribunal to determine or apply Afghan law is exceedingly difficult, if not purely speculative, and could produce an inconsistent result[152]. In relation to Count III, it refers to s.135 of the Restatement (Second) of Conflict of Laws which applies to malicious prosecution and states that the governing law will be the local law of the state where the proceeding complained of occurred, unless some other state has a more significant relationship under the principles stated in s.6 of the Restatment (Second). The Respondent argues that there is ample evidence to overcome the application of the general rule, relying in particular on the following: the Respondent was a Nevada resident and suffered injury in Nevada from the Claimant's wrongful institution of legal proceedings against its executives; the parties' contractual relationship was governed

[151] RPHM § 84-86
[152] RPHB §87-91

by Nevada law; the Claimant's tortious conduct was purportedly undertaken in furtherance of obtaining payment under that contract[153].

128. On the issue of whether tortious interference with contract and/or malicious prosecution/abuse of process are recognised causes of action in Afghan law, the Respondent relies on Mr Qasimi's testimony that both are recognised. In particular:

128.1. In respect of tortious interference with contract, the Respondent refers to art. 758 of the Afghan Civil Code, which provides that a person who destroys the property of another is obliged to pay damages. Mr Qasimi testified that in order to interpret the meaning of the word "property" in this context, it is necessary to engage in "comparison" under Shari'a rules. In particular, he referred to a Shari'a principle of *najsh* which he stated was *"rooted in hadith"*, specifically the Hanafi jurisprudence book of Sahih al-Bukhari published in 870 AD. It was his evidence that under the principle of *najsh*, and by application of the principle to the modern context, a third party to a transaction between others may not interfere in that transaction. Accordingly, Count I of the Counterclaim is actionable under Afghan law[154];

128.2. In respect of malicious prosection/abuse of process, the Respondent contends that such torts are actionable under Afghan law as a consequence of the Criminal Code which makes monetary damages recoverable for the improper initiation of proceedings, relying on Mr Qasimi's oral testimony in

[153] RPHM §92-93
[154] RRCPHB §54-55

which he referred in particular to article 6 of the Criminal Code. Further it states that there is no evidence that the Afghan authorities were aware that the Claimant's accusations were malicious and false, and therefore the Claimant rather than the authorities must be the direct actor who caused the damage[155].

Tribunal's conclusions on governing law for Counts I and III

129. The first decision for the Tribunal, in this section of the Award, is whether Nevada law or Afghanistan law is the governing law for Counts I and III of the Respondent's counterclaims. The starting point, therefore, is how the Tribunal should construe Sub-Clause 1.1.6.5 and 1.4 of the Particular Conditions of the **VICC Sub-Contract** (see paragraph 20 above). Since this is initially an issue of the construction of the **VICC Sub-Contract** the Tribunal should apply the laws of the State of Nevada for this exercise. Having done that the Tribunal then goes on under Sub-Clause 1.1.6.5 to establish what is the governing law.

130. Thus, having examined Sub-Clause 1.4 the focus goes on to Sub-Clause 1.1.6.5. This is because under Sub-Clause 1.4 "*the works and the project*" are to be "*governed by the Laws as set out in Sub-Clause 1.1.6.5*". While the definition of "*the 'Laws'*" may appear to be rather complex the construction of them is quite simple. In the view of the Tribunal the key word is "*applicable*". Hence, while there is a multiple list of statutes, ordinances, regulations, by-laws and so forth relating to Afghanistan and the United States of America, it really comes down to whether it is the laws of Afghanistan or the United States of America which can be deemed to be "*applicable*" relating to the performance of the **VICC Sub-Contract**.

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[155] RRCPHB §56-57

131. It is the Claimant's case that the laws of Afghanistan are the 'applicable' laws while the Respondent argues to the contrary that the laws of the United States, most particularly the laws of Nevada, are the 'applicable' laws. As advised to the Tribunal, there has not been developed, under Afghanistan law, the principles of 'conflict of laws'.

132. Applying generally the principles on 'conflicts of law' the Tribunal has to note that the Contract (**the BOP Contract**) was a contract between **LBG/B&V** and **Symbion** which exclusively was, as long as it was in existence, performed in Afghanistan. Thus if there had been any wrongful interference with this contract it was an interference that impacted upon the performance of the contract in Afghanistan. This, under normal construction of the 'conflicts of law' principles, would make the governing law relating to Count I of the Respondent's counterclaim to be the law of Afghanistan. This form of decision making, under the 'conflicts of law' principles, would all the more, relating to Count III of the Respondent's counterclaim, bring in the law of Afghanistan. All the events, relating to the harassment and detention of the two **Symbion** employees, took place in Afghanistan and nowhere else.

133. Counsel on both sides argued a further point. The Claimant argued that under the law of Nevada, the clear conclusion is that Afghanistan law should apply to both of these Counts in the Respondent's counterclaim. Also applying Nevada law, the Respondent argued to the contrary.

134. Thus, on this point both Counsel drew to the attention of the Tribunal the Restatement (Second) of Conflicts of Law under Nevada law and the case before the Supreme Court

of Nevada of **General Motors Corporation v The 8th Judicial District Court of the State of Nevada and Others 122 Nev. 466 (2006)**[156]("**General Motors Case**") In applying what has been described to the Tribunal as the "*most substantial connection*" test (as adopted in **the General Motors Case**[157]) under Nevada's the Restatement (Second) of Conflicts of Law, the Tribunal has been advised this test breaks down into four components: "*(a) the place where the injury occurred (b) the place where the conduct causing the injury occurred (c) the domicile, residence, nationality, place of incorporation and place of business of the parties and (d) the place where the relationship if any between the parties is centred*"[158]. Applying these four components of the "*most substantial connection*" test the Claimant submits that the injury (i.e. the interference with **the BOP Contract)**, the conduct bringing this about and the corporate existence of the parties all go to Afghanistan. In response the Respondent took the specific point that Mr Drannan of **VICC**, the alleged interferer with **the BOP Contract,** was based, if not also domiciled, in Dubai and it was from Dubai he sought to maliciously interfere with **the BOP Contract**.

135. The Tribunal has taken careful note of the respective submissions, on this point, from Counsel on each side, and has to conclude that whether under the general application of the 'conflicts of law' principles or under Nevada's Restatement (Second) of Conflict of Law the governing law covering Counts I and III of the Respondent's counterclaims must be the law of Afghanistan.

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156 Ex. CL-478
157 **122 Nev 466 (2006)** at page 7
158 RPHM §86

136. Having decided that Afghanistan law is the applicable law for deciding Counts I and III of the Respondent's counterclaims, the Tribunal now needs to examine whether the torts of unlawful interference with a contract and the tort of a malicious prosecution/abuse of process are actionable under Afghanistan law. The Tribunal was assisted by declaratory statements by Mr Qasimi, on behalf of the Respondent, and of Mr Mahjoor for the Claimant. It was also greatly assisted by the evidence, lasting 3 ½ hours, which Mr Qasimi, present in front of the Tribunal, and Mr Mahjoor, over the telephone, gave to the Tribunal on 11 November 2015. Mr Qasimi and Mr Mahjoor did not carry the same qualifications. Mr Qasimi possesses a US law degree and is permitted to practice in Maryland and the District of Columbia, but, although he is a native of Afghanistan and has advised corporate clients conducting business in Afghanistan and lectured in Afghanistan law, he is not a qualified lawyer in Afghanistan nor has he practiced there as a lawyer. In contrast Mr Mahjoor holds from Egypt a Masters of International Law degree and an LLM degree from the USA but is also licensed to practice in Afghanistan being currently a partner in an Afghanistan law firm based in Kabul, Afghanistan.

137. In paragraphs 122 to 128 above the respective submissions, on Afghanistan law, by Mr Mahjoor and Mr Qasimi have been summarised. As the Tribunal learned, particularly during the time when Mr Mahjoor and Mr Qasimi were giving evidence to it on 11 November, there are a number of detailed issues to be considered. However, as both Mr Mahjoor and Mr Qasimi testified, there is no right under the Civil Code of Afghanistan itself for either of these tortious claims to be brought in Afghanistan. This does not mean, in principle, that either under the principles of *shari'a* law or under commercial practices, these tortious claims, particularly the tortious claim of interference of

contract, cannot become enforceable under Afghan law. The question is have they? In this regard it is to be noted that Mr Qasimi was unable to bring to the attention of the Tribunal any particular occasions when the courts of Afghanistan have taken such tortious claims and ruled upon them.

138. In its Post-Hearing Brief, the Claimant cited the case of **Bridas Corporation v Unocal Corporation 16 S.W. 3d 893** ("the **Bridas** case") taken before the Court of Appeals of Texas, Houston (14th District)[159] which was heard in the year of 2000. In citing this case the Claimant invites the Tribunal to adopt this judgment and the findings therein on Afghanistan law[160].

139. This judgment is not binding on the Tribunal but is, in the view of the Tribunal, highly persuasive. The complaints made by the Appellant, in the **Bridas** case, was that, in Afghanistan, (and also in Turkmenistan), the Appellee, **Unocal**, had committed the torts of 'civil conspiracy' and 'tortious interference'. While it is plain from this judgment what was **Bridas's** allegation against **Unocal** of tortious interference with contracts (which **Bridas** had obtained with the governments of Turkmenistan and Afghanistan), it is not clear from the judgment what was the 'civil consipiracy' alleged against **Unocal.** It seems to the Tribunal that the allegation of tortious interference with a contract is the exact allegation which the Respondent is making against the Claimant in this arbitration. Furthermore without knowing what was the form of the 'civil conspiracy' against **Unocal**, it seems to be a similar allegation to the one the Respondent is making

[159] Ex. CL-1110
[160] CPHB §134-143 and Ex. CL-1110

in this arbitration relating to the detention and harassment of two **Symbion** employees Messrs. Copeland and Jaenisch.

140. As recorded in the judgment in the **Bridas** case, the Trial Judge conducted a most extensive eight day preliminary hearing *"consisting primarily of expert testimony on the choice of law..."*[161] Altogether there were five expert witnesses on the applicability of Afghan law four being called by **Unocal** and one by **Bridas.**

141. The first of **Unocal**'s expert witnesses was Professor Edge, a Professor at the University of London, a practicing barrister and a Consultant on the laws of the Middle East. In his testimony Professor Edge opined that:

"Afghan law does not recognise a cause of action for tortious interference or civil conspiracy."

According to the court record:

"He testified that Shari'a provides for a tort-like cause of action only when physical injury has occurred to a person or property. He stated that because interference with an existing or prospective contractual relationship does not relate to tangible property or a person no cause of action exists under Shari'a. Professor Edge also testified that Shari'a requires that for liability to attach to a person the harm caused must be direct and that the causation principles are strict. In other words, ordering a person to break a contract with another person does not make the person making the order liable because there is no causation as to the person giving the order under Shari'a."[162]

142. This evidence was supported by the other three expert witnesses on choice of law as called by **Unocal**.

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[161] Ex. CL-1110 at page 1
[162] Ex. CL-1110 at page 8

143. The evidence given by Dr Hoyle PhD, an administrative law Judge in London, called by **Bridas**, was rejected. In particular the final expert witness for **Unocal**, Dr Frank Vogel PhD, the Professor at Law at Harvard University Law School challenged Dr Hoyle's interpretation of the Afghan Civil Code and Commercial Code stating that Dr Hoyle had incorrectly interpreted Islamic law.

144. As argued by the Claimant in its Post-Hearing Brief, there is a striking resemblance between the evidence of Mr Qasimi and that of Dr Hoyle in the **Bridas** case[163]. Both were stretching out from the Afghan Civil Code for interpretations of the Articles contained in it – interpretations which went beyond the actual text of the Afghan Civil Code. The Tribunal feels bound, therefore, to come to the same conculsion as the Court of Appeals in the **Bridas** case.

145. The fundamental point is that while it is wrongful, under the law of Afghan, to arrest and put in jail anyone on false allegations, it is a matter for criminal law to impose punishment. There is no provision under Afghan law for the injured persons to receive compensation for their wrongful arrest and detention. In evidence before us Mr Mahjoor put it in this way:

> *"If somebody complained to the police, for example, and the police arrested someone or his employee, and – that arrest and putting to the jail or detention is coming from the police, not by the person who reported. So in this situation the person who reported – actually it is a complaint. It is a complaint...he submitted a complaint. Or even he reported and he was wrong, still he is not entitled or liable to pay any compensation. The only thing, he should get punished."*[164]

146. In a sentence Mr Mahjoor stated that

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[163] CPHB §138
[164] Tr. VIII 2106

"Afghan law...does not recognize tortious interference or malicious prosecutions."[165]

147. The Tribunal accepts this advice. It is therefore the conclusion of the Tribunal that the torts of interference with contracts and malicious prosecution do not currently exist under Afghan law and are hence, for the purposes of this arbitration, are unenforceable.

XXVII. TORTIOUS INTERFERENCE WITH THE BOP CONTRACT

148. As set out in paragraphs 129 to 147 of this Award, the Tribunal concludes that the law of Afghanistan applies to Count I of the Counterclaims, and that the tort of interference with contract does not exist under Afghan law. Whilst this is determinative of Count I, for completeness the Tribunal has nonetheless considered the merits of this claim and sets out below the conclusions it would have reached on this claim if the tort of interference with contract was actionable in Afghanistan. The Respondent contends that the Claimant unlawfully interfered with its **BOP Contract** with **LBG/B&V**, by Mr Drannan deliberately making a number of misrepresentations about the Respondent to **LBG/B&V** with a view to causing the termination of **the BOP Contract** so that the Claimant could take the Respondent's place. The Claimant denies the claim.

Evidence relating to tortious interference

149. In addition to the declarations submitted by the parties, the Tribunal heard oral testimony from Mr Drannan and Mr Hicks, as well as from Mr Cordner and Mr Jaenisch.

150. The Tribunal was also referred to various documents by the parties, mainly in the form of email exchanges, including the following:

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[165] Tr. VIII 2105

150.1. On 31 January 2009 Mr Drannan wrote an email to Jack Currie *"following up on our earlier phone discussion about some issues about the power plant project"*, which was stated to be *"confidential between us"*. In this email Mr Drannan said that *"Symbian* [sic] *currently has more than $1.5m in payments that are more than 90 days past due"* and that this did not *"include invoices submitted that are less than 90 days."* He went on to state *"From what I understand there could be more resources thrown at the project to help increase the production and we are more than willing to do this but we need the support and cooperation of symbian* [sic] *in making payments faster than their current 90+ days. From what I am being advised, the project could be hit much harder with resources and substantially reduce the required completion period and we are more than willing to take on any and all work required to support this. I think the design issues are also going to be a serious issue very shortly. We have advised that we would be more than happy to supply design services from our other offices and have very experienced and professional staff on board that can attack this work very quickly."*[166]

150.2. On 2 February 2009, Mr Drannan sent an internal email to Mr Cordner titled *"Re: Symbion"* in which he stated that he had *"recently reviewed their payments"* and that *"They have paid quite a few of the substantial late invoices. Oct payments still due are about $500k. Nov payments due were pretty much paid with large invoices being paid. Dec payments are less than 45 days late so this is not a critical issue yet. From the look of things they may have just forgotten about*

[166] Ex. R-52

the oct invoices. I think I need accounting to issue a late payment invoice balance due request as a reminder... this might solve the past due issues."[167]

150.3. On 21 February 2009, Mr Hinks wrote to Mr Drannan regarding the Respondent's cash flow, which he stated was *"extremely erratic... as a consequence of being unable to properly plan against incoming payments by our client."* He advised that *"a payment of $800,000 was released this week"* and stated *"If you would like to talk to me you can get me on + 1 646 705 2321... If you would like to meet I would be happy to do this and if you would like to see our own payment history with our client I will provide you with full transparency."* [168] Mr Drannan replied to this email the following day, thanking him for his email and saying *"We understand most of the issues facing Symbion in this regard and appreciate the situation you are currently exposed to in regards to this project. My intent was not to disrupt the project or Symbion's operation but to try and determine what type of payments would be made so we can better plan our budgetary needs."*[169] Mr Hinks replied to thank Mr Drannan for his response and promising *"As soon as I see the next incoming cash I will get in touch with you personally."*[170]

150.4. On 12 March 2009 there was an email exchange between Mr Hinks and Mr Drannan in which Mr Drannan requested information about the payment of the Claimant's invoices. Mr Hinks told Mr Drannan that the *"cashflow for us on*

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[167] Ex. C-223
[168] Ex. R-47
[169] Id.
[170] Ex. C-51

this project has gone haywire and we've being trying to get it resolved for the past 2 weeks with B&V in DC and Kansas... I believe that we've almost solved these issues and as soon as I know for sure I'll get in touch and give you something you can plan with."[171] A few days later on 15 March 2009 Mr Hinks sent a further email to Mr Drannan stating that he was *"hopeful we will resolve this in the next few days."*[172]

150.5. On 18 March 2009, the Respondent met with **LBG/B&V** at B&V Overland Park office, to discuss the issues related to potential overpayment on **the BOP contract**, as recorded in a Memo from Mike Boehler to Pat Doherty[173] (both of **LBG/B&V**) and minutes prepared by the Respondent[174]. On 27 March 2009, Mr Boehler emailed Abel B. Dunning of the Respondent and stated *"It seems that we are very close, if not done, on the variance determination, but we still await your variance recovery plan. As you know we will need this before going to USAID to resolve this issue and get payment back on track. Let me know when we can expect that. Thanks!"*[175]

150.6. On 28 March 2009, Mr Hinks emailed Mr Drannan to inform him that he had sent him an update on payment issues, *"with copies of our correspondence with B&V"* which he asked Mr Drannan to keep confidential but sent *"to be sure you are informed."* He told Mr Drannan that *"A lot has occurred on this project,*

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[171] Ex. C-70
[172] Ex. C-71
[173] Ex. C-393
[174] Ex. R-303
[175] Ex. R-74

but things do appear to be improving" and promised him that *"You will be paid as soon as things start moving properly again."* [176]

150.7. On 30 March 2009, Mr Cordner sent an internal email to Mr Drannan informing him that he had spoken to Mr Currie the previous night, and that Mr Currie had told him in *"ABSOLUTE CONFIDENCE that they are bringing in a third party audit sometime in the next couple of weeks to spring on Symbion."*[177]

150.8. On 1 April 2009, Mr Drannan emailed Mr Currie regarding the Respondent. He stated *"Unfortunately, I need to quietly speak with you confidentially about Symbion... I'm getting too many different stories (both from the site and symbion US offices) and have some serious concerns. They still have pending invoices dating back to Oct (work done in Sept) and I'm about to submit a formal notification letter to LBG for non payment so that any future payments to Symbion will be guaranteed to be paid to VICC before being paid to Symbion."* He went on to state *"These guys are into us now for more than $3m and counting... in 3 more weeks this will grow to almost $4m and I'm just not ready to take on that risk based upon information being passed around under the radar..."*[178] The next day, he forwarded the email to Mr Baryalai explaining *"My intent was not to bring this to a legal situation but to find out if symbion was actually paid recently so we could get our own payment..."*[179]

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[176] Ex. C-233
[177] Ex. R-148
[178] Ex. C-235
[179] Ex. C-239

150.9. On the same day, Mr Hinks emailed Mr Drannan explaining he had received some information from site that the Claimant intended to stop work on Saturday if not paid by then and asking him to confirm if it was accurate.[180] Mr Drannan replied stating that the Claimant was *"becoming extremely cautious with the amount of funds currently pending for our invoices. In a few weeks time our exposure on this project will be hitting the $4million dollar range... I have continued to support Symbion by refusing to issue any stop work but as the weeks continue to pass we are still not receiving any details on payment for our invoices."*[181] Further, Mr Jaenisch emailed Mr Copeland and Mr Hinks with an update on the **KPP** Project, in the course of which he stated *"I had a talk with Jack Currie this morning... He informed me that B&V has brought an estimating team to site to make a determination of our construction progress."*[182]

150.10. On 3 April 2009, Mr Drannan sent an internal email to Mr Cordner asking him to keep him informed daily about issues on site and referred to a *"Good cop... bad cop"* strategy.[183] On 4 April 2009 he sent a further email to Mr Cordner regarding the situation and explaining that he was *"going to go ahead and prepare and present a failure letter to LBG for failure to make prompt payment as per far clauses"* on the basis that **LBG/B&V** would be *"legally obligated to see that we are paid in full if any payment is agreed to be released to symbion."* Later in the email he stated *"It would benefit us if symbion would walk, all past due*

[180] Ex. C-238
[181] Id.
[182] Ex. C-396
[183] Ex. C-240 at VENCO0049042

values would have to be negotiated and paid in full before symbion can be released and then all remaining work I'm sure would be provided to us..."[184]

150.11. In the meantime, on 2 April 2009, Mr Boehler of **LBG/B&V** wrote a letter to Mr Hinks regarding subcontractor payments[185]. After referring to the review that it was undertaking in respect of the Respondent's payment, it stated that *"...a new issue has arisen that may impact this proposed plan. On April 1, 2009, LBG/B&V received a written communication from Venco Corporation indicating that Symbion owes Venco more than $3 million in pending invoices."* The letter goes on to request a subcontractor/vendor payment history on the project and various information relating to the Claimant's invoices to the Respondent.

150.12. On 2 May 2009, Mr Drannan submitted a formal letter to **LBG/B&V** in which he stated that the Claimant was *"formally notifying LBG of the failure by Symbion to make prompt payment for supplies and services as provided per contract between Symbion Power LLC and Louis Berger."*[186]

150.13. On 23 May 2009, after the Respondent's contract with **LBG/B&V** had terminated, Mr Cordner emailed Mr Drannan and Mr Baryalai with an update on the site[187]. At the end of the email he stated *"My opinion is still to settle how to get our money and cut away from the project and any other work on the site because I just don't trust any of them."* Mr Drannan replied to the email later that

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[184] Ex C-240 at VENCO0049037 to VENCO0049038
[185] Ex. R-76
[186] Ex. C-246
[187] Ex. C-251

day, stating *"Karl, lets not be too fast to turn away lbg work. Keep in mind that there is a lot of work left to do especially in the area of infrastructure... Let's try to keep on LBG's good side... neither lbg or symbion had provided actual facts about what the problem is between them so it's impossible for us to fully understand or take sides... The reality is that LBG still has more than $1 billion dollars worth of work (out of the $1.5b they were awarded) and we should try to get as much of this as possible... and sumbion has zero $$$ projects."* Later in the email he stated *"...our work with LBG has not gone unnoticed . A few weeks ago I was approached by BV to work with them directly on some other projects and I actually signed an agreement to bid projects with them..."*[188] [emphasis in original]

The Respondent's submissions

151. The Respondent submits that it has established that the Claimant, in particular Mr Drannan, intentionally carried out acts that were intended or designed to disrupt the contractual relationship between the Respondent and **LBG/B&V**, and that these caused actual disruption of the contract and damage to the Respondent. It is the Respondent's case that the Claimant knew that relations between the Respondent and **LBG/B&V** had become strained in late 2008 and that a primary element of the strain was **LBG/B&V**'s unfounded position that the Respondent was overcharging on invoices. Armed with this knowledge, and having an existing relationship with **LBG/B&V**, Mr Drannan then deliberately made a series of misrepresentations to **LBG/B&V** that ultimately resulted in the Respondent's termination from the project. This plan, it says, worked perfectly and caused the Respondent to be terminated from the **VICC Sub-Contract** leaving the

[188] Id.

way for the Claimant to perform the remaining work under it as well as being awarded additional work and new bidding opportunities by **LBG/B&V**[189].

152. The key misrepresentations which the Respondent alleges are the statements made by Mr Drannan in:

152.1. The email to Mr Currie of 31 January 2009, in which he accused the Respondent on having more than $1.5 million in payments to the Claimant that were more than 90 days due. It contends that this representation was false, and that as at 31 January 2009 there were no progress invoices or purchase orders that were 90 day past due. Further, it contends that Mr Drannan knew this representation was false, referring to his email to Mr Cordner on 2 February 2009 and the only reasonable explanation for his representation to Mr Currie was that it was an attempt to drive a wedge into the already strained relationship between **LBG/B&V** and the Respondent[190];

152.2. The email to Mr Currie on 1 April 2009, in which he said that the Respondent was now *"into us now for more than $3m and counting... in 3 more weeks this will grow to almost $4m"* (see paragraph 150.8 above). Again the Respondent contends that this representation was false, and that Mr Drannan should have known that his message would reasonably imply that the Respondent was overdue in payments by more than $3 million. It submits that at the time of this email, at the very most the Respondent was past due (based

[189] RPHM §98-99
[190] RPHM §100-103

on a 56 day payment period) on about $1.2 million. It says that Mr Drannan not only overstated the actual total billed to the Respondent at this time (which was $2,671,521.59) but of this amount only $1,221,376.03 was past-due 56 days. Further, it says there is no evidence to support Mr Drannan's statement that the amount owed by the Respondent to the Claimant would grow to $4 million in three weeks. In fact, in the three week period following this email the Claimant only invoiced the Respondent an additional $251,127[191].

153. The Respondent submits that Mr Drannan's testimony regarding these misrepresentations was wholly unconvincing. Not only was he wrong based on the Claimant's own figures of amounts invoiced to the Respondent, but he also admitted in cross-examination that his normal business practice was to not consider anything past due until it was more than 30 days late. Therefore by his own admission he had no reason to be concerned about these amounts. Further, it submits that there can be no doubt that the Claimant intended to interrupt the Respondent's contract with **LBG/B&V**, relying on Mr Drannan's email to Mr Cordner of 4 April 2009[192].

154. In addition, it submits that between Mr Drannan's emails to Mr Currie on 31 January 2009 and 1 April 2009, in good faith the Respondent kept the Claimant informed of every step of its progress in attempting to negotiate a resolution to the payment issues with **LBG/B&V**, referring to the various emails between Mr Hinks to Mr Drannan during this period[193].

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[191] RPHM §110-113
[192] RPHM §114-118
[193] RPHM §104-109

155. Finally, the Respondent contends that **LBG/B&V** relied on Mr Drannan's misrepresentations to terminate the Respondent from the **KPP** Project, and that its letter of 2 April 2009 was a direct response to Mr Drannan's email of 1 April 2009. When the Respondent was terminated by **LBG/B&V**, the Claimant benefitted by signing follow-on contracts to complete the work on the **KPP** Project and being awarded additional business opportunities to work with **LBG** and/or **B&V** on other projects.

The Claimant's submissions

156. The Claimant denies that the Respondent has proved the necessary cumulative elements of intentional interference under Nevada law. In particular, it denies that the Respondent has proved that Mr Drannan's contact with **LBG/B&V** was intended or designed to harm the Respondent's contractual relationship with **LBG/B&V**, or that it was the proximate cause of the friction between the Respondent and **LBG/B&V** which ultimately resulted in a mutual termination, or that the damages it claims were caused by the Claimant's acts[194].

157. With regard to the motivation behind Mr Drannan's emails to Mr Currie, the Claimant submits that the evidence showed that his sole motivation was to obtain payment of the Claimant's invoices[195]. Further, his understanding of the Federal Acquisition Regulations demonstrated that he was seeking to protect the Claimant's rights as he understood them rather than having any other purpose[196]. More specifically:

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[194] CPHB §148-149
[195] CPHB §150
[196] CPHB §154

157.1. It argues that initial contact was made by Mr Currie, in the phone call referred to in Mr Drannan's email of 31 January 2009. When Mr Drannan contacted Mr Currie on 1 April 2009 this was only after repeated, fruitless attempts to secure payment from the Respondent directly. Whilst Mr Drannan's email to Mr Currie on 31 January 2009 overstated the amount of time that some of the amounts had been due and owing, it says the amounts were generally accurate. Moreover, it contends that there is no evidence that Mr Drannan had any intention to harm the Respondent. His email suggests no action against the Respondent, save that it is encouraged to pay the Claimant. There is no evidence that **LBG/B&V** took any action in response to this email, or that it had any impact on its relationship with the Respondent[197];

157.2. By the time of Mr Drannan's email to Mr Currie of 1 April 2009, he had already been corresponding with Mr Hinks for months about monies the Claimant was owed. Mr Hinks had not questioned the figures referred to by Mr Drannan (on 12 March 2009 Mr Drannan had stated that the outstanding amounts would be *"getting close to $3 million in a few weeks..."* and on 1 April 2009 in an email to Mr Hinks stated that *"In a few weeks time our exposure on this project will be hitting the $4million dollar range"*). Further, Mr Hinks had assured the Claimant that the Respondent's issues with **LBG/B&V** would be resolved by 30 March 2009 but on that date the Claimant instead discovered that **LBG/B&V** planned to audit the Respondent. Despite knowing about this audit since at least 18 March 2009, when it was referred to during the meeting between the Respondent and **LBG/B&V**, Mr Hinks had not updated the Claimant.

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[197] CPHB §150-152

Mr Drannan consulted with the Claimant's accounting department before emailing Mr Currie on 1 April 2009, and gave Mr Hinks prior notice that he would be submitting the "**FAR** letter". Although the Respondent challenges the amount referred to in 1 April 2009 email, it cannot dispute that it owed the Claimant millions of dollars[198].

157.3. Mr Drannan had a reasonable basis to believe that the amounts stated in the 1 April 2009 and 2 May 2009 letter were or would shortly be due[199].

158. With regard to the causation of the termination of **the BOP Contract** between the Respondent and **LBG/B&V**, the Claimant contends that the evidence showed that this was a mutual termination resulting from a long-standing conflict between those parties and was not caused by the Claimant. Whilst the Respondent had hoped to resolve its issues with **LBG/B&V** through negotiations, the anti-Respondent faction within **LBG/B&V** ultimately prevailed and no settlement was reached. The conflict between the Respondent and **LBG/B&V** was not instigated by the Claimant, and in fact the Claimant suffered damage as a result of it[200]. In particular, the Claimant submits:

158.1. The problems between the Respondent and **LBG/B&V** pre-dated the time when the Respondent stopped paying the Claimant and other subcontractors. The Respondent was aware from early in the project that it would not be able to meet the schedule and complete the project in the time allotted.

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[198] CPHB §153-155
[199] CPHB §155
[200] CPHB §156

158.2. **LBG/B&V** criticized the Respondent's performance from the beginning of the **KPP** Project, citing an email from Mr Currie to Mr Copeland dated 5 August 2008[201] and an email from Mr Currie to Mr Hinks dated 14 October 2008[202]. These criticisms continued throughout the project, and there was a tense relationship between the Respondent and **LBG/B&V** including criticisms of lack of site supervision, poor material control and reliance on ABM (a subcontractor). Correspondence from the time shows Mr Hinks admitting that the Respondent had been unable to meet design and material requirements amongst other issues (citing Mr Hinks' reply to Mr Currie's letter of 29 October 2009[203]). By mid-November 2008 the relationship had grown toxic, as shown by Mr Currie's internal email to Jack Whippen and Bob Bell on 15 November 2008[204].

158.3. The prior Tribunal enforced **LBG/B&V**'s imposition of more than one million dollars of liquidated damages and rejected the Respondent's argument that those parties had an unwritten understanding that **LBG/B&V** would not assess liquidated damages[205].

158.4. The Respondent's assertion that it had reached a settlement with **LBG/B&V** in mid-March 2009 but which was then thwarted by Mr Drannan conspiring with Mr Currie is counter-factual and unsupported by evidence. In fact, the Respondent had not reached a settlement with **LBG/B&V**, as

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[201] Ex. CL-347
[202] Ex. CL-350
[203] Ex. CL-351
[204] CPHB §157-162 and Ex. CL-362
[205] CPHB §163

demonstrated by the Memo of the meeting on 18 March 2009[206], and matters were far from resolved after that meeting and remained in dispute through to termination of **the BOP Contract**. There was a two-day mediation between the Respondent and **LBG/B&V** on 18-19 May 2009, however it was unsuccessful and **the BOP Contract** was mutually terminated[164].

158.5. The evidence shows that the Claimant worked to support the Respondent throughout the **KPP** Project, and this was recognised by the fact it issued the Claimant $4 million in change order work. The Claimant was also the logical subcontractor to perform the remaining work on the **KPP** Project after **the BOP Contract** between the Respondent and **LBG/B&V** had terminated, however it made no difference to the Claimant whether it performed that work for the Respondent or **LBG/B&V** directly[207].

158.6. Finally, there was no preferential treatment of the Claimant by **LBG/B&V** after termination of the Respondent's contract. All three of the Respondent's major subcontractors entered into nearly identical Letters of Contract with **LBG/B&V**. **LBG/B&V** did not pay any part of the Respondent's debt to the Claimant. It also issued formal RFPs to bidders for scope of work items remaining to be completed and oversaw a competitive process which was reviewed by **USAID**. The Claimant got no extra compensation for performing the follow-on work[208].

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[206] Ex. C-393
[164] CPHB §164-170
[207] CPHB §171-172
[208] CPHB §173-175

The Tribunal's conclusions on tortious interference with contract

159. The approach of the Tribunal in considering this issue is to examine exchanges of emails throughout the performance of the **VICC Sub-Contract**. The Tribunal places considerable weight on written contemporaneous evidence, which is available in a dispute such this one. In this case such evidence includes the contemporaneous communication between the parties, with relevant third parties, and (possibly of the most value) internal correspondence within the parties' organisations. Examining the exchanges of emails both between the Claimant and the Respondent and between the Claimant and the Respondent with **LBG/B&V** provides a pretty clear picture. According to this correspondence, the persistent concern of the Claimant was the non-payment of its PIs and POs, particularly from February 2009 onwards, and what steps could be taken to achieve payment (see paragraph 150 above). In this exercise the Claimant, through Mr Drannan and Mr Cordner, was not only looking to **Symbion** but also to **LBG/B&V** for help.

160. In none of this correspondence is there any evidence of the Claimant contriving to bring an end to **the BOP Contract** between **LBG/B&V** and **Symbion**. However, the evidence before the Tribunal also indicates that there was only limited contact between **VICC** and **LBG/B&V** particularly in the period January to March 2009. In this period two principal emails have been placed before the Tribunal. The email from Mr Drannan to Jack Currie of **LBG/B&V** of 31 January 2009[209] and the subsequent exchanges of email on 1 and 2 April 2009[210]. In this subsequent exchanges of email, starting on 31 March 2009, Mr Drannan was actually asking Mr Currie if he was still in post. *"Hi Jack,*

[209] Ex. CL-221
[210] Ex. CL-239

checking on to see if you are still running the power station project." to which Mr Currie replied on 1 April 2009 *"Yes I'm still here and still running the projects, despite Kansas efforts to de-throne me I'm hanging on..."*[211]. Hence it appears that there had been no contact between them since January – a fact which must lie contrary to the allegation of contrivance against the Claimant.

161. Reading Mr Drannan's emails of 31 January[212] and 1 April 2009[213], both of which were related to telephone discussions had or about to be had, Mr Drannan was concentrating on the accumulating debt which was building up between **VICC** and **Symbion** during the performance of the **VICC Sub-Contract**. In these emails he may have overstated the amount of the debt but much of this overstatement went to whether the debt was then owing or later owing under a different payment period. The Tribunal does not construe from these two emails that there was any plan by **VICC** to displace **Symbion** as the contracting party relating to the **KPP** plant.

162. It is perfectly true that in May and June 2009 when **Symbion** was being thrown off the **KPP** plant, Mr Drannan speculated about the opportunities for **VICC** to take on remunitive work with **LBG/B&V** in place of **Symbion** (see paragraph 150.13 above). It is also true that earlier, at the beginning of April, Mr Cordner saw advantages if **Symbion** could *"walk"* away from the Contract as there would be advantages for **VICC** (see paragraph 150.10). However these speculations cannot lead to any conclusions that **VICC** was then or earlier interfering with **the BOP Contract**. In short the Tribunal finds that there is nothing like sufficient evidence to support the Respondent's case

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[211] Ex. CL-239 at pages 7-8
[212] Ex. CL-221
[213] Ex. CL-239

against the Claimant of tortious interference with contract if such a tort had been actionable in Afghanistan.

163. There is another reason why the Tribunal cannot come with the Respondent on this issue. There is abundant evidence in the correspondence before us, that, quite separate from whatever **VICC** did or did not do on site, the relationship between **LBG/B&V** and **Symbion** had for a long time been very bad. It may be that Mr Currie of **LBG/B&V** was wrong in his complaints against **Symbion**. The point is that these complaints were being made and strongly made from August 2008 onwards. The emails from Jack Currie of 5 August, 24 August, 7 October (when Jack Currie raised *"SERIOUS concern that the symbion material control is vastly insufficient"*) and 14 October[214]. The Tribunal also refers to the letter of Mr Hinks of **Symbion** of 29 October 2008 which he sent to **LBG/B&V** in which he conceded and explained some of the difficulties admitting, for example, *"Ramadan period was much more devastating in terms of loss of production than we had hoped for"*[215]. The Tribunal notes that by November 2008 the relationship between **LBG/B&V** and **Symbion** had hit a very low point. On 15 November 2008, Mr Currie having had a very terse meeting in the **Symbion** office with Mr Copeland and Mr Jaenisch which started with Mr Currie being asked, in effect, whether he had a bugging device with him and with the proposition that **Symbion** would stop work within 7 days if their financial demands were not met, Mr Currie went on to state *"I have just reviewed and marked up a 63 page schedule* [prepared by **Symbion**] *which is quite honestly the biggest piece of shit I have ever seen in my career. But it's the best we can get from them. They are struggling with the enormity of the task and the fast track schedule is killing*

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[214] Ex. CL-347 to CL-350
[215] Ex. CL-351

them... We are between the devil and the deep blue sea. Screwed if we kick them off, screwed if we don't."[216]

164. Although there were fewer complaints in the next few months the fact is that **LBG/B&V** stopped paying **Symbion** from February 2009 onwards as a result of this dissatisfaction with **Symbion** including concerns that they had been over invoicing **LBG/B&V**. Thus it is clear to the Tribunal that the cause of the termination, on the **LBG/B&V** side, of **the BOP Contract** in May 2009 was dissatisfaction with **Symbion.** Whatever disagreements were running between these two parties, they were not the making of Mr Drannan, Mr Cordner or otherwise of **VICC**. Even as late as 23 May 2009, Mr Drannan was writing to Mr Cordner that it was *"impossible for us to fully understand ('the problem'* between **LBG/B&V** and **Symbion**) *or to take sides."*[217]

165. It is to be noted that the findings which, in this section of the Award, the Tribunal is making are consistent with the Findings in the earlier ICC Award between **LBG/B&V** and **Symbion**, regarding **the BOP Contract Award.** In the prior Award the Tribunal held that the reason for **LBG/B&V** withholding payment to **Symbion** was *"related to scheduling and progress on the Project"*[218]. Shortly afterwards the earlier Tribunal referred to the *"inadequate progress on the project"* by **Symbion**[219]. Furthermore the earlier Tribunal also held that the fact that **VICC** had notified **LBG/B&V** of *"more than $3,000,000 impending invoices owed to it by **Symbion**"* was not what triggered the

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[216] Ex. CL-362
[217] Ex. C-251
[218] BOP Contract Award §370
[219] BOP Contract Award §372

decision of **LBG/B&V** to terminate **the BOP Contract** with **Symbion** (see paragraphs 383 and 385 of the Award in **the BOP Award**).

166. It is right to record that there were words of praise in **LBG/B&V** which reflected credit on **Symbion**. For example there was an internal memo written on 10 December 2008 from Santanu Moitra of the **LBG/B&V** management to Mr Currie and others which stated that "*the progress*" at the power plant had been "*quite remarkable*" and went on to state "*the PM and his staff should be proud of their accomplishments*" and the work done was "*impressive given probable time it would have taken to complete this much work on another site even in a western country. The schedule has been aggressive and so has the construction progress*".[220] The Tribunal also acknowledges the evidence of Mr Hinks that there were two factions in the management of **LBG/B&V** one in favour of **Symbion** and the other against **Symbion** which was evident, for example, at the meeting between Symbion and **LBG/B&V** on 18 March 2009 at the offices of **B&V** in Kansas City.[221]

167. The fact, however, remains that there were continued difficulties between **Symbion** and **LBG/B&V** right up to Mr Hinks' decision to terminate **the BOP Contract**[222] on 19 May 2009. There is no evidence before the Tribunal that any of these difficulties had anything to do with **VICC** its officers and employees.

168. Thus, for the reasons set out in this section of this Award, the majority in the Tribunal firmly conclude, even if this tort was actionable under Afghan law, which the Tribunal

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[220] Ex. J302-R28 as produced by Mr Scott Greathead, Counsel for the Respondent, in his opening statement to the Tribunal on 2 Nov 2015
[221] Tr. VI 1545-1546, Tr. V 1260. See also Ex. CL393
[222] Ex. C-433

holds that it is not (see paragraphs 129 to 147 above), the Respondent would have failed. One member of the Tribunal, however, asks for it to be recorded that he disagrees with the analysis and conclusions of this section of the Award.

XXVIII: BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

169. By Count II of its Counterclaims, the Respondent contends that **the VICC Sub-Contract** contained an implied covenant of good faith and fair dealing, which the Claimant breached by engaging in conduct unfaithful to the purpose of **the VICC Sub-Contract** and to the Respondent's justified expectations[223].

The Respondent's submissions

170. The Respondent contends that every commercial contract contains an implied covenant of good faith and fair dealing (the "**Implied Covenant**"), citing **Hilton Hotels Corp. v Butch Lewis Prods., 17 Nev. 226 (1991)**[224] and that the Claimant's intentional interference with **the BOP Contract** between the Respondent and **LBG/B&V** was in breach of the **Implied Covenant**. It states that the **Implied Covenant** is breached *"where the terms of a contract are literally complied with but one party to the contract deliberately contravenes the intention and spirit of the contract"*[225] again citing the **Hilton Hotels case** (as above). It cites further Nevada authorities relating to breach of the **Implied Covenant** in construction contracts, stating that the Nevada Supreme Court has held that parties in a construction contract breach the **Implied Covenant** if they

[223] R's Answer and Counterclaims §28-31
[224] Ex. RL-351
[225] Id.

"refrain from cooperation in a contract" or *"act in bad faith, calculated to destroy the benefit of that contract to the other contracting party"*[226].

171. In this case it argues that the Claimant's conduct destroyed the benefit that the Respondent was to have gained through **the BOP Contract**. It was the intention and spirit of **the VICC Sub-Contract** that the Claimant would continue to perform under that contract as the Respondent's sub-contractor, and that the Claimant would not take action to terminate the Respondent's role and undermine the Respondent's profitability. However that is what the Claimant did. While Mr Hinks made repeated attempts to apprise Mr Drannan of the Respondent's ongoing payment dispute with **LBG/B&V**, the Claimant took the opposite approach and went behind the Respondent's back, flouting its obligation to work with the Respondent. Further, the Respondent says that the Claimant was well aware that its actions were improper, and knew that the Respondent was on the verge of resolving its payment issues with **LBG/B&V**[227].

172. It states that while a sub-contractor's fleeting contact with an owner might be acceptable, that is not what happened in this case. The Claimant made knowing misrepresentations to **LBG/B&V** intending that its actions would disrupt the Respondent's relationship with **LBG/B&V**. In addition to the Claimant's contractual duty to perform its work in an efficient and competent manner, it was also under a duty to refrain from taking action that would jeopardize its contracting partner's ability to perform under the contract such as by making misrepresentations to **LBG/B&V**[228].

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[226] RPHM §124, and **A.C. Shaw Const. Inc v Washoe** Ex. RL-352
[227] RPHB §123-127
[228] RRCPHB §68

The Claimant's submissions

173. The Claimant does not dispute that **the VICC Sub-Contract** contained the **Implied Covenant**, namely a covenant of good faith and fair dealing. Like the Respondent, it also cites the case of **Hilton Hotels**, but says it provides that a breach of the **Implied Covenant** occurs *"when one party performs the contract in a manner that is unfaithful to the purpose of the contract and the justified expectations of the other party are thus denied."*[229] Further, it says that while the Respondent discusses the **Hilton Hotels** case in some detail, it was not an appellate decision on the merits but a decision on procedural grounds. The cases the Respondent cites all show that the breaching party must have acted in a manner *"calculated to destroy the benefit of that contract to the other contracting party"*[230].

174. In this case, it submits the Claimant was faithful to the purpose of **the VICC Sub-Contract**, which was to perform the civil work for constructing the **KPP**. The Respondent's justified expectation was that the Claimant would perform its work in an efficient and competent manner, and the Claimant's justified expectation was that it would receive payment for its work. The Claimant performed admirably under difficult circumstances and even assisting the Respondent's other sub-contractors which it was not obliged to do. It continued to work even despite non-payment by the Respondent and essentially served as the Respondent's local purchasing agent by accepting the extra-contractual POs. The Claimant says it was only when the Respondent reneged on its payment obligations that the Claimant reached up the contracting chain to provide factual information to **LBG/B&V** regarding late payment in a good faith attempt to

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[229] **Hilton Hotels Corp. v Butch Lewis Prods., Inc 808 P.2d 919** at 923-924, Ex. RL-351
[230] CRRPHM §63

secure its justified contractual expectations. Under **the VICC Sub-Contract**, the Claimant did not require the Respondent's permission to contact **LBG/B&V** which is why the Respondent has to rely upon an assertion of breach of the **Implied Covenant**. The Respondent has failed to cite any cases in which a contracting party was found to violate the **Implied Covenant** simply by communicating with a higher-tier contractor. Further, the Claimant's contact with **LBG/B&V** was not undertaken lightly.

175. The Claimant consistently inquired about late payments from the start of the project to its conclusion. It even encouraged **LBG/B&V** to make payments to the Respondent, hoping that the Respondent would then honour its obligations and pay the Claimant. However, the Respondent's non-payment eventually left the Claimant with no option but to reach up the contracting chain in an attempt to secure payment of long overdue monies. It submits that it is standard practice in the construction industry for unpaid sub-contractors to go "over the head" of the prime contractor if requests for payment have gone unheeded. The Respondent's own communications with **USAID** to secure payment from **LBG/B&V** demonstrates that such inquiries do not constitute bad faith. Further, even if the Claimant's communications with **LBG/B&V** did constitute bad faith the Respondent was not deprived of any justified expectation as the Claimant fully performed its contractual duties. The damages claimed by the Respondent are unjustified as the Respondent was in a loss position and its damages are barred by res judicata[231].

176. The Claimant's action in informing **LBG/B&V** that it was not receiving payments from the Respondent had a legitimate purpose, which was to try and get **LBG/B&V** to help

[231] CPHB §176-182

the Claimant get paid, rather than to harm the Respondent. The Claimant hoped that the Respondent would pay the Claimant and the project would then be completed as planned. It did not act in bad faith but instead cooperated with the Respondent to the maximum extent possible, and did not act with intent to deprive the Respondent of the benefit of its contract[232].

Tribunal's conclusions on breach of the Implied Covenant

177. In the view of the Tribunal there is no substance in this claim. The Tribunal has already rejected the allegations of wrongful interference with **the VICC Sub-Contract**. It therefore follows that there cannot have been any breach of an Implied Covenant of Good Faith and Fair Dealing. It is also particularly to be noticed that, in the correspondence between the parties, there are no complaints by the Respondent on the Claimant's performance of **the VICC Sub-Contract**[233]. On the contrary the Respondent went out of its way, on occasions, to praise the Claimant in its performance of **the VICC Sub-Contract** For example, Mr Jaenisch writing an email to Mr Cordner on 18 December 2008 wrote *"we greatly appreciate what you have done to support the project. Your dedication and commitment to our efforts are commendable"*[234].

XXIX. MALICIOUS PROSECUTION/ABUSE OF PROCESS

178. The Respondent claims compensatory damages in the amount of $249,355 for malicious prosecution/abuse of process in respect of the arrest and detention of Messrs Jaenisch and Copeland[235]. As set out in paragraphs 129 to 147 of this Award, the Tribunal

[232] CRRPHM §63-64
[233] For instance see the examples set out in paras. 60 and 150 of this Award.
[234] SOC, Ex. C-117 and C-118
[235] RPHM §175

concludes that the law of Afghanistan also applies to this Count III of the Counterclaims, and that the cause of action of malicious prosection / abuse of process does not exist under Afghan law. Whilst this is determinative of Count III, for completeness the Tribunal has nonetheless considered the merits of this claim and sets out below the conclusions it would have reached on this claim if this tort had been actionable in Afghanistan.

Evidence relating to malicious prosecution / abuse of process

179. As well as witness statements from Messrs Jaenisch, Hinks and Drannan, the Tribunal heard oral testimony from each of these individuals in respect of this part of the Respondent's Counterclaims including extensive testimony from Mr Jaenisch describing in detail the ordeal he suffered. In particular, Mr Jaensich testified that at various stages throughout his arrest and detention there were persons present whom he recognized to be from the Claimant[236].

180. In addition, the Tribunal was referred to various documents by the parties including the following:

180.1. On 23 May 2009, in an internal email to Mr Cordner, Mr Drannan stated *"Also, **we will not allow symbion to remove any equipment or materials** from the site. **Before they attempt to leave**, I want to be notified and we will see that the afghan police arrive at the site and we wil take possession of everything they own... until we are guaranteed full payment...just as a precaution. I may advise*

[236] See Declaration dated 5 August 2014 §9, 11,16 and Tr. Vol IV 985:11-986:6, 990:13-17, 994:20-995:3, 996:12-16

Ustad to go ahead with a court case against symbion right now and this will not only hold their equipment, but all their staff as well since they will not allow any symbion staff to leave the country until payment is made in full to us. This would be a real shock to our buddy Del [Mr Copeland] *especially if he was caught in Afghanistan and was not allowed to leave until subs are paid in full. We have the authority to do this, I have checked with our contract and local authorities. I have held off on this until all other options were tried."* He continued to state *"We don't have any clear understanding of how or when we will get paid and the only hold we have right now is on symbion, their possessions, and their staff. I hate to say this but we have a major amount of money and major concerns about this money..."*[237]

180.2. Following this email, on 28 or 29 May 2009 Mr Baryalai wrote an undated letter to the Afghan Attorney General Office stating that the Respondent owed the Claimant $3,460,653.93, and *"as precautionary measures, we hope that officials of the above company be summoned, and the Ministry of Interior Affairs should be advised to prohibit their exit from Afghanistan until settlement of accounts with us."*[238]

180.3. On 16 June 2009, the Director for Counter Criminal Deparment, Major General Sayed Ab.Ghafar Sayedzada, wrote a report of a complaint made by Mr Safiullah, son of Abdul Samad, who claimed that he had monetary transactions

[237] Ex. R-156

[238] Ex. R-157 and R-103. R-157 document is undated but the Respondent says it was submitted six days after the email at Ex. R-113 (RPHM §151) and the Claimant says it was submitted on 28 May 2009 (CPHB §185)

with the Respondent but their accounts had not been settled and that *"Director of the above mentioned company, Mr. Steve, has intended to escape from Afghanistan."*[239] On the same day, a person named Safiullah Anis employed by the Claimant emailed Mr Drannan and Mr Baryalai reporting that *"Attorney office gave a demand to Symbion to provide a letter stating; why they are delaying the payment to VICC, why they are not paying VICC; this letter should be with specific detail and information, the should also state* [sic]*, when they are going to pay VICC, the reason to get this letter from Symbion as per our assigned attorney, is to get signed documents from Symbion to let government attorney support to ask a report from LBG on the invoices and progress of work. Del is trying to get his passport back and reasoning his daughter's birthday, we will let you know by tomorrow, immediately VICC refused this request, but we will let you know by tomorrow."*[240]

180.4. On 18 June 2009, Mr Copeland sent an email to Mr Hinks stating that *"Ramin was in the AG's office a 0730 local and has filed a complaint against me and I will not receive my passport today or any other date until we pay all of the local vendors... We should get Steve out today, but Ramin is paying off every bad guy in Kabul."* [241]

180.5. On the same day, a memorandum was written by a lawyer acting on behalf of the Respondent, recording a conversation with the U.S. Consular Officer Brendan O'Brien about Messrs Copeland and Jaenisch's detention. The

[239] Ex. C-417
[240] Ex. R-178
[241] Ex. C-1085

memorandum states that Mr O'Brien *"...said that Symbion employees Del Copeland and Steve Jaenisch were in the custody of the Afghan police and that the Chief of Police had assured their safety... The Chief of Police gave two reasons for detaining Del and Steve: (1) they owed money and (2) they were being charged with the criminal offense of attempting to flee the country. The Chief of Police further stated to Mr O'Brien that Del and Steve would not be released until Symbion produced a letter guaranteeing payment to the 30-40 vendors owed money. It was not clear whether VICC was included in that group."* The memorandum goes on to state *"We also asked Mr O'Brien about the Afghan airport authorities' refusal to let Steve board a plane to Dubai on June 17, 2009. Mr O'Brien explained that he was called to the airport when Steve was not permitted to board his plane. When he arrived the General in charge of airport security was detaining Steve and numerous VICC representatives were present and interacting with the General... At the end of the confrontation, one of the VICC employees called Michael Drannan to report on what had transpired... Mr O'Brien spoke briefly with Michael Drannan. Drannan denied being involved with detaining Steve (which is inconsistent with what Mr O'Brien observed including the unsolicited briefing provided by a VICC employee at the end of the confrontation)."*[242]

180.6. On 19 June 2009, counsel instructed by the Respondent (Williams & Connolly LLP) wrote to B&V and stated *"I have definite confirmation that Black & Veatch's agents, including Mr Schaeffer (the new project manager) and others, have been telling Symbion subcontractors and others that Symbion recently received a*

[242] Ex. R-106

significant payment from Black and Veatch on the Balance of Plant contract for the express purpose of paying its subcontractors. This is an outright lie. As a direct consequence of this false statement, Symbion personnel have been arrested and jailed by the Afghan authorities..."[243]

180.7. On 5 August 2009, the Public Civil and Commercial Rights Prosecution Department of the Attorney General Office gave judgment directing that the dossier be referred to the District Commercial Court. The judgment includes a statement that *"Concurrent with investigation of the dispute, (5) petitions bearing instruction of the Attorney General Office have been received by this Office. Upon review thereof, the afore-mentioned have claimed USD 215,770 against officials of Symbion Company on account of sale of goods."*[244]

The Respondent's submissions

181. The Respondent submits that all the elements of malicious prosection are met, namely (1) want of probable cause to initiate the prior criminal proceeding; (2) malice; (3) termination of the prior criminal proceedings; and (4) damage. Further, it submits that the elements of abuse of process are also met, namely: (1) an ulterior purpose by the defendants other than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper in the regular conduct of the proceeeding[245].

182. Considering the evidence, it argues that there can be no doubt that the Claimant not only participated in but in fact directed the arrest and detention of Messrs Copeland and

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[243] Ex. R-107
[244] Ex. C-D (Mahjoor) Ex. K
[245] RPHM §148

Jaenisch[246]. It submits that the Claimant's actions were clearly malicious, on the basis that Mr Drannan knew that Afghanistan was extremely dangerous, knew that Messrs Copeland and Jaenisch were not personally responsible for the Respondent's debts and from personal experience knew the terror of losing one's liberty by detention[247].

183. Its actions subjected Messrs Copeland and Jaenisch to a frightening ordeal that no-one should have to endure, including their harassment by the Afghan police at Symbion House in Kabul, the seizure of Mr Copeland's passport, the prevention of Mr Jaenish boarding a flight out of Afghanistan and their joint arrest and detention in jail for two days[248].

184. It contends that there can be no doubt that the Afghan authorities' involvement in the matter was an intervention that was criminal in nature, referring to the testimony of Mr Qasimi that the fact that the Afghan Attorney General intervened rather than the Afghan Ministry of Justice, placed the Claimant's complaint in the criminal domain. Further, that the cause of action of abuse of process does not even require a criminal complaint or malice under Nevada law and thus even where there is probable cause to initiate criminal proceedings, where the tortfeasor uses the legal system to bear an amount of pressure out of all proportion to the harm intended to be rectified it will constitute an abuse of process. The Claimant knew or should have known that it had no basis to pursue its claim against the Respondent in the Afghan legal system; even if it believed that it had a viable breach of contract claim in an ICC arbitration, its pursuit of a case in

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[246] RPHM §149-157
[247] RRCPHB §75
[248] RPHM §149

Afghanistan was not motivated by a legitimate interest in resolving its claim through the proper legal process[249].

185. In addition, it argues that the Claimant is liable for full damages for the tort, even if other subcontractors were also involved in encouraging the arrest of Messrs Copeland and Jaenisch citing Restatement (Second) of Torts § 879 (1979)[250].

The Claimant's submissions

186. The Claimant denies Count III of the Respondent's counterclaims, its primary submission being that the Respondent cannot prove that the Claimant was the proximate cause of Messrs Copeland and Jaenisch's detention, as it is required to do. In particular it submits that:

186.1. There were a number of other unpaid local vendors agitating for payment at the same time as the detention and at least five of them had initiated criminal complaints, which were the proximate cause of the detention. It says that these criminal actions were apparently orchestrated by the Respondent's former country director, Ramin Habibi, who unbeknownst to the Respondent was also secretly a director of Hamd Oil, one of the vendors to whom the Respondent owed the most money. Mr Jaenisch testified to seeing Mr Habibi when they left the restaurant to go to the U.S. on 18 June 2009. The Claimant submits that it likely that he filed one of the five criminal complaints. A person called Mohammed Arish, who was employed by the Respondent, may also have played

[249] RPHM §159 and RRCPHM §71
[250] RPHM §158

a role in the arrests. The local vendors were hostile in mood, to be contrasted with the Claimant personnel alleged to be present. The U.S. Consular Officer negotiated the release of Messrs. Copeland and Jaenisch by obtaining a promise to pay those vendors, which reflected the Memorandum prepared by Greg Bowman on 18 June 2009 which recorded that *"Mr O'Brien believes that there are about 30 or so low level contractors owed a total of about $200,000 and that if they are paid off, Del and Steve will be released."*. After these payments were made, Messrs Copeland and Jaenisch were given their passports and released. The amounts the Respondent owed the Claimant remained outstanding[251].

186.2. The Claimant confined its actions to the filing of a civil and commercial complaint, a filing that happened on 28 May 2009, many weeks before the criminal complaints were filed around 16-17 June 2009 and the actual detention on 18 June 2009, suggesting the proximate cause of the arrests was the criminal complaints. There were two branches of the Attorney General Office, civil and criminal, and the Claimant's complaint was addressed to the civil and commercial branch. As such, it was referred to the District Commerical Court. The Attorney General Office could not impose detention in response to a civil complaint. Mr Drannan testified that he had not directed any Claimant employee to file a criminal complaint. In particular, he denied that Safiullah son of Abdul Samad was an employee of the Claimant[252].

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[251] CPHB §184-209, 212-213
[252] CPHB §189, 215

186.3. The Respondent's witnesses who made the allegations of the Claimant's involvement had no direct knowledge of what actually caused the arrests as they were not directly involved in the negotiations with the Attorney General Office and did not speak or read the native language. Mr Jaenisch had no personal knowledge of the proceedings at the Attorney General Office. Further Mr Hinks had no direct knowledge of the contents of the conversation between Mr Drannan and Mr O'Brien. Those matters were handled by Mr Copeland, who did not testify in this arbitration. Further, Mr Jaenisch could not identify by name or with any specificity the Claimant personnel who he said were present at the various stages of proceedings[253].

187. In addition to the above, the Claimant submits that the Respondent is not the proper plaintiff in the action, as only Messrs Copeland and Jaenisch were detained. It also submits that the Respondent cannot establish that the Claimant was involved in any criminal case against it, or that the Claimant acted with any malice or ulterior motive. The Claimant properly used the Afghan legal system for the purpose of pursuing a debt[254].

The Tribunal's conclusions on malicious prosecution / abuse of process

188. On any view Messrs. Copeland and Jaenisch suffered an ordeal in the middle of June 2009 when each of them, as **Symbion** employees, were attempting to leave Afghanistan. As Mr Jaenisch put it in his statement of 5 August 2014:

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[253] CPHB §210-214
[254] CPHB §217-222

"Both Mr Copeland and I were in significant danger. Because of the endemic corruption in Afghanistan we could have been kidnapped and held hostage for ransom, injured or even killed...indeed, Mr Copeland was told by an Afghan partner of Mr Drannan that 'Mr Drannan can have him put in a hole in the ground'"

189. In this statement of 5 August 2015 Mr Jaenisch gave a detailed account of what had happened to him – an account which he repeated, with more detail, at the beginning of his oral testimony before the Tribunal. After he had been prevented from boarding his plane at Kabul Airport he was placed for two or three hours in a small room with two police officers without knowing what was going to happen to him. After being released following an intervention by a Consular Officer at the US Embassy he was further harassed on the next day. After leaving a restaurant with Mr Copeland the cab in which he and Mr Copeland were travelling was surrounded by police and other cars following which he and Mr Copeland were effectively put under arrest and taken to a police station. It appears they were not actually put into a police cell but were locked up in some small room in the police building and kept there for two days. There were no toilet facilities and no food provided. The only food he got was provided by Mr Brandon O'Brien of the US Embassy. In the room with Mr Copeland were three native Afghans who were some form of kidnappers.

190. As Mr Jaenisch described to us in his oral testimony

"It was really a scary time, because I know in Afghanistan, they are not averse to cutting off hands and fingers and limbs to extort payment. That's the kind of standard in that part of the world. You know if they don't get their money, they are not averse to shooting you.

* * * * *

"I think the worst part was talking to my wife when I was in the Embassy and not wanting to tell her that I might die here, so, you know, all I could say [was] *'I hope to be home in a couple of days'"*[255]

191. Neither Mr Jaenisch nor Mr Copeland remotely deserved this treatment. They were not responsible for the non-payment of the monies which **VICC** was claiming against **Symbion**. They were not responsible for the non-payment of the other debts which were being claimed by the other creditors of **Symbion** – those creditors having performed work at the **KPP** plant. It was just a convenient way of putting pressure ultimately on Mr Hinks of **Symbion** for the payment of monies being claimed by **VICC** and other creditors in Afghanistan against **Symbion**.

192. It is not clear how involved Mr Drannan was in this mistreatment of Messrs. Copeland and Jaenisch. He was, however, certainly involved. Two **VICC** employees were present both at the airport and, when Messrs. Copeland and Jaenisch were taken to the police station in Kabul, they were there too. There was an occasion at the airport when one of these employees telephoned Mr Drannan and when the telephone was handed to Mr Brandan O'Brien of the US Embassy for Mr O'Brien to speak to Mr Drannan[256]. Mr Drannan was clearly also involved in the complaints made to the Attorney General's Office in Kabul[257]. Above all the treatment, meted out to Messrs. Copeland and Jaenisch were exactly what Mr Drannan wanted. This is plain from the internal email which Mr Drannan sent to Mr Cordner on 23 May 2009, as described above in paragraph 180.1:

"I may advise USTAD to go ahead with a court case against Symbion right now and this will not only hold their equipment but also their staff as well since they will not allow any

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[255] Tr. IV 1013
[256] See Symbion memorandum: 18 June 2009: Ex. R-106
[257] See undated letter to AG office in Kabul: Ex. R-157 and R-103

Symbion staff to leave the country until payment is made in full to us. This will be a real shock to our buddy Del [Mr Copeland]*especially if he was caught in Afghanistan and was not allowed to leave until subs are paid in full. We have the authority to do this, I have checked with our contract and local authorities*"[258]

193. As set out in paragraph 180.3 above in an email on 16 June 2009 an employee of **VICC** emailed Mr Drannan and Mr Baryalia (then Vice President of **VICC** and now President) *"Del is trying to get his passport back and reasoning his daughter's birthday. We will let you know by tomorrow, immediately VICC refused this request, but we will let you know by tomorrow."*[259]

194. Whatever was Mr Drannan's exact involvement in this treatment of the two **Symbion** employees, the Tribunal has to conclude that Mr Drannan was involved in it and that this treatment was totally wrong.

195. The question is whether the Tribunal has jurisdiction to provide redress, in this arbitration, for these wrongdoings. In the first place the Tribunal has no power to provide redress to Messrs. Copeland and Jaenisch. They are not parties in the arbitration and have no legal status in it. Secondly the Tribunal has held that Afghan law applies to this claim for malicious prosecution/abuse of process, relating to Messrs. Copeland and Jaenisch and has further held that such a tort is not actionable under Afghan law (see paragraph 147 above). There is, however, one further avenue which the Tribunal is prepared to explore. For the first time in its submissions the Respondent in its Reply to Claimant's Post-Hearing Brief raised the point of breach of the Arbitration Clause. They did so rather obliquely:

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[258] Ex. R-156
[259] Ex. R-178

"Rather than arbitrate, as it was contractually required to, VICC proceeded in the Afghan legal system, knowing the attendant fear that its actions would engender, as Messrs. Jaenisch and Copeland could not leave the country, were arrested and, when freed, were further harassed by VICC."[260]

196. The Tribunal has carefully examined the two other main submissions of the Respondent: its Responsive Submissions of 8 August 2014 where it put its case as follows:

"VICC's actions towards Mr Copeland and Mr Jaenisch in June 2009 entitle Symbion to recover for malicious prosecution/abuse of process."[261]

and in its Post-Hearing Memorial of 22 January 2016 where it specifically pleaded Nevada law in support of the malicious prosecution/abuse of process claim citing Section 155 of the Nevada Restatement (of Conflict of Laws)[262] but again made no mention of breach of arbitration agreement.

197. It is right also to note that during the Evidential Hearing Mr Diemand, on behalf of the Respondent, did put to Mr Drannan one question relating to the Arbitration Clause in **the VICC Sub- Contract**:

"Q: *And you are aware that, under your contract with Symbion, that you had a mandatory arbitration clause right? That's how disputes were to be resolved under the contract correct?*

A: *That's a part of the contract, yes.*

Q: *OK. Do you dispute that the contract sets forth that disputes regarding the contract are to be settled by ICC arbitration?"*[263]

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[260] RRCPHB §75
[261] RPM §176
[262] RPHM §92
[263] Tr. III 834

198. The question of arbitrability under **the VICC Sub-Contract** was also mentioned three times by Mr Smith, for the Claimant, in cross-examining Mr Jaenisch, on the basis that disputes between **VICC** and **Symbion** were subject to arbitration before the ICC[264]:

"Q: *You stated that the complaint filed by whomever did not inform the Afghan attorney general that disputes between VICC and Symbion were subject to arbitration before the ICC rather than litigation in the Afghan legal system, correct?*"[265]

199. Two matters are quite clear to the Tribunal. First the Respondent has not actually made a claim of breach of the arbitration clause in **the VICC Sub-Contract** in this arbitration and moreover has not established any causation between such breach of the arbitration clause and what the Respondent may have suffered as a consequence. Secondly the Respondent only raised this issue (and as an issue only) in its very last submission to the Tribunal and never advanced it. Questions put during the Evidential Hearing cannot possibly establish cause of action for the Respondent which is fit for consideration by a Tribunal.

200. It is therefore clear, in all of these circumstances, that the Respondent's claim for malicious prosecution/abuse of process fails.

XXX. PUNITIVE DAMAGES

201. The Respondent also claims punitive damages for Counts I and III of its counterclaims.

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[264] Tr. V 1162,1165 and 1166
[265] Tr. V 1165

The Respondent's submissions

202. The Respondent submits that under Nevada law, a tort victim is entitled to punitive damages in addition to compensatory damages where there is clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied, citing Nev. Rev. Stat § 42.005(1). Where compensatory damages are $100,000 or more, punitive damages may be awarded up to three times compensatory damages; if lower, then they may be awarded up to $300,000[266].

203. It contends that nothing in the UK Arbitration Act 1996, the ICC Rules or English law more broadly prevents the Tribunal from awarding punitive damages where the governing substantive law allows such damages. In particular:

203.1. Section 48 of the Arbitration Act 1996 recognizes and gives effect to party autonomy in respect of remedies and contains nothing to preclude an award of punitive damages, citing Gary Born as support for this proposition[267].

203.2. Article 4(3)(d) of the ICC Rules does not limit the relief requested to non-punitive damages. Further, pursuant to Article 2(1) of the ICC Rules the parties and/or the Tribunal are free to select and/or apply a governing substantive law that allows punitive damages[268].

203.3. Under English law damages are to be assessed in accordance with the substantive law governing tortious conduct, pursuant to Article 15 of Regulation

[266] RPHM §160
[267] RPHM §161-162
[268] RPHM §163

(EC) No 864/2007 on the Law Applicable to Non Contractual-Obligations, as adopted via the Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008 ("Rome II"). As the Respondent submits that Nevada law applies to the Counterclaims, pursuant to Rome II it also applies to to remedy and the assessment of damages[269].

204. The Respondent submits that it is entitled to punitive damages for the Claimant's tortious interference for three reasons. First, Mr Drannan's emails to Mr Currie on 31 January and 1 April 2009 were knowingly false. Second, the Claimant made additional profits as a result of its tortious actions and it should be made to pay in order to undo the benefits it enjoyed as a result of its wrongful actions. Third, this is a case where the tortfeasor had independent contractual obligations to act in good faith toward the victim[270]. In addition, it submits that it is entitled to punitive damages of $748,067 for malicious prosecution/abuse of process due to the egregious nature of its actions in preventing Messrs Copeland and Jaenisch leaving Afghanistan and causing their detention[271].

The Claimant's submissions

205. The Claimant submits that the Respondent's claim of punitive damages should be dismissed out of hand for a number of reasons:

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[269] RPHM §164
[270] RPHM §167-170
[271] RPHM §171-174

205.1. First, such awards are extremely rare in international arbitration, being described by Gary Born as *"unusual"* in practice. As of 2013, it says there are no reported ICC awards in which punitive damages were granted[272].

205.2. Second, punitive damages are not available under Afghan law and hence such an award is unlikely to be enforced by Afghan courts. The Claimant relies on Mr Mahjoor's testimony that punitive damages are not permitted under Islamic law as a recovery in excess of compensation for actual harm to property or person. Under the principle of *lex loci delicti* and the Restatement, Afghan law governs Counts I and III of the counterclaims. English procedural law does not control the award of damages in this case[273].

205.3. Third, even if Nevada law applies (which the Claimant denies), the Respondent has failed to establish that it is entitled to punitive damages as it has failed to meet the high standard required to prove fraud or malice[274].

206. In addition, in respect of Count III it submits that the Respondent entered Afghanistan with full knowledge of its perils and placed itself and its personnel in a situation with little or no preparation. It compounded these risks by "shafting local vendors and then attempting to flee like a thief in the night."[275]

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[272] CPHB §233
[273] CPHB §234
[274] CPHB §235-236
[275] CRRPHM §91-94

The Tribunal's conclusions on punitive damages

207. As the Tribunal has held that the Respondent's claims for tortious interference and malicious prosecution/abuse of process have failed there is no room for the Respondent's claims for punitive damages, resting as they are on these two failed claims, to proceed forward.

XXXI. COSTS

Introduction

208. Pursuant to the Tribunal's Procedural Order 24, Counsel for both parties have submitted very detailed submissions on costs. In doing so, as requested by the Tribunal, they have separately identified specific areas of costs. In the case of the Claimant it has separately identified the costs that it incurred on the Interim Measures and Discovery issues. The Respondent has broken down its costs to five issues including Interim Measures and Discovery. The other areas being, as labelled by the Respondent, 'Initial Case Activity', 'Pre-Hearing Submissions' and 'Evidential Hearing and Post-Hearing Submissions'. The Tribunal therefore has before it 43 pages of submissions from the Claimant on costs and 28 pages of submissions on costs from the Respondent. Many of these submissions go to extreme detail, for example, allegations of the time taken up in the process of the nomination of the Respondent's arbitrator – the complaint against the Claimant being that it took up unnecessary time and cost in challenging the nomination of the first two nominees of the Respondent for the appointment of its arbitrator. The Tribunal does not intend to follow all of these trails and indeed make any decisions on them. Moreover, nor is it necessary, in view of the findings that the Tribunal has made in this Award, to give close scrutiny to most of the costs being claimed by the Respondent because, regrettably for the Respondent, the Tribunal is not minded to

award the Respondent costs except relating to the Interim Measures and Discovery issues. The Tribunal sets out its reasons on both these issues later in this section of the Award.

209. The starting point is what costs are awardable in an ICC arbitration. These, as pointed out by both parties, are specified in Article 37(1) of the ICC Rules. Thus for the purposes of this arbitration, the 'arbitration costs' are, (i) the fees and expenses of the Tribunal, (ii) the ICC administrative expenses as fixed by the ICC Court and (iii) the 'reasonable legal and other costs incurred by the parties' in the arbitration.

210. London is the place of this Arbitration and costs are a procedural matter and the Tribunal has stipulated in Procedural Order 24 that it intended to follow the principle of '*Costs Following the Event*'. As set out below the Tribunal is prepared to take a different position on the costs relating to 'Interim Measures' and 'Discovery'. With these two exceptions the "*event*" is that the Respondent has failed to succeed in this arbitration on the Claimant's claim and on all of its Counterclaims. In making this point on following the principle of "*Costs Following the Event*" the Tribunal has taken full note of the submissions of the Respondent and the general rules in international arbitration on the application of costs.

211. In its Application for an Award of Costs of 22 January 2016, the Claimant sought a total of US$2,826,470.66 (including the costs of its predecessor as Counsel, Sheppard Mullin) specifying that its costs incurred on the Interim Measures issue amounted to

US$95,625.50 and on the Discovery issue US$68,808.50[276] to which it adds the costs incurred by Sheppard Mullin of US$29,479.50 (Interim Measures) and US$1,265.00 (Discovery). Subsequently in its Reply to Respondent's Post-Hearing Request for Costs of 22 February 2016 it increased its total cost claim to US$3,095,380.73 (including the costs of Sheppard Mullin) to bring its costs up to date as of 22 January 2016[277]. In its Reply on Costs of 22 February 2016 the Respondent stated that it had "*no objection to the reasonableness of the costs claimed*" as then being claimed by the Claimant. Thereafter the Respondent has not challenged, as it was entitled to do, this claimed increase by the Claimant in costs. Moreover, as noted in paragraph 222 below, the costs claimed by the Claimant are still significantly lower than the costs being claimed by the Respondent. The Tribunal, therefore, assumes that this increase in the Claimant's costs is not an issue between the parties.

212. In its Application for Costs of 22 January the Respondent sought reimbursement of costs totaling US$3,178,845.50 together with costs incurred in instructing Counsel in England in the sum of UK£28,487.50. It has not sought any further costs down to the time it completed work in this arbitration. Concerning Discovery the Respondent claims US$854,721.01 in costs and Interim Measures US$408,841.77 (plus the UK£12,365.50 for English legal advice).

Claimant's Submissions on Costs

213. Throughout its submissions the Claimant complains about the way the Respondent, through its lawyers, conducted this arbitration against it. It states, for example,

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[276] Ex C-1126
[277] Ex C-1156

"Symbion engaged in oppressive litigation tactics that increased the costs and fees"[278] and *"engaged in scorched-earth litigation tactics"*[279]. Its overall complaint is that the Respondent, through its lawyers, was simply trying to drive the Claimant out of this arbitration particularly in its conduct of the Interim Measures issue. Since, however, the Respondent has not challenged the quantum of the Claimant's costs claim, relating to the fees and expenses which the Claimant incurred with its lawyers, there is no need to consider further these allegations whether they be fair or unfair. While it is true that the Respondent is claiming that it is entitled to recover costs from the Claimant in the specific areas of 'Initial Case Activity', 'Pre-Hearing Submissions' and 'Evidential Hearing and Post-Hearing Submissions' as well as in the 'Interim Measures' and 'Discovery' issues, the Tribunal does not think that these three further issues warrant separate treatment relating to awards in costs. In the view of the Tribunal all three of these areas were all part of the general costs which both parties were having to incur in this arbitration.

214. In these circumstances the Tribunal, in summarizing the Claimant's cost submissions, will just concentrate on the submissions relating to Interim Measures. Here the Claimant asserts that

> *"Symbion turned a simple commercial collection case, in which VICC sought payment for unpaid invoices that were never disputed during performance, into complex litigation by asserting a three count 24 million counterclaim for tortious interference, breach of good faith and fair dealing and malicious prosecution/abuse of process."*[280]

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[278] Claimant Costs Application §10 p3
[279] Claimant Costs Application §32 p12
[280] Claimant's Costs Application §33 p12

215. The Claimant alleges that the Respondent commenced its Interim Measures application with a *"three-page submission with almost no legal or factual foundation...the sole basis for Symbion's application was that VICC had requested a brief extension for the deadline for posting its advance on costs"*[281]. Thereafter it conducted the Interim Measures issue, in its subsequent submissions, in a way which *"was designed to force VICC out of this arbitration on procedural technicality"*[282]. Moreover the Respondent wholly inflated the quantity and strength of its counterclaims against the Claimant from US$10 million, to US$24 million to $29 million and even now, as the Tribunal notes, in its Post-Hearing submissions is seeking against the Claimant just short of US$41,400,000 including punitive damages and interest[283].

216. As far as the Tribunal can ascertain the Claimant has given no explanation of the Tribunal's findings that there was an inference that there had been some form of dissipation of assets although it does argue that its difficulty in satisfying the Tribunal's order for it to provide security in the sum of US$2.5 million was caused by its deteriating financial position .

217. On the Discovery issue the Claimant complains that throughout Discovery the Respondent was making *"overly broad requests"*[284] which were very burdensome for it. Moreover the Respondent *"never made any attempt to confer with* [it] *about alleged production deficiencies instead filing an overblown and outrageous request for sanctions*

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[281] Claimant's Costs Application §50 p16
[282] Claimant's Costs Application §37 p13
[283] RPHM §175 p80
[284] Claimant's Costs Application §74 p22

and discovery monitor"[285]. The fact that the Tribunal ordered additional production of documents does not mean that the Claimant had failed in the production of documents process and should, as a result, have to face "*fee-shifting*"[286]. Moreover the Respondent "*wasted the time of the Tribunal and VICC in seeking ... extraordinary relief*"[287] relating to non-party document discovery and deposition testimony from B&V – testimony which, in the end, the Respondent failed to obtain. All in all "*Symbion's actions dramatically increased the costs of discovery*"[288].

The Respondent's Submissions on Costs

218. For the reasons already stated the Tribunal only needs to examine the Respondent's submissions on Interim Measures and Discovery. On Interim Measures the Respondent asserts "*VICC's misconduct and intransigence in repeatedly misrepresenting the facts and flouting the Tribunal's orders warrant an award of costs in Symbion's favor*"[289]. The whole Interim Measures process involved a total of 34 submissions from the parties and 8 procedural orders from the Tribunal. Of these "*seven pertained to VICC's unsuccessful motion for interim measures and twenty seven pertained to Symbion's successful motion*" [290]. Although the Claimant regularly represented to the Tribunal it was "*in good financial condition*"[291] and would be able to satisfy a $10 million award in favour of the Respondent it was in constant difficulties in providing the security ordered by the Tribunal of US$2.5 million and, in the end, was only able to put up US$500,000 in security. Importantly there was clear evidence before the Tribunal that "*VICC had*

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[285] Claimant's Costs Application §73 p22
[286] Claimant's Costs Application §75 p22
[287] Claimant's Costs Application §69 p20
[288] Claimant's Costs Application §76 p23
[289] Respondent's Request for Costs §37 p13
[290] Respondent's Request for Costs §38 p13
[291] Respondent's Request for Costs §39 p14

deliberately dissipated millions of dollars in assets"[292]. It was this issue that took up an enormous amount of time and cost.

219. On Discovery, the Respondent asserted that its conduct was "*exemplary and directed to expediting discovery*"[293]. In contrast when the Claimant served a 25 document request "*Symbion interposed no objection to seventeen*" and its objections "*to the additional six were upheld by the Tribunal*"[294]. Moreover, in compliance with its Discovery obligations, the Respondent produced to the Claimant over 200,000 pages of documents. In contrast when the Respondent served 33 document requests on the Claimant, it objected to 32 of those requests but the Tribunal then went on to overrule 26 of the Claimant's objections and ordered the production of those documents[295]. The Claimant failed to respond properly or at all to the proper document requests of the Respondent which compelled the Respondent to file its motion for costs on 7 September 2015[296]. One of the serious deficiencies in the Claimant's document searches was they did not use proper electronic searches and not produce a lot of relevant documents. It was only on an order of the Tribunal that the Respondent was able to obtain 1,500 pages of more documents many of which were "*highly relevant exhibits*"[297].

220. In summary the Respondent states its position on Discovery as follows:

> "*Symbion has spent considerable time and money complying with its discovery obligations, seeking to obtain compliance from VICC with respect to its obligations and fending off the VICC's meritless and untimely attempt to obtain additional documents*"[298].

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[292] Respondent's Request for Costs §40 p14
[293] Respondent's Request for Costs §19 p8
[294] Respondent's Request for Costs §19 p8
[295] Respondent's Request for Costs §20 p8
[296] Respondent's Request for Costs §23 p9
[297] Respondent's Request for Costs §24 p9
[298] Respondent's Request for Costs §27 p10

Tribunal's Conclusions on Applications for Costs

Rule of Costs Following the Event

221. The Respondent's position in this Award is that it has failed on the Claimant's claim, on Count I of its Counter Claim, (on the law and merits,) on Count II of its Counter Claim (on the law and merits), and in Count III of its Counter Claim (in law). Save that the merits, in the Tribunal's view, were on its side in Count III of its Counter Claim, the Respondent has failed in all of the substantive claims before the Tribunal. In its request for arbitration of 20 March 2013 the Claimant claimed US$4,198,836 on the unpaid PIs and POs[299]. It did increase this claim and by the time of submitting its Post-Hearing Brief on 22 January 2016 it was up to US$5,416,458.99[300]. The Tribunal has decided in this Award that the correct amount of the Claimant's claim under the PIs and POs comes to US$4,068,659[301]. Thus, in this Award, the Claimant has achieved on the PIs and POs compensation very close to its original claim. This discrepancy in the figures which the Claimant has claimed for damages compared to what the Tribunal is herein awarding should not change the position on the Claimant's entitlement for costs in succeeding in its damages claim. It has long been held, when applying the rule of 'Costs Following the Event' that as long as a party has substantially succeeded in its claim, it is entitled to its costs. In this arbitration it has to be particularly noticed that at the outset, in the first submission that the Respondent made that it stated:

"Venco's claims in this arbitration arise from its false claim that Symbion continues to owe"[302]

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[299] Request for Arbitration dated 20 March 2013 page 12
[300] CBHB §238 p80
[301] See paragraph 102 at p59 above
[302] Respondent's request for Interim Measures of 17 January 2014: para (unnumbered) at the top of p2

the Claimant on the unpaid PIs and POs – somewhat of a strong assertion taking into account that the issue was whether the Respondent was entitled to rely on a 'pay-if-paid' provision for not paying debts which otherwise may have been thought to be due.

222. Leaving aside costs in the 'Interim Measures' and 'Discovery' issues, the Tribunal does apply the rule of 'Costs Following the Event'. Accordingly it awards costs to the Claimant in the sum claimed of US$3,095,380.73 less the adjustments which arise below concerning the costs relating to 'Interim Measures' and 'Discovery' issues. In reaching this decision the Tribunal does note that there was a change of Counsel in January 2015 which must have resulted in a considerable 'reading in' by the Claimant's new Counsel. However the Tribunal has had assurances from the Claimant's new Counsel that the 'reading in' time has been substantially discounted and, in any event, the Respondent has not taken this point. It is also to be noted that the Respondent's own costs of US$3,178,845.50 plus the expenditure of the UK pounds which brings, on current rates of exchange, the Respondent's costs up to the mark of US$3,220,000. Hence, as a measure against the Claimant's costs, the Respondent's costs are higher by more than US$100,000.

223. Thus taking an overall view it seems to the Tribunal that it is justified to Award to the Claimant its claimed costs, subject to deductions concerning the 'Interim Measures' and 'Discovery' issues.

Interim Measures

224. The Interim Measures issue took a great deal of the Tribunal's and the Parties' time. Altogether the Tribunal made seven Procedural Orders from Procedural Order 3 on 2

July 2014 to Procedural Order 22 on 28 September 2015 upon Interim Measures although one of them also dealt with the time table. It is, however, the view of the Tribunal that regrettably there were faults on both sides.

225. The Respondent in making its original request for Interim Measures based it solely on the Claimant's then default, remedied shortly after, in paying the requisite advance on costs required by the ICC[303]. Thereafter in its two further submissions[304] in support of its Requests for Interim Measures, it advanced no argument that the Claimant had been diverting its assets deliberately or at all. As the Tribunal ruled in Procedural Order No 3 it is an essential requirement for an Interim Measures application for security on a claim (whether in the form of a claim or counter claim) that there should be evidence of the other party "*deliberately diverting its assets*"[305]. However, the Tribunal considered that the Respondent's allegations should be deemed to constitute a concern that there was diversion of assets. Accordingly, the Tribunal ordered the Claimant to submit information that would allow this point to be decided. Following upon a number of further procedural orders and submissions, the Tribunal decided that it could draw an inference that there had been some form of dissipation of assets by the Claimant justifying the making of an order for security. Ultimately, the Tribunal agreed that security in the amount of $500,000 would be satisfactory, and the said amount having already been deposited with the ICC[306].

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[303] The Respondent's request for Interim Measures of 17 January 2014
[304] Respondent's Reply to Claimant's Response dated 18 February 2014 and Respondent's Sur-Rejoinder dated 21 March 2014
[305] PO 3 §75 p35
[306] PO No 22 of 28 September 2015 at paragraph 14

226. It is clear to the Tribunal that the Respondent, throughout its Interim Measures application, was inflating its claims which went right up to US$29 million although the Respondent did restrict the security which, it was seeking, to US$10 million. In its submissions of 18 February 2014 the Respondent denied this allegation stating that the Claimant's '*assertion that Symbion artificially inflated its claims is false*"[307]. The Tribunal was not of that view and said so in its Procedural Order No 9[308]. It is now more than clear that this view of the Tribunal was correct. Indeed on the Tribunal's findings in this Award, none of the Respondent's Counterclaims have been found to be sustainable. This is an important factor because the Tribunal from its first Procedural Order on Interim Measures made it clear that the Respondent had, inter alia, to produce "*adequate evidence of the damages to which it contends entitlement*" and to "*demonstrate that there is a reasonable possibility that it would succeed on the merits as to the amount claimed*"[309]

227. The Claimant also contributed to the costs and time taken up over the Interim Measures issue. Although it now states that its inability to provide any security beyond the US$500,000 which it has lodged, on the order of the Tribunal with the ICC arose out of its deteriorating financial circumstances, frequently in its submissions to the Tribunal upon Interim Measures the Claimant asserted that it had the ability to provide security[310].

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[307] Respondent Reply on Interim Measures of 18 February 2014: second paragraph (unnumbered) on page 2
[308] PO 9 of 4 February 2015 §8
[309] PO 3 of 2 July 2014 §79 p37
[310] For instance see PO No 6 paragraph 13.

228. The other matter concerning the Claimant and the Interim Measures issue relates to the clear evidence, which emerged, of it dissipating assets for which no adequate explanation has been given[311] right up to and including the Claimant's current submissions on costs. Both of these defaults by the Claimant substantially increased the time and costs in considering the Interim Measures issue involving in the latter extremely detailed investigations.

229. Finally the Tribunal has to take account on costs that it rejected in its entirety the Claimant's Application for Interim Measures.

230. The decision on what costs the Claimant should be responsible for relating to the Interim Measures issue has to be based upon those costs for which the Claimant was responsible but which it should not caused to have been incurred. This goes to all the costs incurred in investigating its financial status and whether it had been deliberately dissipating assets. It also goes to all the extra work which was involved in the repeated requests of the Claimant to vary the orders under which it should provide the security of $US2.5 million which the Tribunal ordered it to provide. The Tribunal, therefore, needs to look at the activity, pursuant to the Interim Measures issue, which occurred after its Procedural order No 3 of 2 July 2014. The answer is that there was a great deal of activity following the Claimant's production of documents, pursuant to Procedural Order No 3, on 16 July 2014 from which followed a mass of submissions by both sides. Hence the bulk of the work after 2 July 2014 was related in one way or another to an examination of the Claimant's financial status and numerous transactions of the

[311] For instance see PO 9

Claimant to which the Respondent drew our attention. Thereafter there were all the applications by the Claimants to vary the order for security made against it.

231. Examining the Respondent's figures from July 2014 until September 2015 it appears that the Respondent incurred 799.5 hours incurring costs of US$356,273. As already intimated the substantial cause for these hours and costs arose out of deficiencies of the Claimant in its conduct of the Interim Measures issue.

232. In the view of the Tribunal the Respondent also had responsibilities in significantly inflating the value of its Counterclaims and the prospects of its success in bringing them. The Tribunal, therefore, thinks that the fair course of action is to reduce the liability of the Claimant for the Respondent's costs by half to (in round figures) US$180,000. In addition the Tribunal thinks it should reduce the costs claimed by the Claimant on the Interim Measures issue to US$50,000 (resulting in a reduction of US$75,104.00 from the total costs of US$125,104.00 claimed by the Claimant for costs of both Smith Pachter and Sheppard Mullin in respect of Interim Measures). Consequently the Respondent's liability for costs on Interim Measures, should be reduced by US$255,104.00

Discovery

233. Regrettably the Tribunal cannot accept the Claimant's submissions that it was not in default in the Discovery process and that the fault lay with the Respondent's "*overly broad requests*"[312]. It is true that the Respondent made 'broad' requests on Discovery including seeking documents and deposition testimony from a non-party: **B&V**. As to the latter it is plain that the Respondent did receive a significant number of documents

[312] Claimant's Costs Application §74 p22

which were relevant to this arbitration which showed that the Claimant had been deficient in producing documents which it should have produced pursuant to requests from the Respondent. The Claimant's deficiencies in Discovery, as alleged by the Respondent, is to be found in paragraph 219 above and in its Motion on Costs of 7 September 2015[313]. The Tribunal accepts these deficiencies by the Claimant as described by the Respondent. It is also clear that the Claimant did not carry out electronic searches and it is significant that after the Tribunal's Procedural Order No 15 of 19 June 2015 and again after the Respondent's motion for costs on 7 September 2015 that a significant number of relevant documents were then produced by the Claimant which the Respondent numbers to be 1,500 pages of more documents. Long and detailed requests for compliance by the Claimant and requests for sanctions were submitted by the Respondent on 28 January 2015 and 2 April 2015. The Tribunal has held that the Claimant did not deliberately withhold documents[314] but there were, then and later, up to September 2015, continued deficiencies by the Claimant in the production of documents. While the Tribunal did not think the sanctions being sought by the Respondent in January and April 2015 should be granted[315] the Tribunal nonetheless holds, at material times in the preparation for the Evidential Hearing, the Claimants were deficient in the production of documents and that this caused the Respondent to spend considerable extra time and money in dealing with Discovery issues.

234. Similar to the costs analysis on Interim Measures, the question has to be what were the costs that the Claimant, through its misconduct of Discovery, caused the Respondent

[313] Part of Ex R-377
[314] PO 15: 19 June 2015 §6 p3
[315] PO 15: 19 June 2015 §6 p3

additionally to incur over what it would have had to incur had the Claimant properly conducted the Discovery process. The crucial dates are the Respondent's Request for Compliance with Discovery and for Sanctions on 28 January 2015, the Claimant's Response on 27 March 2015 and the Respondent's Reply thereto on 2 April 2015. Thereafter on 19 June 2015 the Tribunal issued Procedural Order No 15 in which it ordered the Claimant to produce further documents, arising out of the Claimant's deficiency in Discovery, and do so by 16 June 2015.

235. As with Interim Measures, there are startling differences in the total hours each party gave to Discovery (the Claimant 220.2 hours and the Respondent 2,105.6 hours) and in the total costs of Discovery (the Claimant US$68,808.50 and the Respondent US$854,721.01). Again as with Interim Measures, to whatever conclusion the Tribunal comes it must treat the figures of the Respondent as having been considerably inflated. During the crucial months, for the Respondent, of January 2015 when it was building up its case against the Claimant for the Claimant's deficiency in Discovery, the Tribunal notes that the Respondent spent 228 hours at the cost of US$85,108.50 (which included the search costs of US$8,000 relating to the **B&V** documents) and of July 2015 when the Respondent was examining the further documents produced by the Claimant pursuant to the Tribunal's Procedural Order No 15. Here the Respondent expended 116 hours at the total cost of US$47,620.50. Thus the Tribunal is prepared to conclude that a significant portion of this time and cost should be put down to the Claimant's deficiencies and sets a figure of US$100,000 to represent the additional costs expended by the Respondent. Looking at the Discovery period as a whole, the Tribunal is also prepared to hold that the Respondent did incur other additional costs, arising out of the

Claimant's deficiencies. Doing the best it can the Tribunal sets those additional costs at US$30,000.

236. The Tribunal also takes note of the hours put in by Claimant in February 2015 (37.9 hours) and March 2015 (137.5 hours) and in June 2015 (25.3 hours) and July 2015 (17.4 hours). It seems to the Tribunal that there was in those times expended by the Claimant an element of time and cost which the Claimant was expending as a result of its own deficiencies. Thus the Tribunal thinks it right to disallow US$20,000 of the costs claimed by the Claimant for Discovery. In summary, therefore, there should be deducted from the total cost claimed by the Claimant the sum of US$150,000 representing costs to which the Claimant is not entitled for its deficiencies in Discovery.

237. In paragraph 211 above, the Tribunal accepted the figure for the Claimant's costs claim at US$3,095,380.73, and therefore, in round figures, sets it at US$3,095,381.00. Thus deducting the costs to which the Tribunal holds that the Claimant is not entitled: US$150,000 relating to Discovery, US$255,104 relating to Interim Measures, the net sum, to which the Claimant is entitled on costs, comes to US$2,690,277.

XXXII. SECURITY FOR COSTS

238. As the Claimant has succeeded in this arbitration it is entitled to receive back the US$500,000 security for costs as ordered to be paid by the Tribunal and as being held by **the ICC** (see paragraph 27 above) until the issue of this Final Award.

XXXIII. INTEREST ON COSTS

239. There is no provision in the **VICC Sub Contract** for the payment of interest on unpaid costs. However to be consistent on interest otherwise being awarded in this Arbitration, the Tribunal thinks it is fair and proper for it to order interest on the arbitration costs until such times as they are paid, being within the relief sought by the Claimant[316], and the Tribunal also thinks it fair and proper for that interest to be set as simple interest at 4% per annum being the interest rate agreed in the **VICC Sub-Contract** for *"financing charges"* (see paragraph 117 above).

XXXIV. FINAL AWARD

ACCORDINGLY WE MAKE AND PUBLISH THIS FINAL AWARD AND DIRECT, ORDER AND AWARD AS FOLLOWS:

(1) **THE CLAIMANT SUCCEEDS IN ITS CLAIM AND THUS THE RESPONDENT SHALL PAY TO THE CLAIMANT THE SUM OF US$4,068,659 (FOUR MILLION SIXTY EIGHT THOUSAND AND SIX HUNDRED AND FIFTY NINE UNITED STATES DOLLARS) TOGETHER WITH INTEREST AT 4% (FOUR PERCENT) PER ANNUM COMPOUNDED MONTHLY FROM 1 MAY 2016 UNTIL FULL PAYMENT THEREOF.**

(2) **THE RESPONDENT FAILS IN ITS COUNTERCLAIMS WHICH ARE THUS DISMISSED.**

(3) **THE CLAIMANT SHOULD BE AWARDED PAST INTEREST ON THE UNPAID PROGRESS INVOICES AND PURCHASE ORDERS AND THUS THE RESPONDENT SHOULD PAY TO THE CLAIMANT THE SUM OF US$1,243,580.78 (ONE MILLION TWO HUNDRED AND FORTY THREE THOUSAND FIVE HUNDRED AND EIGHTY**

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316 See Prayer D on page 12 of the Claimant's Amended Request for Arbitration of 20 March 2013 and Conclusion (paragraph 236) of CPHB of 22 January 2016 where the Tribunal is invited to provide *"such other relief"* as it *"deems just and proper"*.

UNITED STATES DOLLARS AND SEVENTY EIGHT CENTS) TOGETHER WITH INTEREST AT 4% (FOUR PERCENT) PER ANNUM, COMPOUNDED MONTHLY FROM 1 MAY 2016 UNTIL FULL PAYMENT THEREOF.

(4) **THE RESPONDENT TO PAY FORTHWITH TO THE CLAIMANT THE BALANCE OF THE LEGAL COSTS IN THE SUM OF US$2,690,277.00 (TWO MILLION SIX HUNDRED AND NINETY THOUSAND TWO HUNDRED AND SEVENTY SEVEN UNITED STATES DOLLARS) WHICH THE TRIBUNAL HAS FOUND IN THIS AWARD TO BE DUE AND OWING TO THE CLAIMANT.**

(5) **THE ICC COURT OF ARBITRATION HAVING FIXED THE ARBITRATION COSTS AT US$920,000 (NINE HUNDRED AND TWENTY THOUSAND UNITED STATES DOLLARS), THE RESPONDENT TO REIMBURSE THE CLAIMANT FOR THE ONE HALF SHARE OF THE ADVANCES IN COSTS, AS PAID BY IT, IN THE SUM US$460,000 (FOUR HUNDRED AND SIXTY THOUSAND UNITED STATES DOLLARS).**

(6) **INTEREST ON ALL LEGAL AND ARBITRATION COSTS FOUND HEREIN TO BE DUE AND OWING TO THE CLAIMANT SHALL CARRY SIMPLE INTEREST AT 4% PER ANNUM FROM THE DAY AFTER THE DATE OF THIS AWARD UNTIL FULL PAYMENT THEREOF.**

(7) **SAVE AS OTHERWISE PROVIDED IN THIS AWARD, ANY OTHER CLAIMS OR PRAYERS FOR RELIEF MADE IN THE COURSE OF THIS ARBITRATION BY EITHER PARTY ARE REJECTED.**

MADE AND PUBLISHED IN LONDON, ENGLAND, BEING THE PLACE OF THIS ARBITRATION

LORD HACKING

Presiding Arbitrator

STEPHEN R. BOND

Co-Arbitrator

JESSE B. GROVE III

Co-Arbitrator

11th JULY 2016