

**ATLA Public Inquiry with regard to the
Application for licence by Jetstar Hong Kong Airways Limited**

Written decision

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**DECISION ON PRINCIPAL PLACE OF BUSINESS WITH REGARD TO
APPLICATION FOR LICENCE BY
JETSTAR HONG KONG AIRWAYS LIMITED
BEFORE THE AIR TRANSPORT LICENSING AUTHORITY**

BETWEEN

JETSTAR HONG KONG AIRWAYS LIMITED (“JHK”) Applicant

and

CATHAY PACIFIC AIRWAYS LIMITED (“CPA”) Objectors

HONG KONG DRAGON AIRLINES LIMITED (“HKDA”)

HONG KONG AIRLINES LIMITED (“HKA”)

HONG KONG EXPRESS AIRWAYS LIMITED (“HKE”)

DECISION

1. BACKGROUND

A. The application

1. On 10 June 2013, Jetstar Hong Kong Airways Limited (“JHK”) submitted an application for licence under the Air Transport (Licensing of Air Services) Regulations (Cap. 448A) (“the Regulations”) to the Air Transport

Licensing Authority (“ATLA”). JHK subsequently furnished supplementary information in support of its application during June to July 2013. Arrangement was then made by ATLA to publish JHK’s application in the Gazette on 23 August 2013.

2. By the expiry of the 14-day period for lodging representations and objections (i.e. 6 September 2013), representations and objections were received with regard to JHK’s application. Pursuant to the provisions of the Regulations, ATLA made a submission to the Chief Executive (“CE”) for his ruling as to whether the parties making representations and objections should reasonably be regarded as having an interest, private or public, in JHK’s application.

B. Objections and representations

3. CE ruled that Cathay Pacific Airways Limited (“CPA”), Hong Kong Dragon Airlines Limited (“HKDA”), Hong Kong Airlines Limited (“HKA”) and Hong Kong Express Airways Limited (“HKE”) (hereafter known as “the Objectors”) and six other parties having submitted representations in support of JHK’s application; namely: Jardine Airport Services Limited, Hong Kong Air Cargo Terminals Limited, Hong Kong International Airport Ferry Terminal Services Limited, China Travel Service (Hong Kong) Limited, EGL Tours Company Limited and Worldwide Cruise Terminals (Hong Kong) Limited (hereafter known as “the Representors”) could reasonably be regarded as having an interest in JHK’s application.

4. Among the reasons for objection, the Objectors submit, inter alia, that

JHK does not have its principal place of business in Hong Kong and hence granting a licence to JHK to operate scheduled air services is contrary to Article 134 of the Basic Law. The Representors support JHK's application by virtue of, among others, the economic benefits which can be brought by the new airline and its contribution to maintaining Hong Kong as an international aviation hub.

2. PROCEDURAL MATTERS

A. Procedural meeting

5. With CE's ruling, a panel of ATLA members was formed to consider JHK's application and the related objections and representations. On 4 February 2014, ATLA wrote to seek the comments from JHK, the Objectors and the Representors on the proposed procedures to deal with JHK's application. In the light of the comments received, ATLA held a procedural meeting on 28 March 2014 with JHK and the Objectors¹ to discuss and agree upon the procedures for taking forward the processing of JHK's application. All the Representors did not attend the 28 March 2014 meeting as they confirmed that they were not interested in or would not be attending the meeting.

6. At the 28 March 2014 meeting, the procedures for processing JHK's application (including the timing of filing the parties' submissions and responses) were discussed and agreed upon by all parties. Moreover, JHK expressed,

¹ As confirmed by the representing solicitors firm in the 28 March 2014 procedural meeting, CPA and HKDA are regarded as a single objector. It is referred to as "CPA-HKDA" in the ensuing paragraphs.

among other things, their wish that ATLA would consider addressing JHK's compliance with the requirement of having the principal place of business ("PPB") in Hong Kong as preliminary issue. In this aspect, ATLA has clarified that parties wishing to request ATLA to hold a hearing to determine any preliminary issues should formally make an application.

B. Preliminary issues

7. By the subsequent agreement of JHK and the Objectors, they confirmed on 14 April 2014 their request for ATLA to determine the preliminary issues and the request that the time for filing the parties' submissions and responses should only start to run upon the determination of the preliminary issues.

8. The agreed preliminary issues are:

“Q1. Is the issue of JHK's the ‘principal place of business’:

- (a) one that only the HKSAR Government is entitled to determine;
or
- (b) one that ATLA is to determine for itself?

Q2. If the answer to Q1. above is (a):

- (a) must the issue of JHK's ‘principal place of business’ be determined by the HKSAR Government before ATLA undertakes any substantive consideration of JHK's application (and only if the HKSAR Government determines JHK's principal place of business to be in Hong Kong); or
- (b) is ATLA entitled to proceed with its consideration of JHK's application pending the HKSAR Government's determination of that issue?

Q3. If the answer to Q2. above is (b), whether ATLA should proceed with its consideration of JHK's application pending the HKSAR Government's determination of that issue?

- Q4. If the answer to Q1. above is (b):
- (a) must ATLA determine the issue of JHK's 'principal place of business' before proceeding to determine JHK's application (and only then if it determines JHK's principal place of business to be in Hong Kong); or
 - (b) is ATLA entitled to determine the issue of JHK's 'principal place of business' at the same time as determining its application?
- Q5. If the answer to Q4. above is (b), whether ATLA should determine JHK's 'principal place of business' at the same time as determining its application?"

9. On 21 May 2014, ATLA informed all parties that pursuant to the agreement of all parties, ATLA would hold a hearing to determine the preliminary issues and request JHK and the Objectors to file written submissions and evidence together with authorities to be relied upon with regard to the preliminary issues during June 2014.

10. JHK submits that JHK's PPB is one that Hong Kong Special Administrative Region ("HKSAR") Government should determine and ATLA should determine JHK's application at the same time pending the HKSAR Government's determination of JHK's PPB. The Objectors hold the opposing view that JHK's PPB is one that ATLA should determine and ATLA should determine JHK's PPB before determining JHK's application.

11. Seeing that there might be merits of hearing the views of the Transport and Housing Bureau ("THB") of HKSAR Government about the preliminary issues, ATLA wrote on 21 July 2014 to THB (copied to JHK and the Objectors) requesting THB to provide a written submission with regard to the preliminary issues. When writing to THB, it was highlighted that JHK and the Objectors

would be provided with copy of THB's submission upon receipt and they could provide their responses, if any, with regard to THB's submission. THB provided ATLA with the requested submission by way of a letter dated 1 August 2014. The THB's submission was forwarded to JHK and the Objectors on 4 August 2014.

12. On 18 August 2014, JHK informed ATLA and the Objectors, among others, that JHK was agreeable to the proposition that JHK's PPB requirement is to be determined by ATLA itself.

13. As JHK and the Objectors have the same proposition that it is ATLA which should determine JHK's compliance with the PPB requirement, the only outstanding issues are those in Q4 and Q5 of the preliminary issues.

14. ATLA's hearing to determine the preliminary issues was held on 27 September 2014.

15. In the light of the agreement of the parties and after due consideration of Article 134(2) of the Basic Law, ATLA is satisfied that in exercising its power to grant a licence ATLA has to determine whether the Applicant fulfils the PPB requirement as set out in Article 134(2) of the Basic Law:

“The Central People's Government shall give the Government of the Hong Kong Special Administrative Region the authority to issue licences to airlines incorporated in the Hong Kong Special Administrative Region and having their principal place of business in Hong Kong.”

16. The parties rightly accepted that the answer to Q4 is a matter of procedure and case management, entirely within the discretion of ATLA.

17. ATLA also accepts and it is not disputed by any of the Objectors, that the application of JHK must be dealt with expeditiously. However, ATLA is of the view that expedition, must be viewed not as an overriding factor but one of the many factors which have to be considered. In this aspect, an early determination of the PPB issue is consonant with public interest as other airlines may also have similar factors to be considered. Given that all local carriers in operation in Hong Kong are involved in this contested application, an early determination on this particular issue would clearly address how the PPB requirement is to be considered and it is in the public interest that this matter would not be left in abeyance or unclear.

18. Having considered all the relevant circumstances, it is in the view of ATLA that as a matter of discretion, the PPB issue should be dealt with in advance of the other issues in the application which has been objected to.

C. Objectors' request to provide Shareholders' Agreement and Business Service Agreement

19. On 7 November 2014, ATLA informed JHK and the Objectors of the timetable for filing written submissions for the purpose of the public inquiry to determine whether JHK has its PPB in Hong Kong. In working towards having the public inquiry to be held by end January 2015, JHK is to first file its written submissions on PPB by 5 December 2014 while each of the Objectors is to file written submissions by 29 December 2014, and JHK will then make its reply submissions by 12 January 2015.

20. Pursuant to the stipulated timetable, JHK filed on 5 December 2014 its PPB submissions on 5 December 2014. In support of its PPB submissions, JHK filed its evidence bundle including copy of the Shareholders' Agreement² ("SHA") with redactions. JHK also proposed that the Business Service Agreement³ ("BSA") with limited redactions be made available to the Objectors' legal representatives and ATLA upon the acceptance of the Objectors' solicitors of an undertaking as to confidentiality.

21. On 10 December 2014, JHK offered to allow the relevant internal lawyers of the Objectors to also access the redacted BSA and agreed to furnish a revised version of redacted SHA. JHK then delivered on 11 December 2014 the revised redacted SHA to all parties.

22. All the Objectors provided their feedback to JHK's proposal as regards the access to BSA and did not accede to the proposal. JHK also provided its response to the Objector's comments where appropriate. Given the diverging views, both JHK and the Objectors would like to seek the direction from ATLA for the way forward.

23. With due regard to the parties' request, ATLA holds the view that:

- (a) JHK contends that the redacted parts are irrelevant whilst the Objectors argue that they are not able to form any view as they have been

² It is called "Restated and Amended Shareholders' Agreement dated 5 June 2013" with the phrase "Reflects New Agreement on Terms (20 Jan 2014)" on the front page, which was entered into between Jetstar International Group Holdings Co. Limited, Eastern Air Overseas (Hong Kong) Corporation Limited, Go Harvest Investments Limited and Jetstar Hong Kong Airways Limited.

³ It refers to the "Business Service Agreement" dated 27 February 2013 as amended on 13 May 2014 between Jetstar Airways Pty Limited and Jetstar Hong Kong Airways Limited.

redacted. There is much force in the Objectors' submissions. There is no information by which the Objectors and indeed ATLA could consider whether to agree or dispute JHK's contentions.

- (b) In court litigation, if the redactions were made on the basis of privilege or public interest immunity, there may be a need for a privilege log or at least an explanation on why it should be redacted. Here the contention is not that they are privileged but just that they are not relevant.
- (c) ATLA is not satisfied that all the redacted parts are irrelevant when it is a part of a highly relevant document and when ATLA has not been told with specificity what the redactions are. In other words, on balance, the redactions are *prima facie* relevant.
- (d) However, ATLA has to consider the plea of confidentiality and it is necessary to know what have been redacted before a proper balance can be struck between ensuring justice in this matter and avoiding or minimising prejudice which may be caused to JHK.
- (e) Hence, ATLA needs to have sight of the redacted parts to be satisfied that the redactions are irrelevant and if they are relevant whether they should be produced in light of the confidentiality plea. Thereafter, ATLA will make a decision on whether the SHA and the BSA should be produced with or without the redactions, and if any conditions as proposed by JHK should be imposed.

24. On 23 December 2014, ATLA directed that JHK should provide the un-redacted copy of the SHA and the BSA to ATLA, highlighting the redacted portions. To this end, ATLA would consider the redactions on a *de bene esse* basis and decide whether they should be produced without the redactions and if

so the conditions, if any, to be applied.

25. In considering the redactions, ATLA has had due regard to striking a reasonable balance between protecting the confidential information in the SHA and the BSA and enabling the Objectors to make proper response to JHK's PPB submissions. With such redactions as accepted by ATLA, the disclosure of the SHA and the BSA to the Objectors (including the clients) should not pose detrimental effects to JHK.

26. On 5 January 2015, ATLA informed JHK of the redactions on the SHA and the BSA as accepted by ATLA and directed that JHK should redact the SHA and the BSA in the manner as accepted by ATLA, provide the parties with copy of the redacted SHA, revise the undertaking as appropriate, and provide the parties with the redacted BSA upon the Objectors' submission of the duly completed revised undertaking.

27. After rounds of exchange of correspondences between JHK and the Objectors, JHK provided the BSA to the Objectors upon receipt of the duly completed undertakings on 9 January 2015.

D. Procedural steps leading to public inquiry to determine JHK's PPB

28. In view of the time taken to resolve the dispute over the redactions, HKA requested on 8 January 2015 to extend the deadline for making submissions to 15 January 2015. In this regard, the other Objectors also sought to have the deadline for making submissions to be extended to 15 January 2015 while JHK was agreeable to the extended deadline for the filing of Objectors' written

submissions and would make its own reply submissions on 20 January 2015.

29. As the extended deadline for the Objectors was agreed upon by all parties and the revised deadline for JHK to make reply submissions was reasonable and should not affect the conduct of public inquiry, ATLA was agreeable to the revised timetable for the parties to file written submissions. By way of a letter of 12 January 2015, ATLA confirmed the revised timetable in which the Objectors should file their written submission by 15 January 2015 while JHK should file its reply submissions by 20 January 2015.

30. However, there was still dispute between JHK and CPA-HKDA as to the number of copies of redacted BSA which should be provided. CPA-HKDA wrote to ATLA on 9 January 2015 to seek ATLA's direction in this matter. With due regard to the request, ATLA replied on 13 January 2015 that:

- (a) ATLA is not a party to fix the terms of the undertaking which should be drawn up and agreed upon by JHK and the Objectors;
- (b) ATLA did not specify the exact number of the BSA which should be provided as it will vary from one Objector to another. ATLA would not dictate how a copy of the BSA is to be used as to whether it should be used solely by one person or used on a sharing basis by more than one person at the same time;
- (c) The number of copies of the BSA which should be required by CPA-HKDA for preparing the submission should be commensurate with the genuine operational needs of the team involved in the preparation of the submissions;

- (d) CPA-HKDA requests five copies of the BSA, which is considered to be not excessive with due regard to the team of CPA-HKDA which are directly involved in the preparation of their written submissions. Also, CPA-HKDA has confirmed that they would abide by the terms of the undertaking; and
- (e) The parties should resolve outstanding issues sooner rather than later in view of the forthcoming inquiry. Having due regard to the circumstance of the case ATLA proposes that JHK re-consider CPA-HKDA's request and furnish a total of five copies of the BSA on the terms as set out in the undertaking.

31. On 16 January 2015, CPA-HKDA wrote to seek ATLA's direction that there should be no restrictions on making reference to the BSA (including reading out the BSA text) at the public inquiry. The other parties were asked to provide their feedback with regard to CPA-HKDA's request by 19 January 2015.

32. On 19 January 2015, JHK advised that it disagreed with CPA-HKDA's request and argued that the BSA should not be read out at the public inquiry for protection of the confidential information therein. In contrast, both HKA and HKE concur with CPA-HKDA that there should not be any restriction on the use of the BSA at the public inquiry.

33. On 21 January 2015, ATLA replied to the parties that:

- (a) According to the terms of the undertaking agreed by the parties, there is no restriction for the parties to make reference to the BSA in such a way

that identifies the paragraph numbers (without reading out the specific text of BSA) at the public inquiry;

- (b) There is no need for the parties to read out the text of the BSA at the public inquiry as ATLA members can go over the relevant passages as long as the paragraph numbers are clearly identified by the parties; and
- (c) The Objectors should have already set out their arguments in their submissions, including make reference to the BSA as appropriate. It is not clear whether there are new points raised by the Objectors in the public inquiry, for which reading out of the specific text of the BSA is absolutely needed. If there is such necessity at the public inquiry, the parties may put forth the case to ATLA for consideration and direction based on the merits of the individual cases.

3. ATLA PUBLIC INQUIRY

A. The agreed issues for determination by ATLA at the public inquiry

34. The public inquiry to determine whether JHK's PPB is in Hong Kong was held by ATLA during 23 to 24 January 2015 and 14 February 2015.

35. Before the conduct of the public inquiry, as agreed by JHK and the Objectors, the issues to be determined by ATLA are as follows:

- “(1) What is the true meaning and scope of the PPB requirement under Article 134 of the Basic Law?
- (2) Applying the correct PPB test and having regard to the relevant considerations, is JHK's PPB in Hong Kong?”

36. ATLA has made it clear in the previous hearing to determine preliminary issues that PPB is a question of law and the determination of whether the PPB requirement is met is an application of the law to the facts that would have to be proved by JHK by evidence, and the facts would have to be determined by ATLA from the evidence. The criteria to be considered or adopted when deciding whether an applicant meets the PPB criteria depends on the submissions of the parties of what PPB entails. There are no doubt numerous domestic and international cases and learned articles which touch on this particular subject and it would be a matter for the parties to draw attention to those authorities the principle that ATLA should adopt.

B. Representors

37. Regulation 9(2) of the Regulations stipulates that before holding an inquiry in respect of an application, ATLA must give each interested person a written notice informing each of them of the inquiry. Regulation 9(3) of the Regulations states that an interested person must be given an opportunity of being heard at the inquiry. In this regard, interested persons include the Representors.

38. Notice of the public inquiry was served on all of the Representors on 9 January 2015. Except for Worldwide Cruise Terminals (Hong Kong) Limited which confirmed that they would not be present at the inquiry, all other Representors were presented at the inquiry which commenced on 23 January 2015 and confirmed that they did not have anything to say during the public inquiry.

C. JHK's PPB submissions

39. According to the stipulated timetable, JHK filed its PPB submissions together with evidence bundle on 5 December 2014. JHK's PPB submissions ("JPS") were accompanied by a witness statement by Mr Edward Lau in the capacity of the Chief Executive Officer of JHK ("JHK CEO").

40. JHK is represented by Mr Johnny Mok, SC. JHK contends that the expression "PPB" should be construed in a way that promotes the constitutional goal of maintaining Hong Kong's status as a centre for international and regional aviation as it says:

"...the PPB requirement is focused upon ensuring the constitutional goal of maintaining Hong Kong's status as a centre for international and regional aviation." [§4 of JPS]

41. On the relevant considerations for the determination of PPB, JHK states that ATLA may properly have regard to the following:

- “(a) Establishment and incorporation in Hong Kong under relevant laws and regulations.
- (b) Having a substantial amount of operations and capital investment in physical facilities in Hong Kong.
- (c) Paying income tax in Hong Kong.
- (d) Registering and basing aircraft in Hong Kong.
- (e) Employing a significant number of Hong Kong residents in managerial, technical, and operational positions.
- (f) Effective exercise of central and ultimate management and control in Hong Kong.” [§5 and §40 of JPS]

42. JHK considers that in determining its PPB, it is necessary for ATLA to approach the matter in a manner which is consistent with how the PPB of CPA and other incumbent airlines has been understood and accepted under the Basic Law [§24 of JPS].

43. JHK submits that the general common law test for PPB of a company is based on the effective exercise of central and ultimate management and control [§27 of JPS]. However, JHK argues that “effective exercise of central and ultimate management and control” should be one of a number of relevant considerations which should be taken into account in assessing an airline’s PPB and is by no means the sole or main consideration [§28 of JPS].

44. One of the relevant considerations for PPB determination, as contended by JHK, is reflected in terms of the model clause of the International Civil Aviation Organization (“ICAO”) promulgated in a paper of 2003 Worldwide Air Transport Conference. JHK highlights the relevant passage of the model clause as relevant to the meaning of PPB in the context of JHK’s application:

“Evidence of principal place of business is predicated upon: the airline is established and incorporated in the territory of the designating Party in accordance with relevant national laws and regulations, has a substantial amount of its operations and capital investment in physical facilities in the territory of the designating Party, pays income tax, registers and bases its aircraft there, and employs a significant number of nationals in managerial, technical and operational positions” [§36 of JPS]

45. In justifying the case that JHK has its PPB in Hong Kong, JHK has highlighted the following key factors:

- (a) The ultimate shareholders of JHK are Shun Tak Holdings Limited (“Shun Tak”), China Eastern Airlines Corporation Limited (“China Eastern”) and Qantas Airways Limited (“Qantas”) [§42 of JPS];
- (b) Shun Tak controls 51% of the voting rights in the general meetings of JHK [§43 of JPS];
- (c) The Board of Directors of JHK (“JHK Board”) comprises seven

members and Shun Tak has the right to nominate four out of seven directors [§51 of JPS];

- (d) The Executive Committee (“Excom”) comprises five members, three of whom are appointed by Shun Tak [§53 of JPS];
- (e) JHK CEO reports directly to JHK Board [§57 of JPS];
- (f) The management team of JHK reports to JHK CEO [§59 of JPS];
- (g) The vast majority of operations are conducted by JHK either directly or through non-associated third party service providers [§65 of JPS];
- (h) JHK has entered an arrangement with Jetstar Airways Pty Limited (“JAPL”) as licensor of the “Jetstar” brand and as a service provider. That arrangement is reflected in a business service agreement entered into between JAPL and JHK and amended by a supplemental agreement dated 5 May 2014⁴ (“the Supplemental Agreement”) which makes it clear that JHK has ultimate control over all matters relating to the supply of services by JAPL on the basis of what JHK Board considers are in the best interests of JHK [§67 of JPS]; and
- (i) Even in relation to services outsourced to JAPL, JHK Board is entitled on an ongoing basis to require that any decision by JAPL in delivering outsourced services to JHK be subject to the approval of JHK Board [§69 of JPS].

46. JHK contends that applying the relevant considerations for PPB determination, JHK satisfies the test. As to ultimate management and control,

⁴ This refers to a letter by Jetstar Airways Pty Limited (“JAPL”) to JHK containing the revised terms of the BSA. The letter was signed on 5 May 2014 by the Chief Executive Officer of JAPL (for and on behalf of JAPL) and on 13 May 2014 by JHK CEO (for and on behalf of JHK). The letter was also endorsed by Shun Tak and China Eastern respectively.

JHK also satisfies the test [§76-77 of JPS].

D. Witness Statement of Mr Edward Lau

47. In support of JHK’s claim that its PPB is in Hong Kong, JHK filed a witness statement by Mr Edward Lau (in the capacity of JHK CEO) (“ELWS”) forming part and parcel of JHK’s PPB submissions dated 5 December 2014. As to the purpose of the witness statement, Mr Lau stated:

“The matters that I will cover in this witness statement are matters dealing with the incorporation, shareholding and management structure and operations, commercial and other functions of JHK as I believe may be relevant to the question of the ‘principal place of business’ of JHK. To this end, I will state, amongst other things, how decisions regarding the management and control of JHK are made, and how operational, commercial and other functions physically take place and key decisions about those functions are made. I also describe the outsourcing and other arrangements entered into by JHK with providers including those agreed with JAPL and set out in the Business Service Agreement.” [§16 of ELWS]

48. On the effect of the Supplemental Agreement, the witness statement echoed JHK’s PPB submissions about JHK’s entitlement to require any decision made by JAPL in the delivery of outsourced services to JHK being subject to the approval of JHK Board as it says:

“... The Supplemental Agreement provides that the JHK Board is entitled to require any decision made by JAPL in the delivery of outsourced services to JHK in accordance with the Business Service Agreement be subject to the approval of the JHK Board. This makes it clearly beyond doubt that JHK has ultimate control over all matters relating to the supply of services by JAPL on the basis of what the Board of JHK considers to be in the best interests of JHK.” [§18 of ELWS]

49. Mr Lau has highlighted a number of circumstances in support of the claim that JHK has its PPB in Hong Kong. They include:

- (a) JHK manages the acquisition, sale and financing of its aircraft in Hong Kong [§28 of ELWS];
- (b) The Excom has powers to make decisions in relation to key aspects of JHK's management decisions and may also make recommendations to JHK Board for its approval regarding appointment of JHK CEO, key strategic decisions, and JHK's corporate policies and budget [§52-53 of ELWS];
- (c) JHK has the benefit of some services provided to it by JAPL in the area of operations. Pursuant to the BSA (as amended by the Supplemental Agreement), JAPL has shared its existing operating manuals with JHK so as to assist JHK in its development of its own manuals suite. JHK retains maximum autonomy to operate its business given its understanding of the local market and its right to make all decisions relating to services provided by JAPL in JHK's best interests as confirmed in particular by the Supplemental Agreement [§69 of ELWS];
- (d) Under the BSA, JAPL may set minimum operating standards with which JHK must comply. Those standards constitute a high-level checklist of "best practices" for an airline from an operational standpoint. If any matter in the checklist comprising the "minimum operation standards" is considered not to be in the best interests of JHK, JHK has the right (as confirmed by the Supplemental Agreement) to vary or not to adopt the same [§70 of ELWS];

- (e) Under the BSA, JHK may outsource engineering and maintenance services to JAPL. Such arrangement is based on that JHK will have the maximum level of autonomy relating to engineering and maintenance matters whilst recognising that scale benefits in procurement will benefit all Jetstar Branded Airlines, including JHK [§92 of ELWS];
- (f) Given JAPL's scale and competency, JAPL may be best equipped to provide the complete suite of engineering functions to JHK at its set-up, launch and early stages. However, JHK is not obliged to obtain all its engineering and maintenance services from JAPL [§93 of ELWS];
- (g) JHK retains management of all its engineering and maintenance and the Engineering Service Level Agreement ("the Engineering SLA") makes it clear that it does not have to accept any services or recommendations made by JAPL [§99 of ELWS];
- (h) JHK has outsourced execution of some of its commercial services to JAPL under the BSA. There shall be a substantial degree of customisation for the local market. In any event, should there be any disagreement between JAPL and JHK, JHK has (as confirmed by the Supplemental Agreement) the right to make the ultimate decision in its best interests [§110 & 112 of ELWS];
- (i) JHK has outsourced to JAPL the provision of supporting technical analysis for the network considered by JHK. JHK does not have to accept or have regard to any networking or scheduling recommendations made by JAPL [§118 of ELWS];
- (j) JHK will outsource execution of its technical pricing and revenue management work to JAPL under the BSA. For the purposes of the

technical management work outsourced to JAPL, JHK CEO will in turn set revenue targets for JAPL that it must help JHK to deliver [§124 of ELWS];

- (k) The BSA expressly recognises that JHK CEO has ultimate accountability for the financial performance of JHK's business. Indeed, JHK will be making the ultimate decision and JAPL must follow any reasonable direction from JHK CEO in relation to pricing [§126 of ELWS];
- (l) Under the BSA, JAPL will develop and publish pricing specifications for JHK. JAPL must participate in regular detailed discussions with JHK relating to all elements of fare and tariff specifications and policies and consider all feedback from JHK. JHK makes the ultimate decision and JAPL must follow any reasonable direction from JHK CEO in relation to pricing [§128 of ELWS];
- (m) The BSA expressly recognises that, whilst a centralised approach to ancillary products has benefits for all Jetstar Branded Airlines due to the ability to leverage the Jetstar Brand, JHK is in a unique position to customise the delivery of ancillary products to the local Hong Kong market [§130 of ELWS];
- (n) Under the BSA, JAPL also provides the service of developing, agreeing and managing airline partnerships for JHK, which it delivers after consultation with JHK. However, in practice, as a low-cost carrier ("LCC"), JHK does not prioritise airline partnerships and JHK CEO anticipates that they will not affect a large part of the flights operated by JHK [§140 of ELWS];
- (o) The BSA also recognises that cultural and local differences may require

- the brand to be tailored appropriately to each market [§141 of ELWS];
- (p) If any conflicts between JHK and JAPL should arise, which cannot be resolved by consultation or collaboration, JHK will (as confirmed by the Supplemental Agreement) have the right to make the final decision [§142 of ELWS];
 - (q) JAPL provides some outsourced services to the JHK finance team under the BSA but those are limited in scope. JHK remains accountable for its own profit and loss performance and annual budgets and fleet plans, which are set and approved by the JHK Board [§146 of ELWS];
 - (r) JHK has decided to adopt the ‘turn-key’ information technology (“IT”) service because it would enable JHK to access a full set of IT systems at relatively low cost and minimum capital outlay, at least until operational launch [§147 of ELWS];
 - (s) Using common systems enables JHK to enjoy the benefits of scale whilst offering to JHK’s customers a common experience shared with the customers of other Jetstar Branded Airlines. The use of the existing common systems is in the best interests of JHK and other Jetstar Branded Airlines [§148 of ELWS];
 - (t) Under the BSA, JAPL must provide JHK with a general framework and sample policies, and JHK agrees to align with those insofar as they do not conflict with local legal, regulatory, cultural and other norms [§149 of ELWS]; and
 - (u) JHK has agreed under the BSA to adopt common corporate communication protocols with JAPL, developed in consultation and collaboration between JHK and JAPL. If there are any conflicts which

arise between JHK and JAPL in that area, JHK will also have (as confirmed by the Supplemental Agreement) the right to make the ultimate decision in those matters [§150 of ELWS].

E. CPA-HKDA's submissions

50. Following the agreed timetable, CPA-HKDA filed its written submissions (“CHS”) on 15 January 2015. CPA-HKDA is represented by Mr Benjamin Yu, SC. In terms of the purpose of the Basic Law with regard to civil aviation, CPA-HKDA has the following key propositions:

- (a) The position as to any new routes for any Hong Kong airline and as to any new airline is dealt with by Articles 133 and 134 respectively [§9 of CHS];
- (b) Continuity is a major theme of the Basic Law and of the one country two systems model. Article 135 expressly ensures that businesses relating to civil aviation functioning in Hong Kong before 1997 may continue to operate [§17 of CHS];
- (c) Article 128 of the Basic Law sets out clearly the objective of Chapter V Section 4, namely to maintain “the status of Hong Kong as a centre of international and regional aviation”. To achieve that objective, the subsequent Articles in Section 4 set out the requirements. One of the requirements is the imposition of the PPB requirement for the licensing and designation of airlines under Articles 133 and 134 of the Basic Law [§29 of CHS]; and
- (d) The business of Hong Kong-based airlines and the provision of air

services to and from Hong Kong depend heavily on Hong Kong-based airlines being able to gain access to foreign air traffic rights. PPB requirement was included in Articles 133 and 134 of the Basic Law for precisely the purpose of protecting Hong Kong's own air traffic rights [§31 of CHS].

51. Turning to the PPB test, CPA-HKDA contends that there is no definition of the phrase "principal place of business" within the Basic Law, Hong Kong legislation, or in the jurisprudence of the courts of the HKSAR and one has to look to the common law to see if it provides an aid to construction of the meaning of that phrase [§18-20 of CHS]. CPA-HKDA further states that:

"The common law meaning of PPB, i.e. that the PPB of an entity where the effective exercise of central and ultimate management control of the entity lies, is thus the intended meaning as it best suits the intended purpose of ensuring that only Hong Kong-based airlines may be licensed by the HKSAR authorities." [§39 of CHS]

52. CPA-HKDA argues that the reference to ICAO model clause with regard to PPB as put forth by JHK is irrelevant as it has no legal force at all and is not consistent with the common law test [§42-43 & 45 of CHS]. As for the six criteria which JHK contends are relevant to the determination of PPB, CPA-HKDA submits that such approach represents a departure from and is inconsistent with the settled common law meaning of PPB and is accordingly misconceived [§58 of CHS].

53. In addition, CPA-HKDA contends that the task before ATLA is the determination of whether JHK meets the PPB requirement now, and not whether

other airlines met that requirement at any point in the past and in that sense, the ownership and control of CPA and HKA are simply not relevant to the interpretative task at hand [§47 of CHS].

54. CPA-HKDA submits that while it is difficult to provide an exhaustive list of the criteria that would need to be satisfied in every case in order for the PPB requirement to be met, the following factors are of particular importance:

- “(1) All important decisions regarding the business of the applicant airline should be made by the directors and/or senior management of the applicant, and not by or subject to any constraints set by a foreign relation or the approval or veto of any such relation.
- (2) The senior management of the applicant airline should be at arms-length from any foreign carrier relation – it is difficult to see how ultimate management, control and authority over the applicant could rest in Hong Kong if its senior management is nominated by and/or required to report to a foreign relation.
- (3) The operations and commercial functions of the applicant should be distinct from those of any foreign air carrier relation and not reliant upon the resources or expertise of any such foreign relation or upon a pooling of resources or expertise between them (whether in terms of aircraft, facilities, equipment or personnel) – it is difficult to see how ultimate management, control and authority over the applicant could rest in Hong Kong if its day-to-day business were to be in any way dependent upon the use of resources or expertise provided to it by a foreign relation.
- (4) The branding and marketing of the applicant should be distinct from that of any foreign air carrier relation – if the applicant has (or is to have) common or associated branding and/or co-ordinated advertising, sales, promotions, loyalty programmes or distribution arrangements, or operates via a common website, with a more established foreign relation this would tend to indicate that the applicant is subject to its oversight and diktat.” [§67 of CHS]

55. CPA-HKDA further submits that there are 11 strategic or neural functions which an airline must possess in order to survive and prosper; namely: (1) strategic planning, (2) purchasing, (3) international affairs, (4) revenue management, (5) brand management, (6) product development, (7) sales and distribution and online booking systems, (8) customer relations and database, (9)

integrated operations centre, (10) engineering, and (11) safety and security [§69-89 of CHS]. In order for an airline to have its PPB in Hong Kong, CPA-HKDA contends that the performance of all of the 11 functions above must be subject to ultimate management, control and authority in Hong Kong, and cannot be delegated to or conducted in collaboration with a foreign air carrier relation [§90 of CHS].

56. In arguing against JHK's claim about having its PPB in Hong Kong, CPA-HKDA puts forth the following key arguments:

- (a) JHK is related to Qantas via Jetstar International Group Holdings Co. Ltd ("JIGH") and through Qantas to JAPL. JHK also has a direct and significant contractual relationship with JAPL [§95 of CHS];
- (b) Qantas' and JAPL's submission to the Australian Competition and Consumer Commission ("the ACCC submission") dated 28 June 2012 is made for the purpose of seeking authorisation "for coordination between [Qantas and JAPL] and existing and future airlines operating as Jetstar low cost carriers ("Jetstar LCCs") predominately in the Asia-Pacific region under the Jetstar brand and business model". It shows that the ultimate management, control of and authority over JHK is in Australia, in the hands of Qantas and JAPL [§96 of CHS];
- (c) The purpose of the conduct for which authorisation was being sought is "to deepen the Qantas Group presence in Asia-Pacific ... by expanding the Jetstar network pursuant to the next stage of the Jetstar Pan-Asia Strategy" [§97 of CHS];
- (d) The Jetstar Pan-Asia Strategy is described as involving: (i) the

establishment of joint ventures in a number of Asian jurisdictions by [Qantas and JAPL] and local partners, (ii) coordinating between each Jetstar LCC and its full service airline shareholder (where relevant), and (iii) the coordination of each of the Jetstar LCCs with each other and with each of Qantas and [JAPL] pursuant to the Jetstar Joint Venture Coordination Agreement (“JVCA”) [§98 of CHS];

- (e) The Jetstar Business Model is specifically designed to create an “integrated Jetstar network” in which each Jetstar LCC (including JHK) will, far from operating independently, share aircraft, boarding, airport facilities and a further range of unspecified goods and services [§101 of CHS];
- (f) The Jetstar Business Model is enshrined in the BSA made between JAPL and each of the Jetstar LCCs. Under the BSA, JAPL licenses its business systems and ‘know-how’ to each of the Existing Jetstar Joint Ventures in order to optimise local execution while leveraging a common brand, go to market model and support in relation to (a) network, scheduling and fleet strategy, (b) product, (c) pricing and distribution, and (d) sales, marketing and customer service activities [§102 of CHS];
- (g) What is described in the ACCC submission is not, as Mr Lau suggests, “outsourcing” but is instead the reposing in JAPL of the ultimate decision-making for and control over each Jetstar LCC, including JHK [§103 of CHS];
- (h) Under the JVCA, the parties propose to operate as a single fully integrated organisation by coordinating their operations and activities in the Asia region. The areas of co-ordination embrace “network and

scheduling decisions”, “pricing and inventory decisions” and “joint purchasing and procurement” [§107 of CHS];

- (i) The SHA and the BSA are entirely consistent with the content of the ACCC submission [§110 of CHS];
- (j) Notwithstanding that Shun Tak has 51% of the voting rights in respect of JHK, and apparent Board control as Shun Tak nominates four out of seven directors, the reality is that JIGH, and hence Qantas, has an absolute veto over JHK Board decisions because for any decision requiring “Board Extraordinary Approval” the JIGH nominated director must vote in the affirmative [§115 of CHS];
- (k) Board Extraordinary Approval embraces every decision which is not otherwise delegated to JHK CEO or the Excom. It therefore places considerable control over JHK in the hands of JIGH and hence Qantas [§116 of CHS];
- (l) The requirement under the “Shareholders Approval” for an 80% affirmative vote gives the overseas shareholder a power of veto [§117 of CHS];
- (m) The SHA defines “the Business” as “the business of the Jetstar Hong Kong Group [comprising] the establishment and operation of an LCC applying the Jetstar Business Model” and the “Jetstar Business Model” is “the business model adopted by the Jetstar Network Group as described in the BSA”. JHK will closely align the Business with the business of the Jetstar Network Group and if there is any inconsistency between the provisions of the SHA and the provisions of the BSA, the provisions of the SHA prevail [§118 of CHS];
- (n) Pursuant to the SHA, JIGH has the right to nominate JHK CEO. The

JHK CEO has a dual reporting line to Jetstar Group Chief Executive Officer (“Jetstar Group CEO”) [§119 of CHS];

- (o) A person cannot be appointed as a Senior Executive of JHK unless first nominated by JIGH and China Eastern [§120 of CHS];
- (p) The Jetstar Business Model only works if each of its members agrees to accept common branding, models and forms and to use a conjoined sales portal. By doing that as a franchisee, it is inevitable that JHK submits itself to the control of the franchisor: JAPL [§123 of CHS];
- (q) The BSA was made between JAPL as “licensor” and JHK as “licensee”. Its recital and the core principles set by its clause 4 set a contractual scene which signals the relationship to which it gives rise is intended to be part of an integrated Jetstar network led by JAPL [§126 of CHS];
- (r) the BSA places substantial active control over and supervision of JHK in the hands of JAPL/Qantas, e.g. it requires JHK to comply with the Brand Guidelines, prohibits JHK from using the Licensed Brand other than as specified by JAPL, permits JAPL to conduct a financial audit of JHK subject only to the requirement of at least 2 days’ notice, gives JAPL the right to discontinue or substitute different Intellectual Property for use in any part of the Licensed Business etc. [§129 of CHS];
- (s) The Supplemental Agreement dated 5 May 2014 can be dismissed as empty rhetoric or sheer window dressing because: (i) the Supplemental Agreement does not purport to depart from or negate anything actually contained in the BSA, it talks only of “confirmation”; (ii) the Supplemental Agreement deals only with decisions of JAPL as to the “delivery” of any “Outsourced Services for JHK in accordance with the

BSA” being subject to the approval of JHK Board, as opposed to management, control and authority over the substance of the services concerned; (iii) the Supplemental Agreement does not purport to displace JAPL’s overriding powers (including its ultimate power of termination if JHK does not do as it says); and (iv) all JHK shareholders are in any event still bound by the SHA which has expressly stipulated that JHK will adopt and pursue the Jetstar Business Model, and any requirement for approval of “delivery” should not amount to any more than the need to add a rubber stamp [§131 of CHS];

- (t) The fact that JAPL has the lead function in relation to the strategic planning for JHK is demonstrated by the provision in clause 7 of Schedule 4 to the BSA under which JHK will play an active role in fleet, network and scheduling strategy, whilst by clause 7.2(b) it is JAPL that will develop suggested network plans and schedules for the operation of flights by JHK. The active role for JHK is thus clearly subsidiary to the role of JAPL [§134 of CHS];
- (u) If JHK is part of the integrated Jetstar Group, in accordance with the Jetstar Business Model, it has to accept network and scheduling decisions made by JAPL in the wider interests of all the Jetstar LCCs rather than JHK alone [§135 of CHS];
- (v) By reason of Schedule 3 to the SHA, JHK has ceded control over the ability to operate on “Strategically Sensitive Routes” to a “Flying Committee” composed of an equal number of representatives from China Eastern and the Jetstar Group (meaning JIGH and JHK) [§136 of CHS];

- (w) By reason of clause 6.4 of Schedule 3 to the BSA, it is JAPL which, after consultation with JHK, will be responsible for developing, agreeing and managing all airline partnerships with JHK and for providing ticket systems and platforms that will facilitate any interline agreements, code shares and alliance memberships [§137 of CHS];
- (x) By virtue of paragraph 3(e) of Schedule 2 to the SHA, JIGH has a veto power over any approval of or material amendment to JHK's strategic plan [§138 of CHS];
- (y) According to paragraph 2.13 of the ACCC submission, all decisions as to capacity, which must include aircraft purchases, are made with a view to maximising profitability for the Qantas Group. Clause 14.3 of the BSA also provides that JAPL and JHK agree to collaborate on the planning and the acquisition of aircraft for the Licensed Business for the joint benefit of JHK and the broader licensed group [§139 of CHS];
- (z) By virtue of Schedule 4 to the SHA, JHK: (i) must consult with the nominated Jetstar Company on aircraft needs and purchases; (ii) can only acquire aircraft which are consistent in terms of specification and configuration with the fleet of aircraft of Jetstar Group⁵; and (iii) must give the nominated Jetstar Company the opportunity to match the market price and terms of any potential alternative supplier. Even if JHK does choose to procure its own aircraft outside the consolidated purchase agreement negotiated for Jetstar airlines by JAPL, JHK is still obliged to ensure that the aircraft acquired are consistent with the aircraft specification and configuration developed by JAPL [§140 of

⁵ Jetstar Group means the Jetstar Ultimate Holding Company Group and each entity that a Jetstar Ultimate Holding Company Group member has licensed to operate under the "Jetstar" brand.

CHS];

- (aa) By virtue of paragraph 3(d) of Schedule 2 to the SHA, JIGH has a veto power over all acquisitions of aircraft whatever JHK CEO may recommend or propose [§141 of CHS];
- (bb) Clause 1.1 of Schedule 5 to the BSA states the JAPL will develop a Finance Policy for the Licensed Business. Such policy can be amended by JAPL from time to time under the BSA. Since JHK has covenanted to conduct the Licensed Business in accordance with the terms of the BSA, JHK is plainly obliged to follow the finance policy dictated by JAPL for it from time to time [§143 of CHS];
- (cc) Paragraph 7.40 of the ACCC submission states that by implementing the Jetstar Pan-Asia Strategy and engaging in the Proposed Conduct, Qantas is increasing the international competitiveness of a key Australian business by seeking to capitalise on the growth in demand for air travel services in Asia for its own benefit and ultimately the benefit of Australians. Also, the then Chief Executive Officer of JAPL told the Rural and Regional Affairs and Transport Legislation Committee of the Australian Senate on 6 February 2012 that despite Jetstar growing to 3,000 flights a week and two-thirds of those flights operating outside Australia, the lion's share of all of their staff were still employed in Australia and all of the knowledge workers where the intellectual property was created were in Melbourne under Australian contracts [§145 of CHS];
- (dd) Clause 5.2 of Schedule 4 to the BSA provides that it is JAPL, not JHK, that will take the lead in international relations and will do so in the

interests of the Licensed Group⁶ generally rather than JHK specifically [§146 of CHS];

- (ee) Although Mr Lau seeks to suggest that JHK is the ultimate decision maker, the reality is that JHK has been established by Qantas/JAPL pursuant to the Jetstar Business Model as the local presence of JAPL in Hong Kong as part of a single integrated customer proposition in respect of all airlines flying under the Jetstar brand. Section 6 of Schedule 4 to the BSA ensures that such arrangement is achieved via control by JAPL [§148 of CHS];
- (ff) JHK cannot be said to have a unique brand. The BSA confirms that the management of the Jetstar brand rests firmly in the hands of JAPL and that JHK is obliged to follow whatever JAPL requires in relation to branding [§149 of CHS];
- (gg) The “Business System” used by JHK pursuant to the BSA includes “the Licensed Brand and Licensed Intellectual Property”. By clause 11.1(a), JHK is obliged to conduct its business only using the Licensed Brand and the Licensed Intellectual Property [§150 of CHS];
- (hh) By clause 2.1 of Schedule 3 to the BSA, local tweaks may be undertaken by JHK to the extent that it is approved by JAPL [§151 of CHS];
- (ii) The development of the Jetstar branded products rests with JAPL but not JHK [§152 of CHS];
- (jj) The BSA confirms that JHK operates sales, distribution and online booking systems which are shared in common with all other Jetstar

⁶ Licensed Group refers to the Licensor and any other person to whom the Licensor or a Qantas Group Company grants a licence to use the Licensed Intellectual Property and the Business System in a business.

- branded airlines and are under the control of JAPL [§153 of CHS];
- (kk) Clause 1.1 of Schedule 3 to the BSA records agreement by JHK to use “Common Channels to ensure the Licensed Group is perceived as a single, consistent offer to all customers in all territories ...” [§154 of CHS];
- (ll) It is JAPL which is to define the Products to be offered through each of the common channels and which JHK then agrees to offer, and JHK is subject to the further control of JAPL that it is obliged to use those common channels as the only channels through which it will offer the Products of the Licensed Business, unless otherwise agreed in writing by JAPL [§155 of CHS];
- (mm) It is JAPL (not JHK) which: (i) is responsible for the design of all Common Marketing Programmes, which JHK agrees to adopt (clause 3.2(a) and (b) of Schedule 3); (ii) is responsible for a common marketing plan, which JHK will endorse (clause 4.1(a) and 6.1 of Schedule 3); (iii) will develop a common in-flight magazine (clause 3.1 of Schedule 3); (iv) will co-ordinate and implement a common strategy for the use of electronic direct mail as part of the overall marketing strategy for all Jetstar branded airlines (clause 4.5 of Schedule 3) etc. [§156 of CHS];
- (nn) The Business System licensed to JHK by JAPL, via the BSA, and which JHK was obliged thereby to follow, includes the “Operation Manuals” (see clause 5.1(b)), which sets out the policies, procedures and standards of the Business System. It follows that JAPL can exercise control over JHK’s day-to-day operations and management by means of such manuals if it wishes to do so [§160 of CHS];

- (oo) By reason of clause 5.1(b)(vi), 11(1)(b) and 15(j), the ultimate management and control for the safety standards used by JHK rests with JAPL [§161 of CHS];
- (pp) Under clause 2.7(b) of the SHA, the shareholders have agreed that JHK will adopt from time to time and comply with systems and standards of safety of the Jetstar Group [§165 of CHS];
- (qq) IT is covered by Schedule 6 to the BSA. Under clause 1.2(d), the “Choice” option nevertheless consists of the “Mandatory IT System” which JHK must procure through JAPL. Such system extends to corporate systems, core IT infrastructure etc. JHK could not function without the IT which it is obliged to obtain from, and is controlled by, JAPL [§167 of CHS]; and
- (rr) The BSA vests substantial control over the management of Ancillary Business in JAPL: (i) it makes JAPL (rather than JHK) responsible for the development, set up and management of all Ancillary Businesses listed in Attachment 1 to Schedule 11 (clause 1(b)(i) and (ii) of Schedule 11); (ii) it gives JAPL the right to determine and set the pricing of all Licensed Group products forming part of the Ancillary Business, as well as the policies, procedures and standards for their delivery (clause 1(b)(iii) and (vi) of Schedule 11); (iii) it permits JAPL to select and manage any preferred Ancillary Business Product listing as it may determine (clause 1(b)(vii) of Schedule 11); (iv) it gives JAPL the right to distribute the revenue to JHK based on the Ancillary Business items specified in Attachment 1 to Schedule 11 (clause 4.1(a) of Schedule 11); (v) where a new Ancillary Business is introduced by JAPL, it requires JHK to acquire the services to enable successful

operation of the new Ancillary Business (clause 5.2(a) of Schedule 11); and (vi) it gives JAPL the sole right to develop, market and sell extensions of the Jetstar Brand and to retain 100% of the revenue from such brand extension (clause 6.1(a) of Schedule 11) [§171 of CHS].

57. CPA-HKDA also filed a witness statement by Mr Arnold Cheng (in the capacity of General Manager, International Affairs of CPA). However, this witness statement was not accepted by ATLA as further explained in paragraphs 125 to 127 below.

F. HKA's submissions

58. Pursuant to the stipulated timetable, HKA filed its submissions (“HKAS”) on 15 January 2015. HKA is represented by Mr Holden Slutsky.

59. HKA submits that there are doubts as to whether JHK’s PPB is in Hong Kong. The key arguments in support of HKA’s propositions are as follows:

- (a) 51% of the voting interest in JHK does not provide Shun Tak with the ability to make decisions. According to the SHA, numerous matters require unanimous approval by shareholders (100%) and “Shareholder Approval” requires an affirmative vote of more than 80%. The apparent majority is misleading in that it does not equate to the ability to make decisions on matters requiring either unanimous approval or even ordinary resolution [§7-11 of HKAS];
- (b) Under clause 1.1 of the SHA, Board Extraordinary Approval is a

resolution of JHK Board that is passed by an affirmative vote of more than 50% of the votes cast by those Directors present and entitled to vote on the resolution and in which the majority includes the approval of at least one Director nominated by JIGH, one Director nominated by China Eastern and one director nominated by Shun Tak. By having three out of the seven directors on JHK Board as Shun Tak Directors, it is misleading that it appears on the face of it that a significant portion of JHK Board is controlled by Shun Tak in that Board Extraordinary Approval may be passed with mere approval by one director from each JIGH, China Eastern and Shun Tak [§15-16 of HKAS];

- (c) By having three out of the five members on the Excom to be appointed by Shun Tak, it gives the misleading impression that the majority of the Excom, in terms of decision making power is always with Shun Tak. A quorum of three, where Shun Tak's voting power would be limited to one third is enough. There are various matters which require a unanimous decision, not even a majority [§20 of HKAS];
- (d) Under clause 10.1(a) of the SHA, JIGH has the right to nominate a person for appointment as JHK CEO. It is impossible to appoint or remove JHK CEO without the approval of JIGH [§22-23 of HKAS];
- (e) JHK CEO has dual reporting obligations as under clause 10.1(b) of the SHA, JHK CEO "will report, and is responsible, to JHK Board but have a dual reporting line to the Jetstar Group CEO to ensure appropriate coordination with the Jetstar Group" [§24-25 of HKAS];
- (f) Under the BSA, all network decisions are to be discussed through a

forum known as JET⁷. If a dispute is unable to be resolved through JET, the Jetstar Group CEO has the authority to make a final and binding decision on the matter. It is therefore the Jetstar Group CEO who has the right to make a final decision over any such dispute [§27&29 of HKAS];

- (g) Under clause 1.1 of the SHA, “Jetstar Network Group” is defined as members of the Jetstar Group flying under the ‘Jetstar’ brand and other entities that are licensed by the Jetstar Group to fly under the ‘Jetstar’ brand. Clause 2.1 of the SHA states that the business of Jetstar Hong Kong Group will comprise the establishment and operation of an LCC applying the Jetstar Business Model [§31 of HKAS];
- (h) Clause 1.1 of the BSA defines the meaning of “Licensed Group”. The JVCA also acknowledges that each Jetstar Joint Venture forms part of the Jetstar Group [§32 of HKAS];
- (i) Clause 2.3(c) of the SHA states that JHK will closely align the Business with the business of the Jetstar Network Group, and will continue to do so in the future, to ensure that the profitability and coordination of ‘Jetstar’ branded airlines is achieved as underlined in the BSA [§33 of HKAS];
- (j) If JHK wants to supply a product or service which JAPL does not agree to in writing, JAPL will have the right to terminate the licence granting JHK’s use of the Jetstar brand. If the licence is indeed terminated, JHK is unable to operate the business, as under the SHA, it would be

⁷ According to the BSA, JET means the Jetstar Airways Pty Ltd. (“JAPL”)’s executive team comprising the Jetstar Group Chief Executive Officer, his or her direct reports and the Chief Executive Officers (or their delegates) of such members of the Licensed Group as determined by JAPL from time to time.

deviating from the Jetstar Business Model [§34 of HKAS];

- (k) Under the BSA, JHK also has a reporting requirement in that it must also provide JAPL with monthly statements of accounts [§36 of HKAS];
- (l) Under the BSA, where there is an overlap of routes between members of the Licensed Group, and where Licensed Group carriers are not able to reach agreement on pricing, scheduling and capacity decisions related to overlap routes, JAPL has the right to determine pricing, scheduling and capacity allocation for each member of the Licensed Group. JHK may reasonably object to JAPL's determination and such objections may be raised as JET Disputes, which will ultimately be subject to Jetstar Group CEO's final decision. Also, all network decisions are to be discussed and validated through JET prior to final approval [§38 of HKAS];
- (m) JHK has outsourced to JAPL essentially nearly all of its commercial and technical functions [§41 of HKAS];
- (n) There is no freedom for JHK to choose most aspects of how it conducts its business. Under clause 13.1 of the BSA, JHK has agreed to use the Core Business Services which include "Marketing and Sales Services", "Commercial Services", "Financial Services", "IT", "People (Human Resources)", "Corporate Communication", "Engineering and Maintenance", "Operations", and "Ancillary Business" [§42 of HKAS];
- (o) Under clause 19 of BSA, for Dispute Resolution Process, the Jetstar Group CEO has the right of final determination [§43 of HKAS];
- (p) JAPL not only develop and provide JHK with their commercial policies and procedures, but also execute JHK's commercial and technical

services, and enter into contracts on JHK's behalf as well as use JHK to enter contracts with third party suppliers [§44 of HKAS]; and

- (q) Despite JHK's submission that JHK Board is entitled to require any decision by JAPL in delivering outsourced services be subject to approval of JHK Board, it is not JHK that will be making the key decisions. JHK only has the ability to customise what it is given. JHK is required under the BSA to operate its "Licensed Business" in strict compliance with the terms of the BSA [§47 of HKAS].

G. HKE's submissions

60. HKE is represented by Mr Anthony Chow. HKE filed its submissions ("HKES") on 15 January 2015 and with JHK's agreement, its supplemental submissions on 21 January 2015.

61. HKE puts forth that the following considerations and factors should be taken into account when determining if an applicant for ATLA licence has its PPB in Hong Kong:

- (a) The central and ultimate management and control of the applicant's business;
- (b) The shareholders and directors;
- (c) The senior management and staff of the applicant;
- (d) Whether and the extent to which the applicant carries out its operations in HKSAR; and
- (e) The relationship between the applicant and foreign airlines and

non-local associated companies. [§16 of HKES]

62. HKE argues that JHK does not have its PPB in Hong Kong. The key arguments of HKE are:

- (a) The range of activities and functions that are necessary to carry out the business of JHK are described in the BSA. The business model is in effect an operational branch of another airline [§28&30 of HKES];
- (b) According to Section 2 of the SHA, the large part of the proposed activities to enable JHK to function as an airline are carried out in accordance with the Jetstar Business Model licensed by the Jetstar Group owned and controlled from Australia [§32 of HKES];
- (c) According to the SHA, JIGH (as wholly owned by JAPL) may terminate the licence immediately (clause 2.7(d)) and has the right to nominate the JHK CEO (clause 10.1(b)) [§33-34 of HKES]; and
- (d) According to the SHA, JHK's financial statements are required in the form as required by JIGH (clause 11.4(a)) [§35 of HKES].

63. In HKE's supplemental submissions of 21 January 2015 ("HKESS"), HKE makes the following key propositions in support of the argument that JHK does not have its PPB in Hong Kong:

- (a) The relationship between JHK and JAPL as described by Mr Lau as "outsourcing" is a liberal use of the term as commonly understood. In outsourcing, the party requesting the services typically details the product or service required according to its specification. However, in

JHK's case, the determination of specifications and standards clearly lies with the described outsourced partner, the Licensor [§5-7 of HKESS];

- (b) Under the BSA, the proposed activities that are to be carried out by JHK are only in a limited number of areas, and are substantially arguably only those of relationship management and processing in Government affairs (paragraph 5 of Schedule 4), local administration (paragraph 2 of Schedule 7) and operational service delivery (Schedule 10) [§9 of HKESS];
- (c) The relationship between JHK and JAPL is one where the benefit in a number of important areas is to JAPL and the Licensed Group, rather than to JHK (clause 12.3 and 17.6) [§11 of HKESS];
- (d) Under the BSA, the dispute resolution procedure inclines towards the Licensor (clause 29.1(f)) [§12 of HKESS]; and
- (e) The business model described in the BSA is in many ways akin to that of a Head Office and a branch business unit [§16 of HKESS].

H. JHK's reply submissions

64. JHK provides its rebuttals to the Objectors' submissions by way of its reply submissions of 20 January 2015 ("JRS"). Accompanying JHK's reply submissions is the supplemental witness statement of Mr Lau which refers to a clarification letter dated 20 January 2015 ("the Clarification Letter") entered into between JAPL and JHK. JHK sought leave from ATLA for allowing the Clarification Letter to be accepted for the public inquiry. The reasons that ATLA accepts the Clarification Letter are set out in paragraphs 117 to 120.

65. On the PPB meaning under the Basic Law, JHK highlights the following key contentions:

- (a) CPA-HKDA has proposed the narrowest approach to the PPB requirement that the only legally relevant considerations are those which go to the questions of JHK's "ultimate management, control and authority". JHK submits that such position is unsustainable [§5-6 of JRS];
- (b) In the international aviation context (in particular, the designation of an airline by a State contracting party to a bilateral air services agreement to fly a particular route thereunder), there is clear distinction between PPB on the one hand and substantial ownership and effective control ("SOEC") on the other. Such distinction is also recognised in bilateral agreements by the HKSAR in aviation and tax contexts [§7-15 of JRS];
- (c) According to *The Rewis*, it is not suggested that the place where most of the business is carried out is irrelevant to the question, or indeed that the place where most of the business is carried out cannot be of substantial weight depending on the overall circumstances [§20 of JRS];
- (d) It cannot be right that the "specific" or sole purpose of the PPB requirement is to prevent foreign airlines from appropriating Hong Kong air traffic rights by stealth. Even if the protection of air traffic rights were a relevant consideration for maintaining Hong Kong's status as an aviation centre, it does not follow that such factor must be the only (or even the key) relevant consideration [§25-26 of JRS];

- (e) It is axiomatic that the same words in the same section of the same constitutional document must carry the same meaning, absent a clearly expressed contrary intention. “PPB in Hong Kong” cannot have one meaning in Article 135 and another meaning in Article 134 [§29 of JRS];
- (f) Whereas CPA-HKDA’s approach is a highly restricted approach limited to the question of ultimate management and control, JHK’s involves a broad inquiry into the overall arrangements in respect of the applicant with a view to establishing where its “business” principally resides [§34 of JRS]; and
- (g) JHK’s analysis on the proposed considerations for PPB determination has been reinforced by ICAO model clause and THB’s guidelines [§35 of JRS].

66. JHK contends that the Objectors’ claims are erroneous and the key arguments raised by JHK are highlighted below:

- (a) The BSA gives JHK only some, but not all, the tools needed to deliver the business of a low-cost airline. Almost no operations functions are outsourced to JAPL (save for some aspects of the Engineering and Maintenance function) [§43&44 of JRS and Appendix 2 thereto];
- (b) The majority of services outsourced to JAPL are commercial services, whilst JHK retains ultimate control over those services [§45 of JRS];
- (c) There are functions not outsourced, e.g. finance, procurement, human resources, legal, strategy, government and international affairs, and administration [§47 of JRS];

- (d) The Supplemental Agreement contains more than a confirmation; it introduces a process whereby any decision made by JAPL in the delivery of any of the services provided by it under the BSA could be declared by JHK Board to be subject to an approval process by JHK. Many rights that JAPL has can be overridden [§49 of JRS];
- (e) As regards Board Reserved Matters, no one shareholder has any more control over JHK than any other. Outside of those matters, Shun Tak has a greater control over JHK's affairs. There are 15 categories of Excom decisions requiring unanimous approval but most decisions require a majority only, which can be carried by Shun Tak, if thought fit [§54 of JRS];
- (f) The functional heads are nominated by both Qantas and China Eastern and appointed by a Board approval that requires a vote by directors representing all three shareholders. They are not mere "Qantas/JAPL nominees" as alleged by CPA-HKDA [§56 of JRS];
- (g) There is nothing in the common law authorities to the effect that, in the case of a joint venture company, shareholders cannot each enjoy a veto power regarding certain important decisions and certain members of the senior management cannot be nominated by and/or required to report to one of the shareholders for limited purpose [§65 of JRS];
- (h) The four PPB criteria and the 11 neural functions put forward by CPA-HKDA appear to be misleading and incomplete [§67 of JRS];
- (i) CPA-HKDA's references to the "real position" under the ACCC submission are irrelevant as they do not reflect actual contractual obligations [§73(1) of JRS];
- (j) Although clause 3.1(b) of Schedule 4 to the BSA provides that JAPL

reserves the right to determine pricing, scheduling and capacity allocation, that again is a matter which can be overridden by the terms of the Supplemental Agreement [§73(1) of JRS];

- (k) The Flying Committee addresses overlapping routes between JHK and China Eastern and so its remit is contained to routes between Hong Kong and the mainland China [§73(1) of JRS];
- (l) The Supplemental Agreement gives JHK the right of overrule airline partnership decisions made by JAPL [§73(1) of JRS];
- (m) It is misleading for CPA-HKDA to single out Qantas veto power as the right to approve “strategic plan” is enjoyed equally by all three shareholders. Pursuant to such “strategic plan”, JAPL can then perform the services under the BSA, including the development of network decisions which are subject to final approvals by JHK [§73(1) of JRS];
- (n) The ACCC submission does not confer any contractual rights or obligations [§73(2) of JRS];
- (o) Consultation with the nominated Jetstar Company or giving to that company the opportunity to match an offer do not mean that JHK is not free to procure aircraft at the most commercially attractive terms [§73(2) of JRS];
- (p) The so-called veto power of Qantas over aircraft acquisitions is a right that every other shareholder enjoys. The fact that JIGH has a veto power does not mean that it can dictate to the other shareholders that JHK must purchase through JAPL [§73(2) of JRS];
- (q) Even apart JHK’s rights in the Supplemental Agreement to override any finance policy issued by JAPL, there is actually nothing in the BSA that

- compels JHK to adopt JAPL's finance policy [§73(2) of JRS];
- (r) JHK CEO has ultimate accountability for revenue and JAPL must follow any reasonable direction from him [§73(4) of JRS];
 - (s) JHK benefits from use of the established Jetstar brand owned by JAPL and in return for the right to use the Jetstar brand, is prepared to accept restrictions on use of the brand. It is usual for a licensor to expect some sort of brand protection when it licenses its brand. Use of a licensed brand is not in itself a reason to say that JHK does not have its PPB in Hong Kong [§73(5) of JRS];
 - (t) The Supplemental Agreement will give JHK Board the right to override any decision made by JAPL in delivering products. That gives ultimate control over product development to JHK whilst allowing JHK to benefit from the services provided by JAPL in designing and providing the product to JHK [§73(6) of JRS];
 - (u) JAPL must follow all reasonable directions of JHK CEO to develop new payment channels or technologies (clause 14.6(d) and 14.7(a) of Schedule 4 to the BSA). Also, the Supplemental Agreement will give JHK the ultimate control over JAPL's work to develop products for JHK [§73(7) of JRS];
 - (v) The definition of "Operational Manual" does not extend to the JHK's "own manual suite" covering JHK's operations which it has developed based on the JAPL "existing operating manuals" provided by JAPL as part of the services (clause 3(a) of Schedule 10 to the BSA). The scope of JAPL's power to issue "Operations Manual" does not apply to any operational matters [§73(9) of JRS];
 - (w) As for JHK's engineering arrangements, according to clause 3(c) of

Schedule 9 to the BSA, those are mere services that might be provided to JHK but they would be subject to services actually agreed in the Engineering SLA. Annex 1 to the Engineering SLA details the agreed services to be provided by JAPL, which are generally low-level execution tasks [§73(10) of JRS];

- (x) Given that safety is a critical factor to customers' choice of airlines and that such reputation can take years to build up, using a brand with a reputation for safety will help JHK to better compete as a start-up provider against large incumbents [§73(11) of JRS];
- (y) JAPL merely provided the infrastructure, monitoring and security over the [IT] system plus commercial negotiations to ensure that JHK received the system at a more cost-effective group price. If for any reasons, JHK believes it needs to make the ultimate decision on any aspect of IT services, it can declare such decision a "Relevant Decision" under the Supplemental Agreement and make the ultimate decision [§73(12) of JRS];
- (z) If for any reason, JHK believes it needs to make the ultimate decision on any aspect of those ancillary revenue services, it can declare such decision a "Relevant Decision" and make the ultimate decision [§73(13) of JRS];
- (aa) The ACCC submission was filed to support an application by JAPL and Qantas for exemption from anti-competition laws in Australia. The efficiency and growth accrues to all airlines that coordinate with each other – it is not solely for the benefit of JAPL and Qantas. For the purposes of evaluating JHK's PPB, what is relevant is its actual circumstances in the present-day. Selective cross references to the

ACCC submission of the coordination of JHK and JAPL etc. are not helpful or relevant to ATLA's evaluation of JHK's PPB [§77-79 of JRS];

- (bb) Shareholders other than JIGH (including China Eastern) also have the same right to veto a decision requiring Unanimous Shareholders Approval and Shareholders Approval. Such a right does not mean that PPB is in the mainland China (where China Eastern is controlled) [§83 of JRS];
- (cc) Shareholders other than JIGH (including China Eastern) also have the same right to veto a decision requiring Board Extraordinary Approval. Such a right does not mean that PPB is in the mainland China (where China Eastern is controlled) [§84 of JRS];
- (dd) The fact that an airline and its shareholders have decided, at the point of setting up the airline, to pursue a particular business model does not mean that ultimate control has not been exercised when that critical decision was made at the outset. That decision itself was freely made by each of the shareholders including Shun Tak [§85 of JRS];
- (ee) JIGH's right to nominate a person to be JHK CEO is subject to the power of appointment of that nominated person as JHK CEO. Hence, all shareholders have an equal say in such appointment. Corresponding mechanisms apply to the nomination of the Chairman of JHK Board (a Shun Tak right) and the Chief Finance Officer ("CFO") (a China Eastern right) [§86 of JRS];
- (ff) The Senior Executives jointly nominated by JIGH and China Eastern are subject to the power of appointment of the Excom. Appointment is subject to the unanimous approval of all members of the Excom.

Hence, all shareholders have an equal say in such appointment. The mechanism of joint nomination by JIGH and China Eastern does not mean that PPB is in Australia [§87 of JRS];

- (gg) JHK is a stand-alone company with its own board and management structure and its three investors have expressly agreed that they will invest in a business model that has proven to be successful, reliable and effective. Many key decisions of JHK Board require the agreement of representatives of all three shareholders, which is fair and equitable and shows the interest that all shareholders have in protecting their investments [§88 of JRS];
- (hh) CPA-HKDA has pulled together a number of clauses in the BSA as evidence of an intention for JHK to “integrate” with the Jetstar network. Analysed item by item, the clauses instead reflect that JHK has accepted the licence of a valuable brand in return for which JHK accepts reasonable obligations to protect the brand, received services from JAPL that are much narrower in scope than CPA-HKDA claims. On top of those factors, the Supplemental Agreement gives JHK at all times the right to not follow any decision JAPL makes in the delivery of the Outsourced Services under the BSA [§91 of JRS]; and
- (ii) It is necessary to read the individual provisions of the BSA in conjunction with the Supplemental Agreement which reinforces the point that active control over JHK remains in its own hands [§93-94 of JRS].

I. CPA-HKDA's closing submissions

67. The oral presentations by the parties with regard to their written submissions and the cross-examination of Mr Edward Lau were completed during the public inquiry held on 23 to 24 January 2015. To take the matter forward, ATLA directs that, by agreement of all parties on 24 January 2015, each of the Objectors is to file its written closing submissions by 4 February 2015 and JHK is to file its written closing submissions by 11 February 2015, and that the parties are to make oral closing on 14 February 2015.

68. CPA-HKDA filed its closing submission (“CHCS”) on 4 February 2015 as scheduled. CPA-HKDA reiterates its position that the PPB requirement under Article 134 of the Basic Law is the settled common law meaning, namely, the location where ultimate management, control and authority over the relevant entity is exercised [§5 of CHCS].

69. CPA-HKDA submits that the Supplemental Agreement and the Clarification Letter are not credible reflections of the true relationship between JHK and JAPL [§7 of CHCS]. CPA-HKDA draws the attention of ATLA to a chronology of events since early 2012 in understanding the true relationship between JHK and JAPL [§9 of CHCS and Appendix 1 thereto].

70. CPA-HKDA also highlights that a number of important decisions concerning JHK were made outside Hong Kong. They are:

- (a) the decision that JHK should be formed as a joint venture to run the

- business in accordance with the Jetstar Business Model;
- (b) the decision to appoint Mr Edward Lau as JHK CEO;
 - (c) the decision to acquire nine aircraft;
 - (d) policy directions given by JAPL on Finance Policy for JHK pursuant to Schedule 5 to the BSA;
 - (e) policy directions given by JAPL on People (Human Resources) Policy Framework for JHK pursuant to Schedule 7 to the BSA; and
 - (f) policy directions given by JAPL by way of Operation Manuals and safety standards for JHK to follow [§12 of CHCS].

71. CPA-HKDA emphasises the integration of JHK with the Jetstar Business Model. In its closing submissions, it states:

“... as a matter of plain business commonsense, it is difficult to see how the Jetstar Business Model can work unless – as the ACCC submission states most unequivocally – there is a single, fully integrated organisation with integrated management.” [§13 of CHCS]

72. CPA-HKDA also highlights the inconsistency brought by the Supplemental Agreement and the Clarification Letter. It says:

“... the position set out in the Supplemental Agreement and in particular the Clarification Letter, is entirely inconsistent with the Jetstar business model as elaborated in all of the other documentary and contractual material prior to that date ... The Clarification Letter purports, in effect, to completely negate the BSA and the Jetstar business model and results in a legally incoherent situation (having regard to the contents of the JVCA, Shareholders Agreement and BSA)... the entire Jetstar business model with integrated branding and service is predicated upon and only works if there is centralised management control over corer functions of the various Jetstar branded airlines.” [§16 of CHCS]

73. CPA-HKDA further argues that JHK has failed to provide ATLA with details and documentary evidence of the actual dealings which have occurred between JAPL/Qantas and JHK since JHK's inception [§17 of CHCS]. CPA-HKDA adds that since JHK is not yet operational, there is only a limited degree to which Mr Lau could speak to the way in which JHK and JAPL will actually operate in future: one must revert to the formal legal documents and the pre-application evidence (i.e. JVCA, SHA, BSA and ACCC submission) [§18 of CHCS].

74. In support of its argument, CPA-HKDA furnishes by way of its closing submissions a Revised Table of Key Documentary References to demonstrate the control that has been reposed in JAPL/Qantas in respect of various key or core functions of JHK [§20 of CHCS & Appendix 2 thereto].

75. As regards the true meaning and scope of PPB requirement, CPA-HKDA reiterates that PPB is where the ultimate management, control and authority over the company is exercised; and that it is not necessarily the same place as where the company's day-to-day management or main business is conducted [§21 of CHCS].

76. CPA-HKDA contends that the purpose of the PPB requirement in Articles 131 to 135 of the Basic Law is highly instructive and a principal reason for imposing PPB requirement must be the protection of access to Hong Kong's air traffic rights [§27 of CHCS]. CPA-HKDA also argues that other considerations comprising the diffused or "multiple considerations" test of PPB would have little connection with protection of Hong Kong's air traffic rights

[§28]. In any case, CPA-HKDA indicates that JHK has cited no legal authority whatsoever for adopting the “diffused” test of PPB and the diffused test is inconsistent with the established common law position [§33-34 of CHCS].

77. CPA-HKDA submits that the ICAO materials, the circumstances of CPA, certain treaties and legislation on double taxation and the cases on “place of business” are red herrings and irrelevant to the PPB determination [§37-51 of CHCS].

78. In its closing submissions, CPA-HKDA highlights the following key points in support of its argument that JHK does not have a PPB in Hong Kong:

- (a) The decision to set up the Hong Kong joint venture came from Australia [§56 of CHCS];
- (b) The ACCC submission is highly instructive as to the true intention and arrangement in respect of JHK [§57 of CHCS];
- (c) The ACCC submission explains the Jetstar Pan-Asia Strategy [§59 of CHCS];
- (d) The Qantas Group’s investment in the Jetstar Pan-Asia Strategy are predicated on the ability of Jetstar LCCs to coordinate their operations through a single brand, go to market strategy and business model [§60 of CHCS];
- (e) The “dual brand strategy” of Qantas is to maximise profitability for the Qantas Group as a whole whilst maintaining a clear profit focus for the separate businesses [§62 of CHCS];
- (f) The Jetstar Business Model is designed to create an “integrated Jetstar network” (para. 4.11 of the ACCC submission) [§65 of CHCS];

- (g) Jetstar Business Model is enshrined in the business service agreement made between JAPL and each of the Jetstar LCCs (para. 4.14 of the ACCC submission) [§66 of CHCS];
- (h) JAPL is the final arbiter of overlapping routes between different Jetstar LCCs including JHK (para. 4.17 of the ACCC submission) [§67 of CHCS];
- (i) JHK, once established, will accede to the JVCA (paragraph 5.3 of the ACCC submission) [§69 of CHCS];
- (j) The parties propose to operate as a single fully integrated organisations (paragraph 5.6 of the ACCC submission) [§70 of CHCS];
- (k) “Single business model” and “uniform branding concept” are referred to (paragraph 5.8 and 5.9 of the ACCC submission) [§71 of CHCS];
- (l) “Integrated management of all operational, commercial and procurement activities” for each Jetstar LCC is referred to (paragraph 5.10 of the ACCC submission) [§72 of CHCS];
- (m) The intention expressed in the ACCC submission is in fact borne out in and is consistent with the provision of the SHA and the BSA [§73 of CHCS];
- (n) The statements made by Qantas and JAPL to the Rural and Regional Affairs and Transport Legislation Committee of the Australian Senate are supportive of the intention and structure as set out in the ACCC submission [§74 of CHCS];
- (o) The apparent control given to Shun Tak by its 51% voting rights and entitlement to nominate four out of seven directors is illusory as JIGH has an effective veto over numerous JHK Board decisions because for any decision requiring “Board Extraordinary Approval” the JIGH

- nominated director must vote in the affirmative [§77 of CHCS];
- (p) Qantas (via JIGH) has an effective right of veto over any matter requiring shareholder approval [§79 of CHCS];
 - (q) The form of having apparent voting control of JHK Board vested in Hong Kong permanent residents and majority voting control vested in a Hong Kong company is negated by the effective powers of veto set out above [§80 of CHCS];
 - (r) The effective power of veto by JHK shareholders renders the appearance of voting and JHK Board control by Shun Tak illusory [§82 of CHCS];
 - (s) By reason of clauses 2.1, 2.2, 2.3 and 2.4 of the SHA, each of the shareholders in JHK, and each of their appointed directors is strictly fettered in what they can do with regard to JHK by an obligation to follow and further the Jetstar Business Model and the Jetstar Pan-Asia Strategy. The SHA expressly takes precedence over JHK's Articles of Association (see Clause 19.1) and the entire constitutional make-up is inexorably tied to the Jetstar Business Model and the Jetstar Pan-Asia Strategy [§83 of CHCS];
 - (t) By virtue of clause 10.1(a) of the SHA, JIGH has the right to nominate JHK CEO. Also, the JHK CEO has a dual reporting line. The JHK CEO is at all times expressly tied to operating JHK in accordance with the Jetstar Business Model and other matters set out at clause 2 [§85 of CHCS];
 - (u) Clause 10.3 of the SHA provides that a person cannot be appointed as a Senior Executive of JHK unless first nominated by JIGH and China Eastern [§86 of CHCS];

- (v) The Jetstar Business Model only works if each of its members agrees to accept common branding, models and forms and to use a conjoined sales portal. By doing that as a franchisee, JHK submits itself to the control of the franchisor: JAPL [§89 of CHCS];
- (w) The credibility of the subsequent changes to the original business service agreement is undermined by their timing and obvious purpose. ATLA is invited to focus primarily on the original business service agreement in ascertaining the true intended and factual situation [§90-93 of CHCS & Appendix 3 thereto];
- (x) The key provisions⁸ of the BSA demonstrate that JHK is intended to be one arm of a single fully integrated organisation led by JAPL [§95 of CHCS];
- (y) The net effect of clauses 10.2, 11.1, 11.5, 20.1(a) and 26 together with the wide definition of “Specifications”, is that JAPL is given a virtually limitless power to control and direct JHK in any area of its operations [§97 of CHCS]; and
- (z) Both the JVCA and the BSA assists in informing the reader as to what are regarded as “core” areas. If JHK is to function, it cannot operate as an airline, in particular one bearing the Jetstar name and brand, without the input and control provided by JAPL as stipulated in the BSA [§99 of CHCS & Appendix 2 thereto].

79. On the effect of the Supplemental Agreement and the Clarification

⁸ Such provisions include Recital (b), Recital (d)(iii) and clause 4.1(c), Recital (d)(v) and clause 4.1(e), clause 4.2, clause 5.2, clause 6.1(a), clause 6.6, clause 9.2, clause 9.3, clause 10.2, clause 11.1(a), clause 11.5, clause 11.1(b), clause 11.4, clause 12.2(b), clause 13.1, clause 16.2, clause 20.1(a), clause 20.2(a), clause 29, clause 3.1 of schedule 4, clause 7.2(b) and 7.2(c) of schedule 4, and clause 26.1(a).

Letter, CPA-HKDA submits that ATLA must decide whether as a matter of fact and reality, the Supplemental Agreement and the Clarification Letter have made and will make any difference to the true situation and intention in terms of the relationship between JHK and JAPL/Qantas. CPA-HKDA contends, among others, that:

- (a) By reason of the SHA, JHK must be operated pursuant to the Jetstar Business Model, namely as one arm of a single fully integrated Jetstar organisation headed by JAPL [§102 of CHCS];
- (b) The Supplemental Agreement was executed at a time when the determination of the PPB issue by ATLA was becoming imminent. The purpose is abundantly clear that it was solely to attempt to bolster JHK's position on PPB in its licence application [§107 of CHCS];
- (c) The Supplemental Agreement does not purport to amend the BSA. Also, the parties to the SHA are not all parties to the Supplemental Agreement. All of the obligations of JHK and rights of JIGH under the SHA remain intact notwithstanding the Supplemental Agreement. Moreover, the SHA takes precedence over the BSA and ties JHK to the original BSA [§108(1)&(2) of CHCS];
- (d) The procedure at clauses (a) to (d) of the Supplemental Agreement applies only to decision of JAPL in the "delivery" of any of the Outsourced Services for JHK in accordance with the BSA. It does not affect provisions of the BSA which enable JAPL to control and direct JHK or restrict what JHK can or cannot do, nor does it affect the provisions of the BSA which tie JHK to the Jetstar Business Model [§108(4) of CHCS];

- (e) The Supplemental Agreement does not purport to displace JAPL's overriding powers under the BSA, including JAPL's wide power to terminate the BSA, and JAPL's ultimate power to determine the resolution of disputes with JHK in the interests of the Licensed Group [§108(5) of CHCS];
- (f) The Supplemental Agreement executed by JHK CEO is ultra vires and could have no legal effect notwithstanding the purported endorsement by Shun Tak and China Eastern [§108(7) of CHCS];
- (g) From the powers given to Qantas/JAPL by the SHA and the BSA, they could demand and obtain reversal of any effect of the Supplemental Agreement and the Clarification Letter at any time should they wish to do so and that if JHK refused to defer to JAPL's demands as to how it was to operate JAPL could then terminate the BSA [§108(8) of CHCS];
- (h) As regards the May 2014 amendments to the BSA, JAPL's obligation to follow the "reasonable directions" of JHK is in very limited contexts, and is undermined by the fact that any dispute as to whether a direction of JHK is "reasonable", would fall to be determined by the Dispute Resolution Process, which is ultimately to be resolved by the Jetstar Group CEO having regard to the benefit of all members of the Licensed Group [§110 of CHCS];
- (i) The Clarification Letter entirely lacks credibility as it came extraordinarily late (i.e. only 3 days before the public inquiry) and, like the Supplemental Agreement, is easily reversed [§111 of CHCS]; and
- (j) CPA-HKDA submits that the Clarification Letter:
 - (i) does not amend the SHA;
 - (ii) is wholly inconsistent with the entire scheme of the other

contractual documentation as well as with the Jetstar Business Model;

(iii) is entirely inconsistent with the SHA and the remainder of the BSA;

(iv) should not be given any weight; and

(v) (as executive by JHK CEO) is ultra vires and could have no legal effect [§112 of CHCS].

80. As regards Mr Lau's witness, CPA-HKDA submits that it lacks creditability and highlights the following key points:

(a) As regards instructions from JAPL on matters covered by the BSA, Mr Lau chose to describe the relationship as "outsourcing" and referred to the BSA as a "tool" presented to him;

(b) He confirmed that his working and interpersonal relationship with Ms Hrdlicka (i.e. Jetstar Group CEO) did not change after the amendment to the BSA in May 2014;

(c) The decision to hire Mr Lau would have been made outside Hong Kong;

(d) When pressed, he accepted that he did report to Ms Hrdlicka in relation to matters covered by the BSA;

(e) He claimed that Ms Hrdlicka and Mr Joyce did not convey to him the notion of a "single fully integrated organisation". However, that is not credible;

(f) He accepted that under the BSA there were many areas where JAPL can give directions to JHK;

- (g) He would not depart from the Jetstar Business Model and he would not depart from the terms of the BSA;
- (h) He claimed that he made network and scheduling decisions for JHK. However, that is inconsistent with the BSA (Schedule 4, clause 7.2);
- (i) He claimed that in respect of pricing, under the BSA JHK would determine the pricing policy etc. However, that is inconsistent with Schedule 4 to the BSA (clauses 6.1(a), (b) and 6.2(c));
- (j) The suggestion that the Clarification Letter is a “clarification” is a distortion as it purports to amend the BSA and is entirely inconsistent with the scheme and business model set up under the BSA and the SHA; and
- (k) In relation to numerous areas of JHK’s intended business, Mr Lau was unable to give meaningful evidence because JHK is not yet operational [§116 of CHCS].

J. HKA’s closing submissions

81. Pursuant to the stipulated timetable, HKA filed its closing submissions (“HKACS”) on 4 February 2015. HKA argues that through the ACCC submission, the BSA, the SHA, the JVCA and the evidence of Mr Lau, JHK is nothing more than a franchisee or a branch of JAPL [§50-51 of HKACS]. HKA submits that JHK, as a member of and with its allegiance to the Jetstar Group, with the lack of control that Shun Tak and JHK itself have over JHK’s affairs, and with the requirements and obligations that it has to JAPL, appears to not be an airline having PPB in Hong Kong [§53 of HKACS].

82. In supporting its argument, HKA contends that Shun Tak lacks control over JHK's affairs as highlighted in the following key points:

- (a) While Shun Tak does hold 51% of the voting shares, such majority is misleading given the fact that shareholder resolutions require either 80% or 100% for approval. It is impossible for Shun Tak and China Eastern to pass any resolution requiring shareholder approval without JIGH also approving of the resolution [§8-9 of HKACS];
- (b) Board Extraordinary Approval requires the approval of the Jetstar Director⁹, and that is in effect a veto right, being that where the Jetstar Director chooses not to approve of a resolution, it will simply not be approved [§13 of HKACS]; and
- (c) A quorum of three members (one from Shun Tak, one from China Eastern and one from JIGH) is required at any meeting of the Excom. Even with the three members of the Excom being from Shun Tak, it is stipulated that it must consist of the directors from each Shun Tak, China Eastern and JIGH. Putting aside the matters which require unanimous decision, Shun Tak's voting power could be limited to one third [§15&17 of HKACS].

83. HKA further contends that JHK lacks control over its own affairs by reason of the following key points:

- (a) Mr Lau, in his evidence, initially denied that he has a reporting duty to

⁹ Jetstar Director means the Director nominated for appointment by the Jetstar Group Shareholders from time to time in accordance with the SHA but is not the Airline Shareholder Approved Director.

the Jetstar Group CEO and then later stated that he only reports to her in relation to matters covered under the BSA [§19 of HKACS];

- (b) There is a large amount of outsourcing to JHK through the BSA, including the Core Business Services (clause 13.1 and Schedules 3 to 11 to the BSA) [§22 of HKACS];
- (c) Under the BSA, it is not JHK that will be making the key decisions, but JHK may merely attempt to customise and deal with what is given. Having a right to approve of a decision is not the same as having a right to create a decision that may be up for approval [§24 of HKACS];
- (d) If one looks at the terms of the BSA, JHK in reality has no choice but to comply with its outsourcing, e.g.
 - (i) Should it be “reasonably considered” that JHK is not complying with its obligations, JHK will pay for the cost of inspections. (clause 20.2(c)); and
 - (ii) The BSA may be terminated by JAPL if JHK “ceases or threatens to cease to carry on a part or a substantial part of the Licensed Business etc. (clause 26.1(a)(ix)) [§25 of HKACS];
- (e) Under the BSA (recital paragraph (d)), decisions are to be made for the benefit of the Licensed Group. JHK, under the SHA, has also agreed to align its business with the Jetstar Network Group (clause 2.3(c)) [§27 of HKACS];
- (f) If JHK is not following the agreements entered into with JAPL, JHK would be subject to losing its licence and hence not be able to operate as an airline [§28 of HKACS];
- (g) If JHK was to not approve of one of JAPL’s decisions as stipulated under the Supplemental Agreement, such non-approval still could not

be against the Jetstar Business Model or compromise its alignment with the Jetstar Network Group, if so they would be in breach of the agreements and again, subject to losing the licence [§29 of HKACS]; and

- (h) JET disputes are to be, if left undecided, ultimately decided by the Jetstar Group CEO (clause 29.1(f) of the BSA) [§30 of HKACS].

84. HKA submits that JHK has an obligation to adopt the Jetstar Business Model and to use the Jetstar Brand. HKA argues, inter alia, that:

- (a) The business of Jetstar Hong Kong Group will comprise the establishment and operation of an LCC applying the Jetstar Business Model (clause 2.1 of SHA). Also, each Jetstar Joint Venture forms part of the Jetstar Group (recitals, F(ii) of JVCA). There is an impracticality in JHK in not following the Jetstar Business Model in that it is at risk of losing its licence [§32-33 of HKACS]; and
- (b) JHK is to only be 'Jetstar' branded and is not to carry any sub-branding. It must also not use 'Jetstar' without JAPL's consent, other than as specified in the Brand Guidelines (Clause 6.8(a) of the BSA) [§35 of HKACS].

85. HKA further contends that the joining of Shun Tak as shareholder, the amendment to BSA in May 2014 and the Supplemental Agreement are made solely for the application for licence. HKA contends ATLA should give little weight to the Supplemental Agreement as the approval power would not be effected in practice, given that such decision could be contradictory to the BSA

or the SHA [§38-46 of HKACS].

K. HKE's closing submissions

86. HKE filed its closing submissions ("HKECS") on 4 February 2015. As far as the meaning and scope of PPB requirement is concerned, HKE highlights the following key points:

- (a) Given that the Basic Law is a constitution document, reference to the common law interpretation of the term "PPB" ought to be employed in the inquiry. Adopting the common law interpretation, the natural and ordinary meaning of the term ought to be employed as that is the axiom of interpretation at common law [§6-7 of HKECS];
- (b) The test espoused by all the three English cases (i.e. *The Rewia*, *The Polzeath*, *Faz*) and the US case (i.e. *Hertz*) is the same, and that is that one looks at where is the ultimate control and management of a company. Ownership is relevant only insofar as it coincides with the issue of control and management [§17 of HKECS];
- (c) The criteria described in HKE's opening all ultimately lead to where is the ultimate control and management or "the nerve centre" of a company in accordance with the common law [§18-19 of HKECS];
- (d) the ICAO Conference papers are regarded as irrelevant to the ATLA's determination as the model text is the form of words that was recommended for participating countries or territories to use in the event that they adopt an open skies policy [§22 of HKECS];
- (e) JHK's reference to various taxation arrangements between Hong Kong

and other countries are irrelevant given that they deal with minimisation of double taxation and not with interpretation of the Basic Law or the application of the HKSAR's aviation policy [§26 of HKECS];

- (f) JHK's approach to include other factors as relevant considerations is inadequate and inconsistent with that adopted by the English authorities cited [§28-32 of HKECS];
- (g) Licensing by ATLA to operate scheduled services is a necessary step to obtain designation and allocation of traffic rights by the HKSAR Government. An applicant for ATLA licence should also have a PPB status that is not incompatible with the criteria that will in turn be used by THB in the designation of airlines [§34&37 of HKECS];
- (h) The benefit of each (i.e. ATLA and THB respectively) determination of PPB does not necessarily or automatically carry forward to the next decision, but it makes sense for there to be a reasonable level of alignment of the PPB determination criteria [§45 of HKECS];
- (i) In order to ensure consistency in application between Articles 134(2) and 134(3) of the Basic Law, there is considerable merit for ATLA to take account of the considerations and such other factors that the HKSAR Government has stated that it may take into account when determining PPB for the purpose of designation [§47 of HKECS]; and
- (j) HKE submits that the THB considerations are consistent with and ultimately lead to the common law test, that is where is the ultimate control and management or "the nerve centre" of an airline [§50 of HKECS].

87. HKE submits that JHK does not have a PPB in Hong Kong due to the following key reasons:

- (a) ATLA ought to look at the substance rather than the form and it is helpful to review the sequence of events and the powers and obligations that are described in the submitted documents [§51&53 of HKECS];
- (b) HKE does not accept that the joining of Shun Tak as shareholder of JHK is a bona fide structure as a one-third shareholding can obtain 51% voting rights [§59 of HKECS];
- (c) Shun Tak has 51% voting rights, but it has limited powers and cannot even pass an ordinary resolution. Shun Tak does not ultimately control JHK Board in relation to matters such as appointment and removal of CEO and Chairman, approval of the strategic plan and budget and disposal of assets etc. [§60-61 of HKECS];
- (d) All network decisions are made subject to the decisions of the Flying Committee from which Shun Tak is notably absent [§62 of HKECS];
- (e) The business of JHK is that of the Jetstar Business Model. The shareholders are obligated to follow the Jetstar Business Model and are in effect locked-in to the model and cannot adopt a different model without the agreement of JAPL [§69 of HKECS];
- (f) A number of illustrative provisions in the SHA and the BSA¹⁰ strengthen and support the position that JHK is a conduit or branch for JAPL [§71 of HKECS];
- (g) The ACCC submission indicates that:

¹⁰ Clause 2.4(a), 2.4(c), 2.4(d) and 2.7(d) of the SHA and clause 4.2(a), 10.2(a)(b), 11.1(b), 11.8(b)(i), 11.8(c), 14.3(b), 7.2(c) of Schedule 4, clause 6.1 of Schedule 4, clause 9.1 of Schedule 4, clause 1.1 of Schedule 3, clause 12.2, 16.2, 17.6 and 29.3 of BSA

- (i) JAPL and Qantas intend to expand the Jetstar Network as part of the Jetstar Pan Asia Strategy;
 - (ii) The internationally aviation regulatory environment makes it impossible for the Qantas Group to wholly or majority own an airline outside Australia;
 - (iii) JAPL and Qantas have developed an effective “dual brand” strategy in Australia and offer other Jetstar joint ventures in Asia alongside such strategy;
 - (iv) In order to overcome the regulatory and structural difficulties, Qantas and JAPL have established the Jetstar Business Model;
 - (v) Under the JVCA, the parties propose to operate a single fully integrated organisation by coordinating their operation and activities; and
 - (vi) Integrated management of all operational, commercial and procurement activities of existing and future Jetstar Joint Ventures including network pricing is necessary to provide scale and connectivity via an optimised Jetstar brand presence [§72 of HKECS];
- (h) The freedom of action that is ostensibly allowed for in the Supplemental Agreement and the Clarification Letter is limited as any substantial variance is subject to veto per the powers that the shareholders have [§76 of HKECS];
- (i) The Supplemental Agreement and the Clarification Letter would be:
- (i) contrary and anathema to the Jetstar Business Model as set out in the BSA and would make the business model unworkable; and
 - (ii) in conflict with SHA and the JVCA in that JHK’s business shall be

coordinated and controlled by JAPL [§77 of HKECS];

- (j) The Supplemental Agreement and the Clarification Letter did not expressly refer to the SHA and the JVCA [§78 of HKECS]; and
- (k) If a would-be Hong Kong carrier that is both heavily outsourced to and directed by a foreign carrier is determined to have a PPB in Hong Kong, such PPB determination would be counter to the Basic Law as it not only does not support the HKSAR as a centre for aviation per se for investment, employment and expertise, but also is for the transfer of a large part of the economic value of Hong Kong's aviation industry to overseas and to a foreign airline [§87 of HKECS].

88. In its conclusion, HKE summarises its arguments in the following key points:

- (a) Owing to regulatory environment which makes it impossible for Qantas to wholly or majority own airlines outside Australia, Qantas through JAPL went looking for a joint venture partner that would work with to achieve its business objectives of having a Pan Asia network so as to deepen the presence of the Qantas Group and the Jetstar Group in Asia Pacific [§91 of HKECS];
- (b) The relationship between JHK and JAPL is not one per a "normal" outsourcing arrangement. JHK and its shareholders are contractually required to act in a certain way, and for the benefit of JAPL. Those obligations are described in the BSA, the SHA, and the JVCA [§92 of HKECS]; and
- (c) The reality and substance of the relationship between JHK and JAPL is

akin to JHK being an overseas branch of JAPL, or indeed as outsourced partner or contractor of JAPL, with considerable obligations but with limited real autonomy [§94 of HKECS].

L. JHK's closing submissions

89. JHK filed its closing submissions (“JCS”) on 11 February 2015. At the outset, JHK highlights that the Objectors have failed to established the requisite legal basis for asking ATLA to “disregard” the Supplemental Agreement and the Clarification Letter [§8 of JCS]. JHK further points out that the Objectors’ cases amount to an allegation that the arrangements that JHK has presented to ATLA are in effect sham arrangements [§14 of JCS].

90. JHK argues that the Objectors’ claim is entirely fallacious due to the following key reasons:

- (a) The documents relied upon by CPA-HKDA show clearly that Qantas and JAPL are fully conscious of the different regulatory requirements in the various jurisdictions and they are prepared to do whatever that are necessary to fully comply with the local laws and regulations;
- (b) Hong Kong also imposes its own regulatory and constitutional requirements. Qantas and JAPL have demonstrated that the pursuit of the Jetstar Business Model has not prevented them from conducting themselves in a flexible manner in order to satisfy Hong Kong’s requirements;
- (c) The fact that the Supplemental Agreement and the Clarification Letter

are to improve JHK's position before ATLA on PPB reinforces JHK's case that those documents were entered into for the purpose of ensuring that the ultimate management and control of JHK reside and are effectively exercised in Hong Kong;

- (d) The fact that the Clarification Letter was made shortly before the inquiry in no way undermines the genuineness of the parties' purpose;
- (e) CPA-HKDA's assertions on the parties' supposed "purpose" and timing are far from being cogent evidence of any kind to show that the documents were "sham" or "window dressing";
- (f) It is trite law that parties to any contractual document are at liberty to vary and amend the document to suit their purposes. Applying the normal approach to interpretation, where there are any inconsistencies between the BSA and the later documents, a tribunal will have no difficulty giving effect to the latter documents according to the express terms thereof;
- (g) The statements made in the ACCC submission were simply for different purposes, whereas the Supplemental Agreement and the Clarification Letter were for the purpose of ensuring the ultimate management and control of JHK are in Hong Kong. Qantas and JAPL have demonstrated their readiness to comply with local regulations and if that entails certain flexibility being given to the "Jetstar Business Model" for the purpose of satisfying the PPB requirement in Hong Kong, that was precisely what they were prepared to, and did, give;
- (h) To the extent that there is any technical defect in the Supplemental Agreement and the Clarification Letter as to their execution by JHK, that can be speedily addressed by a board resolution; and

- (i) There is no evidence showing that the parties to the Supplemental Agreement or the Clarification Letter, or the shareholders behind JHK, had a different agreement or intention which show that the terms of those documents were not intended to be implemented or complied with [§27 of JCS].

91. As far as the correct approach to evaluating the detailed evidence is concerned, JHK contends that the correct focus is upon the practical realities of the situation and it is neither proper nor sensible to try to abstractly compare different business and operational aspects of an airline to assess which are qualitatively or quantitatively dominant [§40 of JCS]. Moreover, JHK stipulates that ATLA must consider the matter (i.e. JHK's business) holistically and realistically [§45 of JCS]. JHK highlights the following key points:

- (a) The involvement of Shun Tak can only have the effect of strengthening JHK's position as to its PPB in Hong Kong. There is no basis for contending that Shun Tak has agreed to join in the JHK venture for the purpose of presenting a false or misleading picture as to JHK's PPB [§34 of JCS];
- (b) There is no significant change to the relationship between Mr Lau and Ms Hrdlicka because even before May 2014 the prevailing reality was that Mr Lau was not dictated to by Ms Hrdlicka or anyone else from JAPL or Qantas as regards his running of JHK as its CEO [§49 of JCS];
- (c) The BSA must be read with and subject to the provisions of the Supplemental Agreement and the Clarification Letter, the clear and overriding effect of which is to confirm and ensure that ultimate control

- and management of JHK resides in Hong Kong [§74 of JCS];
- (d) With or without the Supplemental Agreement, the Jetstar Business Model has an inherent flexibility contractually built into it in many respects to allow it to be adapted to local markets [§75 of JCS];
 - (e) It is expressly recognised in the BSA that nothing in the agreement or the relationship created by the BSA allows JAPL to operate or control JHK's business, or entitles JAPL, or anyone else to use the air traffic rights which may be granted to JHK (BSA Recital (e)) [§76 of JCS];
 - (f) The Jetstar Business Model governs day-to-day because JHK's own shareholders have agreed that it is in the best commercial interests of the venture that it should. The use of the model is itself an exercise in choice by the JHK shareholders [§79 of JCS];
 - (g) The clear advantage to JHK in using the Business System is that it is a tried and tested system, which a proven track record, which has been recognised and selected by the investors of JHK for its obvious practical and commercial advantages [§84 of JCS];
 - (h) As confirmed by the Supplemental Agreement and the Clarification Letter, JHK has not transferred control over JHK's central functions as an airline to JAPL [§85 of JCS];
 - (i) It is important to note that coordination between airlines (CPA included) occurs frequently. Coordination between two competing airlines is also common [§90-91 of JCS];
 - (j) As for financial management, it will be noted in respect of the BSA that:
 - (i) JHK also engages JAPL to develop a finance policy which meets JHK's local needs;

- (ii) whilst JHK agrees to comply with the finance policy, JAPL will not unreasonably withhold approval for changes to the policy based on the local requirements of JHK; and
 - (iii) “policies” are expressly covered by the Clarification Letter and the Supplemental Agreement and JHK has the overriding right to decide that matter [§103 of JCS];
- (k) All shareholders acknowledge the importance of conducting a safe and efficient business, and that safety is the highest priority of JHK Board and management (SHA clause 2.7(a)). The adoption of Jetstar’s safety standards is for the protection of the Jetstar Brand (SHA clause 2.7(c)) [§129 & 131 of JCS];
- (l) On purchasing, pursuant to the SHA:
 - (i) JHK operates on a “fully commercial basis” and is “free to invite bids simultaneously from Jetstar Group and from other manufacturers or suppliers”;
 - (ii) JHK may participate in Jetstar Group Fleet Orders for aircraft (schedule 4 to the SA) within the initial fleet plan, if JHK Board determines that “such offer is most commercially attractive” to JHK; and
 - (iii) Clause 2.3(e) of the SHA overrides any inconsistent provision in the BSA. That therefore overrides BSA Clause 14.3 relating to provision of aircraft. [§132 of JCS]
- (m) Clause 14.3(s) of the BSA confirms clause 2.3(e) of the SHA that JHK is not obliged to make a commitment in respect of all or any of the aircraft proposed by JAPL. Clause 2.3(e) of the SHA (which overrides the BSA) provides that JHK “shall be free to decide which

one of the bids is the most commercially attractive bid to JHK and such bid shall accordingly be accepted” [§133 of JCS];

- (n) Under clause 14.3(b) of the BSA, JAPL will determine the specifications and configuration of the aircraft, coordinating with JHK to ensure that the specifications and configuration comply with any local or national regulations. That is advantageous for JHK to adopt the same or similar specification and configuration for a number of reasons (e.g. having a model that has been operated for many years and proved to work) [§134 of JCS];
- (o) Schedule 4 to the SHA (relating to Jetstar Group Fleet Orders) does not have the effect of undermining JHK’s right enshrined in clause 2.3(e) of the SHA to order aircraft from other manufacturers or suppliers. As to the acquisition of nine aircraft and subsequent sale of six aircraft by JHK, those decisions as ones regarding aircraft were decisions of JHK Board as required by the SHA (Schedule 2 Clause 3(d)) [§136 of JCS];
- (p) On network and scheduling, JHK engages JAPL to provide supporting technical analysis for the network considered by JHK. JHK does not have to accept or have regard to those recommendations [§142 of JCS];
- (q) The Clarification Letter makes clear that “validation” is a matter covered by the Supplemental Agreement. It is a decision in the delivery of outsourced services for JHK and can be overridden by JHK Board. Decision by JET and Jetstar Group CEO are both covered by the Clarification Letter and can be overridden by JHK Board [§143(2) of JCS];
- (r) JAPL reserves the right to determine pricing, scheduling and capability allocation on overlap routes. Such “determination” is also covered by

the Clarification Letter and the Supplemental Agreement, and hence a decision which can be overridden by JHK Board [§143(3) of JCS];

- (s) JAPL, after consultation with JHK, is responsible for developing, agreeing and managing all airline partnerships with JHK and for providing ticket systems and platforms for those matters. JHK may reasonably object and objections are raised to JET. Both decisions regarding airline partnerships, etc. and JET decisions are covered by the Clarification Letter and the Supplemental Agreement and can be overridden by JHK Board [§134(4) of JCS];
- (t) The coordination arrangement as regards network and scheduling only applies where JHK and another Jetstar branded airline fly on the same route and therefore is not a matter which would likely affect many of JHK's flights [§148 of JCS];
- (u) JAPL recognises that JHK CEO has ultimate accountability for the financial performance of its business. In delivering the services as regards technical pricing and revenue management, JAPL is obliged to follow any reasonable direction from JHK CEO in relation to pricing and inventory management [§151 of JCS];
- (v) JAPL must also participate in regular detailed discussions with JHK relating to all elements of fare and tariff specifications and policies and consider all feedback from JHK [§152 of JCS];
- (w) Insofar as JHK might be said to be obliged under the BSA to comply with any specifications or decisions made by JAPL in the delivery of those services, such specifications and decisions are covered by the Clarification Letter and the Supplemental Agreement and can be overridden by JHK Board [§156 of JCS];

- (x) Any decisions made in the area of Government/International Affairs are subject to the overriding decision of JHK Board under the Clarification Letter and the Supplemental Agreement [§159 of JCS];
- (y) JHK has adopted the Jetstar brand as it is a well-recognised brand in Asia and has been used by other established Jetstar branded airlines. By adopting the Jetstar brand, JHK will benefit from the market recognition which the brand name has gained over the years. JHK also expects substantial savings in its marketing costs. Some of the benefits and savings are obtained through access to distribution, sales and marketing channels (“the Common Channels”) that JHK shares with other Jetstar branded airlines [§160-163 of JCS];
- (z) Insofar as the BSA provides that JHK “agree to offer” products through the Common Channels to ensure consistency across the Jetstar Group as the only channels, it expressly provides that JHK may “reasonably object to using any Common Channel”. The resolution of that objection, either through JET or the Jetstar Group CEO, will be a decision covered by the Clarification Letter and the Supplemental Agreement and can be overridden by JHK Board [§164(2) of JCS];
- (aa) JAPL will follow any reasonable direction from JHK CEO in relation to:
 - (i) alternative booking channels and technologies;
 - (ii) providing Specifications for payment channels for consumers and travel agents for JHK’s business; and
 - (iii) forms of payment by both consumer and travel agents across all channels and all payment methods [§164(3) of JCS];
- (bb) JHK is entitled to provide advice to JAPL regarding such localisation

(i.e. tailoring the delivery of JAPL's services to recognise the cultural and local differences in the Hong Kong market). If JAPL decides not to follow such advice, JHK board may override such decision under the Supplemental Agreement and the Clarification Letter when it considers that to be appropriate [§166 of JCS];

(cc) As licensor of the Jetstar brand, JAPL is entitled to a certain level of protection of that brand, and the intellectual property arising from it. To the extent JHK is a user of the brand, it is under contractual obligations to protect it. It also benefits JHK as a user of the brand by having the assurance that other Jetstar branded airlines are protecting the brand in the same way [§169 of JCS];

(dd) Any decision relating to ancillary business are covered by the Clarification Letter and the Supplemental Agreement and JHK Board has an overriding right to decide [§173 of JCS];

(ee) The turn-key service include certain "mandatory IT systems". Those systems enable JHK to enjoy the benefits of scale whilst offering to JHK's customers a common experience shared with the customers of other Jetstar brand airlines [§179 of JCS];

(ff) JAPL provide corporate communications support to JHK. JHK has agreed to adopt common protocols developed in consultation and collaboration with JHK and JAPL. That helps to ensure alignment and consistency of communications amongst Jetstar branded airlines and supports the common Jetstar brand [§183 of JCS]; and

(gg) If there are conflicts arising between JHK and JAPL in the area of corporate communications and marketing, JHK will have the right to make the ultimate decision under the Supplemental Agreement and the

Clarification Letter [§186 of JCS].

92. JHK argues that CPA-HKDA seeks to correlate the “core business services” (i.e. Schedule 3-11 to the BSA) to the so-called “neural functions” (Appendix 2 to CPA-HKDA’s closing submissions) and confuses a number of different concepts, particular branding, “input” (in terms of services) and “control” [§188-190 of JCS].

93. JHK contends that the fact that an airline adopts a shared brand used by several other airlines or licences a well-known airline brand, does not put the PPB of that airline to be outside Hong Kong [§191 of JCS]. Also, “input” in the sense of providing services (albeit in a diversity of “core” areas) also does not mean that the PPB of the recipient of such services is outside Hong Kong, or resides where such services are provided [§193 of JCS]. Furthermore, the place of “control (as explained in *Hertz*) means “the place where a corporation’s officers direct, control and coordinate the corporation’s activities, i.e. the “nerve centre” [§195 of JCS].

M. Oral closing by the parties on 14 February 2015

94. The points raised by the parties during the public inquiry on 23 to 24 January 2015, in particular those relating to the cross examination of Mr Edward Lau, have by and large been covered in the parties’ written closing submissions. At the inquiry on 14 February 2015, the parties made their oral closing and further representations.

95. At the outset of the public inquiry on 14 February 2015, we invited the parties to address by way of their oral closing the following issues:

- (a) The implications of the ACCC submission, and also JAPL's submission to the Rural and Regional Affairs and Transport Committee of the Australian Senate, on the PPB of JHK or how it would not impact on the PPB of JHK in that sense.
- (b) As regards the substance-over-form point, ATLA would like to be addressed on how to give weight to the relevant documents, bearing in mind that the Applicant has not started its operations in any main way.
- (c) Relating to the question of control, does the fact that relatively speaking, Shun Tak, which is the Hong Kong shareholder of the Applicant, has lesser experience in aviation operations than the other two foreign shareholders, give rise to any implications on the control of JHK?
- (d) The parties' views as regards the factors that THB would consider when determining PPB, in particular the factors under points (a) to (c) of THB's criteria.

96. CPA-HKDA started the oral closing. It highlights the following key points:

- (a) the common law test (i.e. ultimate management and control) is the test for PPB and CPA-HKDA disagrees with JHK's approach that the common law test is just one consideration;
- (b) in terms of the substance-over-form point, the test is one of determining, as a matter of practical matter of fact as to where the ultimate control

and management is exercised with regard to the Supplemental Agreement and the Clarification Letter (on which JHK heavily relies).

- (c) CPA-HKDA considers the Supplemental Agreement and the Clarification Letter to be ‘window-dressing’ and ‘artificial’;
- (d) the decisions of forming JHK as a joint venture to run Jetstar Business Model, purchasing nine aircraft for JHK and appointing JHK CEO and the directions given by JAPL on finance policy, human resources and by way of operation manual have provided strong evidence that the ultimate management and control of JHK is not in Hong Kong;
- (e) the SHA binds all shareholders to operate on the Jetstar Business Model;
- (f) the Supplemental Agreement and the Clarification Letter are found to be legally incoherent when read together with the SHA;
- (g) in any case, the SHA should have precedence over the others; and
- (h) the credibility and reliability of Mr Lau’s witness is questioned.

97. By way of oral closing, HKA makes the following key propositions:

- (a) JHK is not a Hong Kong homegrown airline but conceptualised and formulated in Australia. It has been designed to operate as a branch of JAPL and it is controlled by its headquarters which is in Australia. Granting the licence to JHK will open the floodgates and Hong Kong’s air traffic rights which are something precious to the economic interests of Hong Kong will go to the hands of a foreign airline;
- (b) Despite a 51% voting right of Shun Tak, the shareholders of JHK cannot pass resolutions without also having an affirmative vote from

JAPL. Board extraordinary approval and decisions of the Excom are likewise subject to JAPL's veto power;

- (c) JHK CEO also reports to the Jetstar Group CEO and the majority of JHK's business services are controlled by JAPL through the BSA; and
- (d) JHK has the obligation to adopt the Jetstar Business Model and it must use the Jetstar brand.

98. In its oral closing, HKE submits, inter alia, that:

- (a) the case is where a foreign carrier wishing to operate scheduled services out of Hong Kong as part of its pan-Asia strategy. Given the regulatory hurdles, that foreign carrier has come up with a plan in the form of a business model that gives it ultimate management and control of a carrier set up in Hong Kong that is in the guise at least of being a Hong Kong carrier, and thus able to satisfy the Hong Kong regulatory environment and use traffic rights of the HKSAR;
- (b) According to the SHA, the JVCA and the BSA, the foreign carrier not only has the ultimate say as to how JHK operates its business, including where they fly, and imposing structures on where they may not fly, the pricing of the fares, marketing and sales, the choice of aircraft, but also the nomination of JHK CEO, whose role is to make decisions on the day to day operation of JHK. JHK is a tool used by Jetstar Australia and Qantas to act as a branch or business unit of Jetstar Australia and Qantas, and whereby JHK is also serving the broader group of Jetstar through market intelligence, traffic rights, support, negotiations, and service provisions, as well as procurement;

- (c) Even with 51 per cent voting right by Shun Tak, Shun Tak cannot even pass an ordinary resolution. For an ordinary resolution to pass, it requires 80 per cent of the votes of shareholders present and entitled to vote, hence, Shun Tak does not control the voting power of JHK;
- (d) the Supplemental Agreement and the Clarification Letter are regarded as lacking credibility, given the lateness of their creation, and that they were created and crafted for the sole purpose of improving on preparation of JHK's application;
- (e) There is no evidence of how those two documents in reality take precedence over the BSA. Both documents are actually in conflict with the Jetstar Business Model set out in the BSA and with the SHA and the JVCA. If the Supplemental Agreement and the Clarification Letter have in effect varied the obligations of the parties in the BSA, JHK cannot exercise the powers alleged in the Supplemental Agreement and still work under the Jetstar Business Model; and
- (f) HKE reiterates that to ensure consistency in the application of Article 134(2), and Article 134(3) of the Basic Law, it would be unhelpful and counter-productive if ATLA were to adopt PPB determination criteria that are different to those considered by THB.

99. JHK started off the oral closing by way of an analytical discussion to repudiate that JHK's PPB was in the mainland China. JHK contends that none of the Objectors argue that JHK has its PPB in the mainland China notwithstanding that China Eastern is entitled to veto certain decisions. Moreover, China Eastern is also entitled to nominate the senior executives and the executive vice-presidents for the appointment by the Excom. And one of

the executives nominated by China Eastern is the CFO. Notwithstanding all of those special powers which China Eastern has, there is no controversy that JHK's PPB is not in the mainland China. The analysis shows that many of those rights and powers are equally enjoyed by the three shareholders. But, there cannot be three principal places of business.

100. JHK also argues that the place where the directors meet is not irrelevant. The reason is: all the three shareholders having equal equity interests do reside in three different places, so where they choose to conduct their business by directing the company as a board is clearly highly relevant to the assessment.

101. JHK further submits that JHK employs its people in Hong Kong. When one talks about the place of business, or principal place of business, obviously it is important to see where its employees actually operate, and where its management staff actually operate.

102. JHK points out that if there is a licensor of a brand exercising certain control over the brand, that does not qualify as ultimate control and management which goes into the assessment of principal place of business.

103. Of even greater importance, although Qantas and JAPL have their own model, which is called the Jetstar Business Model, at the same time, they are very sensitive to the regulatory requirement of the different jurisdictions in which they wish to participate. JHK is the prime example to show that Qantas and JAPL are flexible. There is nothing wrong in seeing that there is a requirement of PPB in Hong Kong, and if that means to vest effective and ultimate control and management in Hong Kong, and if that means it is necessary for JAPL to give up

certain rights, they are willing to do so, and they have done so. Indeed, what the Supplemental Agreement and the Clarification Letter do is to alter the rights and powers being given to JAPL. But it does not really alter the services which have to be provided by JAPL.

104. JHK adds that even for dispute resolution, Jetstar Group, or JAPL, has also given up its power in favour of JHK, and that is clearly reflected in the Clarification Letter. In citing some examples for illustration, JHK demonstrates that the Supplemental Agreement and the Clarification Letter are to vary certain parts of the BSA. If that is the genuine intention, there is no reason why such intention should not be given effect too.

105. JHK stresses that there is nothing to show that by acting on the Clarification Letter and the Supplemental Agreement, Qantas or JAPL would be acting in any way which is inconsistent with the authorisation given. The Clarification Letter and the Supplemental Agreement means that there is more independence and less control over JHK.

106. There is nothing to show that by giving up some rights or some power under the BSA to a local airline, they no longer deserve the authorisation, because all that means is that it would loosen the control, increase the independence of the local airline, and reduce the possibility of any anti-trust behaviour.

107. With regard to the questions raised by ATLA, CPA-HKDA replies that:

- (a) As far as the ACCC submission is concerned, its objectives include

securing air traffic rights, optimising profits for Qantas group, and setting out the operations of Jetstar integrated business model. So, it is like a blueprint governing the operations of the integrated business model. But, it is not clear as to the implications on JAPL or JHK as it is a document for the Australian government;

- (b) As regards the second question, it has been duly addressed in the closing submissions;
- (c) For the third question, the directors from Shun Tak, or even from China Eastern, would obviously be able to offer some opinion but the whole business really has the guide from JAPL because of the Jetstar Business Model; and
- (d) As regards the fourth question, point (b) of THB's criteria is to be emphasised and if (b) and (c) are not separate tests, then (b) and (c) are part of (a). CPA-HKDA is agreeable to THB's adopting the criteria as PPB assessment.

108. JHK has addressed the first two questions raised by ATLA in the above arguments. As regards the third question, JHK states that all the three shareholders have their own unique contribution. China Eastern's contribution is in relation to the China market; JAPL, in relation to the running of a low cost airline; and Shun Tak, in relation to the local situation and the travel industry in Hong Kong, and to a certain extent in Macau as well. So all of them play an equally important function in the successful operation of the airline. As regards the fourth question, point (a) of THB's criteria should be the ultimate test while (b) and (c) may be aspects of it which ATLA can take into consideration. However, by no means should those be the only matters which should be looked

into.

109. A new point was raised by CPA-HKDA during the public inquiry. CPA-HKDA submits that:

- (a) The SHA was the one which was entered into between JIGH, Eastern Air Overseas (HK) Corporation Ltd, Go Harvest Investments Ltd (being Shun Tak's subsidiary), and JHK; and
- (b) Although the Supplemental Agreement (which was endorsed by Ms Pansy Ho, the managing director for and on behalf of Shun Tak Holdings and Mr Tang Bing on behalf of China Eastern Airlines) is actually not a document which was signed for and on behalf of JIGH. It was instead signed by Jetstar Group CEO for and on behalf of JAPL; and
- (c) According to the SHA, the BSA is defined to mean the February 2013 BSA (rather than the BSA that may be amended from time to time).

110. With regard to the new point raised by CPA-HKDA, JHK has the following key responses:

- (a) As every agreement is capable of being amended and if one reads the agreement purposively, and in the light of the agreement itself, it goes to show that it must encompass the agreement as amended from time to time, and not simply the exact wording of the agreement frozen at a particular point in time; and
- (b) As to the signing parties, the two parties are JAPL on the one hand and JHK on the other. And those are exactly the two persons or the two

parties which signed the agreement. Although they are not exactly the parties which are the parties of the shareholders, but clearly, what the endorsement goes to show is that the other two shareholders groups have approved those amendments.

4. ATLA'S RULING ON SPECIFIC APPLICATIONS RAISED AT THE PUBLIC INQUIRY

111. There were specific applications put forth before ATLA at the public inquiry. It would be appropriate for us to set out the basis of our ruling in this decision.

A. CPA-HKDA's skeleton argument with regard to restriction on the use of BSA

112. Prior to the commencement of the public inquiry, CPA-HKDA wrote to ATLA on 16 January 2015 seeking ATLA's direction with regard to making reference to the BSA at the public inquiry. Having due regard to the views of JHK and the Objectors, we informed the parties of ATLA's view on 21 January 2015 as stated in paragraph 33 above.

113. In response to ATLA's views of 21 January 2015, CPA-HKDA wrote to ATLA on 22 January 2015 enclosing its skeleton argument and indicated that they would be making an application for a direction with the regard to making reference to BSA at the public inquiry.

114. At the public inquiry on 23 January 2015, Mr Yu, SC raised the application and said:

“The point of my submission will be that, first, it would not be practicable for us to proceed in this hearing without being able to read out part of the business services agreement, which is actually a core document in this case, for the reasons which I will explain.

And also, in the course of my cross-examination of witness, it would be unduly inhibitive if I would not be allowed to ask questions by reference to the text and point to particular words in the clauses.

That is part of it. But also, for the reasons that we will submit, as a matter of open justice, it would not be right and fair in these proceedings for a core document and the terms of the core document to be subject of restriction, so that the public who are seeking to follow these proceedings would actually not be entitled to have an understanding of what these issues are.” [Page 106-107 of Transcript of 23 January 2015]

115. Given the nature of the BSA, we consider that it would not be appropriate to deal with the matter on the basis of a blanket approval that confers a simple “yes” or “no” answer to the request. Instead, there are merits (and indeed more pragmatic) for the panel to deal with it on a case-by-case basis as and when such request arises. In that case, if JHK wishes to object to specific texts of the BSA to be read out by the Objectors in the course of the public inquiry, then ATLA can hear the matter and having due regard to the circumstances of that particular case, decide whether or not such texts should be read out in the public inquiry.

116. The parties are agreeable to this approach for dealing with the issue about reading out specific text of the BSA at the public inquiry.

B. The Clarification Letter by JHK

117. By way of submitting its reply submissions on 20 January 2015, JHK specifically requests ATLA to grant leave to include a supplemental witness statement by Mr Edward Lau in the Applicant's evidence. The supplemental witness statement refers to the Clarification Letter dated 20 January 2015 entered between JHK and JAPL.

118. On this, at the outset of the public inquiry on 23 January 2015, Mr Mok, SC said:

“This arises from certain doubts which have been set out in the submissions of Cathay Pacific and Dragonair, and since the two parties to the agreement are the parties who are supposed to set out or to have a common understanding on the effect of the Supplemental Agreement, they have agreed to set out both what they wish to clarify as well as whatever agreement they want to make, so that any doubt arising from the effect of the Supplemental Agreement is set out without any doubt or ambiguity.”
[Page 4 of Transcript of 23 January 2015]

119. In response to that, CPA-HKDA suggested dealing with it on a *de bene esse* basis so that the parties could allow it to be in and argue about the effect of it and the admissibility of it later. Both HKA and HKE were amenable to this approach.

120. After hearing the parties' views, the panel has considered the case and directed that the supplemental witness statement of Mr Lau and the Clarification Letter dated 20 January 2015 attached thereto be admitted. Parties can make submissions relating to that document. In coming to that decision, the panel has considered the following:

- (a) the Clarification Letter is to be read in conjunction with the BSA and the Supplemental Agreement, and is relevant to the understanding of the operations of JHK and hence its PPB;
- (b) there is no evidence challenging the authenticity of the Clarification Letter which is duly drawn up and signed by the contractual parties (i.e. JAPL and JHK);
- (c) the actual effect of the Clarification Letter aside, there is no reason for ATLA to reject such other information as supplemented by the Applicant bearing in mind the Objectors are also given the right to make their submissions in response to the Clarification Letter; and
- (d) as in other submissions before the panel, we will hear the parties and having due regard to all evidence and relevant factors, consider the weight that should be given to the Clarification Letter in the determination of PPB.

C. Reference to CPA's initial public offering in 1986

121. In response to CPA-HKDA's submissions of 15 January 2015, where it is stated that:

“[i]f .. one wishes, in interpreting the PPB requirement in the Basic Law, to take into account the circumstances of other airlines established in the HKSAR in the past, one will have to consider such circumstances not only when the Basic Law came into force in 1997, but also at various different points in time throughout the 1980s and the early 1990s, during which the Joint Declaration and the Basic Law were drafted and promulgated.” [§53 of CHS]

JHK furnished on 22 January 2015 the relevant extracts of CPA's prospectus for

its initial public offering in 1986 in support of JHK's contention that CPA was effectively managed by executives employed by the United Kingdom ("UK") based Swire Group.

122. At the public inquiry held on 23 January 2015, CPA-HKDA objected to admissibility of that document on the grounds of irrelevance and lateness. Due to lateness of the document, HKA and HKE indicated the need to take time to examine the document and provide comments.

123. Rather than rushing to a conclusion at the outset of the public inquiry, the panel deemed it appropriate to deal with it at a later time during the public inquiry. In that case, the panel could hear the views of the parties when they came to the discussion of the matter and having due consideration of the relevant circumstances, make a ruling on it. The parties agreed with the panel's approach to dealing with the matter.

124. After hearing the parties, the panel informed the parties on 24 January 2015 that the panel did not allow that document to form part of the record. This is based on the following key considerations:

- (a) The PPB requirement is an ongoing requirement under the Basic Law. It appears that the circumstances of another airline at a particular point of time (be it pre- or post-1997) are irrelevant to the panel's consideration of JHK's PPB;
- (b) The reference to an extract of the prospectus of the 1986 initial public offering of CPA can only give part of the picture even if the

circumstances of CPA at that time is relevant to the panel's consideration of JHK's PPB; and

- (c) The public inquiry is for ATLA to determine whether JHK now meets the PPB requirement under Article 134(2) of the Basic Law. We do not see the relevance and necessity for the panel to examine the circumstances of CPA through the scrutiny of its prospectus of 1986 initial public offering.

D. Witness statement by Mr Arnold Cheng of CPA

125. CPA-HKDA's submissions of 15 January 2015 include a witness statement by Mr Arnold Cheng (in the capacity of the General Manager, International Affairs of CPA).

126. JHK filed on 24 January 2015 an objection to the proposed witness evidence by Mr Arnold Cheng for two main reasons:

- (a) While the evidence is in the nature of expert opinion evidence, Mr Cheng's expertise in the matters addressed is neither apparent nor accepted. In any event, Mr Cheng lacks the necessary independence to stand as an expert witness; and
- (b) The evidence serves no useful purpose as it is based solely on Mr Cheng's purported experience in respect of CPA's functions as an international airline.

127. Insofar as the witness statement of Mr Arnold Cheng is concerned, the panel has considered the submissions of the parties and also will not allow that to form part of the record having due regard to the following key factors:

- (a) Mr Cheng's evidence is based on his own experience working in CPA. We are not convinced that he can be regarded as an independent aviation expert in the field;
- (b) The witness of Mr Cheng aligns with CPA-HKDA's submissions of 15 January 2015 in that he has adopted the classification of the 11 strategic or neural functions of an airline (as leveraging on CPA's operations). We do not see it appropriate to refer to such classification as a paradigm that can be applied to all other airlines (including JHK); and
- (c) The proper approach to determine JHK's PPB is to look at how JHK's business is to be operated with regard to the specific circumstances and mode of operations of JHK. Any approach for determining JHK's compliance with PPB requirement by reference to the 11 strategic or neural functions (which are predicated upon the operations of CPA) is out of context and not helpful or relevant in the panel's consideration.

128. Notwithstanding the above, we note that CPA-HKDA has not insisted on calling Mr Arnold Cheng as witness as Mr Yu, SC said in the oral closing on 14 February 2015 that:

“... So although the Tribunal had not allowed Mr Arnold Cheng to be called to give evidence, in a sense, I don't need him, because I have their own document to show that in their own regime, in their own set up, in their own Jetstar business model, those which are in schedules 3 to 11 are regarded by themselves as core business services.” [Page 25 of the transcript of 14 February 2015]

E. Access to February 2013 version of the BSA

129. CPA-HKDA raised before the close of the public inquiry on 24 January 2015 an application that JHK should disclose the February 2013 version of the BSA. Subsequent to that, JHK provided information about the February 2013 BSA by way of a letter dated 26 January 2015.

130. As there was no further exchange of correspondence from CPA-HKDA in response to JHK's information provided on 26 January 2015, ATLA wrote to CPA-HKDA on 4 February 2015 seeking to confirm that the aforesaid application was withdrawn.

131. CPA-HKDA confirmed to ATLA on 6 February 2015 that in the light of the information provided by JHK on 26 January 2015, it is no longer necessary to pursue the said application.

F. Return of BSA copies by CPA-HKDA to JHK

132. In connection with the undertaking as to confidentiality, JHK wrote on 29 January 2015 to the Objectors with regard to the disclosure of BSA provisions and request the Objectors to confirm, among other things, that all BSA copies would be returned to JHK by close of business on 16 February 2015.

133. CPA-HKDA reverted to JHK on 12 February 2015 arguing that:

- (a) The undertaking provides for the return of the documents "at the end of

the PPB Inquiry” and the PPB Inquiry will end when a decision is rendered by ATLA and not before;

- (b) Given the importance of BSA in any judicial review proceedings, copies of the BSA should not be returned until three months after the date of delivery of the ATLA decision; and
- (c) If judicial review proceedings are brought, the date should be a specific period after the delivery of the judgement in any judicial review proceedings or any appeal therefrom.

134. JHK replied on 13 February 2015 and disagreed with CPA/HKDA’s arguments in that:

- (a) an “inquiry” refers to the process at which an interested person is given an opportunity of being heard in accordance with Regulation 9(3) of the Regulations and the disclosure of BSA was only for the purpose of the inquiry; and
- (b) the reference to judicial review as contended by CPA-HKDA was inappropriate.

135. CPA-HKDA did not return the BSA copies by 16 February 2015. On 18 February 2015, JHK wrote to CPA-HKDA demanding the return of BSA copies no later than 25 February 2015.

136. CPA-HKDA replied on 25 February 2015 reiterating their position but counter-proposed that if JHK was prepared to undertake to return the copies of BSA upon request for purposes in connection with their legal remedies or

defending any challenge to ATLA's decision, they would be prepared to return the copies of BSA forthwith.

137. In its reply of 27 February 2015, JHK argued that it was premature to consider the question of possible challenge to ATLA's decision and there was no bearing whatever on the undertaking governing the access to the BSA.

138. CPA-HKDA wrote on 4 March 2015 disagreeing with JHK's arguments and saying that JHK did not respond to their counter-proposal. On 6 March 2015, JHK replied and recapitulated that copies of the BSA had to be returned after the inquiry which was closed and demanded that copies of the BSA had to be returned by 9 March 2015.

139. CPA-HKDA replied on 9 March 2015 that they disagreed with JHK's proposition and was disappointed that their counter-proposal had been ignored. JHK did not accept CPA-HKDA's argument and wrote on 12 March 2015 to invite ATLA to direct that CPA-HKDA return copies of the BSA forthwith.

140. Having considered the pertinent facts with regard to JHK's request, ATLA is of the following views:

- (a) ATLA is not a party to fix the terms of the undertaking which should be drawn up and agreed upon by JHK and the Objectors. Having said that, the terms of the undertaking should be followed by the parties who signed the undertaking;
- (b) Clause 4 of the undertaking reads "... the said numbered copies will be returned in their entirety to JHK's solicitors at the end of the PPB

Inquiry”. With due regard to the purpose of the undertaking, the term “PPB Inquiry” should be construed as the physical convening of the hearing;

- (c) There does not seem to have a strong case for CPA-HKDA to continue to keep the BSA copies on the grounds that ATLA’s decision on PPB may be subject to judicial review. Besides, if that happens, the relevant parties are not debarred from entering into another undertaking with regard to access to BSA for the purpose of the judicial review; and
- (d) All BSA copies passed to the Objectors should be returned to JHK’s solicitors after the end of PPB Inquiry which was closed on 14 February 2015, in accordance with clause 4 of the undertaking.

141. We informed JHK and CPA-HKDA of our views on 19 March 2015 and requested CPA-HKDA to return all BSA copies to JHK by 20 March 2015. CPA-HKDA then wrote on 20 March 2015 to confirm their return of the BSA copies to JHK as directed by ATLA.

5. DETERMINATION OF PPB CRITERIA

A. Regulatory regime of local carriers

142. At the constitutional level, the regulatory regime of local carriers is laid down in the Basic Law. Specific to our consideration of the case in this public inquiry, the PPB requirement stems from Article 134(2) under Chapter V Section

4 “Civil Aviation” of the Basic Law. For this reason, it would be relevant and useful to first look at the relevant provisions of the Basic Law to have an overview of the regulatory regime.

143. Chapter V Section 4 comprises Articles 128 to 135. Article 128 reads:

“The Government of the Hong Kong Special Administrative Region shall provide conditions and take measures for the maintenance of the status of Hong Kong as a centre of international and regional aviation.”

144. It appears that it is a key objective under the Basic Law for the HKSAR Government to maintain Hong Kong’s status as a centre of international and regional aviation.

145. Article 129 stipulates that the HKSAR “shall continue the previous system of civil aviation management in Hong Kong”. It is clear that the ATLA licensing process forms part of the “previous system of civil aviation management of Hong Kong” which the HKSAR Government has a constitutional duty to carry on pursuant to Article 129.

146. Article 133 stipulates, among other things, that the HKSAR Government “may negotiate and conclude new air service agreements providing routes for airlines incorporated in the Hong Kong Special Administrative Region and having their PPB in Hong Kong”.

147. Pursuant to Article 134(2), the Central People’s Government shall give the Government of the HKSAR the authority to issue licences to airlines

incorporated in the HKSAR and having their PPB in Hong Kong. Moreover, under Article 134(3), the HKSAR Government shall have the authority to designate such airlines under the air service agreements and provisional arrangements referred to in Article 133.

148. Reading Article 133 and 134(3) in context, designating airlines incorporated in and having PPB in Hong Kong may arguably be relating to the protecting of Hong Kong's air traffic rights.

149. Before addressing the PPB requirements, it is useful to have a clearer picture of the overall regulatory regime by understanding further about the background of designation of local carriers.

150. International air traffic rights are normally exchanged between countries on a bilateral basis. For obvious reasons, countries are extremely reluctant to grant landing rights to foreign airlines as they have to protect the interests of their own national carriers.

151. As regards Hong Kong's position in its negotiations for international air traffic rights in the past, it is noted that its negotiations for international air traffic rights were made through the UK Government as Hong Kong was a British colony before 1 July 1997. Hong Kong's international air traffic rights were therefore negotiated as part of the UK bilateral air services agreements.

152. The change came in 1987 when Hong Kong, in its own right, negotiated

and signed its first air services agreement with another country¹¹. The agreement was signed between the Government of Hong Kong and the Government of the Kingdom of the Netherlands on 26 June 1987.

153. As pointed out by Mr Yu, SC during the inquiry on 24 January 2015, the change from SOCE to IPPB¹² in terms of designation of local carriers was traced back to 1987. Although none of the parties were able to provide further information explaining the rationale behind the change, all we can see is that the PPB requirement has since been adopted in all subsequent air services agreements and has also been properly set out in the Basic Law for the purpose of designation. For ATLA licensing, the PPB requirement has come into place with effect from 1 July 1997 by way of Article 134(2) of the Basic Law.

154. Under the existing regulatory regime, to establish an airline in Hong Kong to provide scheduled services between Hong Kong and other places, an applicant needs to apply for an Air Operator's Certificate ("AOC"). The AOC application is stipulated under Regulation 6 of the Air Navigation (Hong Kong) Order 1995 (Cap. 448C) and issued by the Director-General of Civil Aviation. In addition, the applicant is required to apply for a licence under the Regulations. In this regard, it is important to note that under Regulation 11A of the Regulations, ATLA may grant a licence only if ATLA is satisfied, among other things, that the applicant holds an AOC. Furthermore, the applicant has to apply for designation as a Hong Kong carrier so that it would be eligible to utilise

¹¹ The relevant air services agreement is available for access at:
<http://www.doj.gov.hk/eng/laws/table1ti.html>

¹² It refers to the requirement that the designated airline is incorporated in and having the principal place of business ("IPPB") in Hong Kong. As far as the ATLA public inquiry is concerned, as there is no dispute that JHK is incorporated in Hong Kong, the only issue for ATLA to determine is whether JHK is having its principal place of business ("PPB") in Hong Kong.

the air traffic rights allocated to local airlines under Hong Kong's air services agreements with the aviation partners of the HKSAR Government.

155. The system of air transport licensing is prescribed in the Regulations, the origin of which could be traced back to 1949 when ATLA was established. Notwithstanding the various amendment exercises to the Regulations, the ATLA licensing system remained a part of the civil aviation system before 1 July 1997.

156. We see that ATLA is the mechanism through which the HKSAR Government implements Article 134(2) under the over-arching theme of continuity stated in Article 129. Moreover, having the PPB in Hong Kong is the requirement for both designation of local carriers by THB under Article 134(3) and issuing licences to local carriers by ATLA under Article 134(2).

157. As the authority to designate airlines and the authority to issue licence are vested in THB and ATLA respectively, there should be separate PPB requirements for the two distinct purposes although this does not suggest that there cannot be areas of common or similar factors for determining PPB for the two authorities.

158. Article 135 provides for those airlines in existence on 30 June 1997 to continue with their operations upon the changeover on 1 July 1997. However, it is not clear how the airlines at that time had met the PPB requirements. Nor is there evidence to the satisfaction of ATLA that the prevailing circumstances of the relevant airlines at that time could be deployed to construct the meaning of PPB test applicable to other parts of Chapter V Section 4. In any case, we agree

that as submitted by JHK, it is important to look at the present day circumstances when determining whether an applicant fulfils the PPB requirements. We consider that this should also be the approach to dealing with the PPB compliance of all incumbent licence holders.

159. The issue about drawing up specific criteria for the PPB test by ATLA emerged from the objections to JHK's application. In particular, the preliminary issue as to whether ATLA should grant a licence to applicant having its PPB in Hong Kong was put before us for consideration in the procedural hearing on 27 September 2014.

160. Whilst ATLA has not promulgated specific criteria for PPB test prior to that, we take the views that there is no change to the licensing requirements and that compliance with PPB requirements for ATLA licensing process is an ongoing requirement and it is the primary responsibility of all incumbent licence holders and new applicants to ensure that they comply with such requirements at all times. We see the merits, by way of this public inquiry, to set out clearly the PPB test that should be applied not just to JHK but also the other incumbent licence holders and future applicants.

B. ATLA's power

161. ATLA, which is an independent statutory body established under the Regulations, is responsible for considering licence applications to operate scheduled air services between Hong Kong and any point in the world.

Pursuant to Regulation 4(7) of the Regulations, the quorum at a meeting of ATLA for the despatch of business is three members.

162. Regulation 6(5) of the Regulations empowers ATLA to require the applicant to provide any information that ATLA considers necessary for determining the application. Regulation 11 of the Regulations stipulates that in exercising the discretion to grant or refuse to grant a licence, ATLA must have regard to, inter alia, representations and objections made at the public inquiry. ATLA has a duty to consider all relevant information furnished by the applicant for the purpose of considering the application, as well as the submissions made at the public inquiry.

C. Corporate structure of JHK

163. In facilitating readers' understanding of the passages to follow, it would be useful to briefly explain the corporate structure of JHK. JHK is a joint venture with equal equity investment by three shareholders. JHK's current shareholding is as follows:

<u>Shareholder of JHK</u>	<u>Ordinary shares held</u>	<u>Non-voting shares held</u>	<u>Equity interest</u>	<u>Voting right</u>
Jetstar International Group Holdings Company Limited (“JIGH”) ¹³	117,470,294	127,059,707	33 ¹ / ₃ %	24.5%
Eastern Air Overseas (Hong Kong) Corporation Limited (“CEA”) ¹⁴	117,470,294	127,059,707	33 ¹ / ₃ %	24.5%
Go Harvest Investments Limited (“GHI”) ¹⁵	244,530,001	-	33 ¹ / ₃ %	51.0%

164. JHK was initially a joint venture entity established by JIGH and CEA in 2012 and held in equal shares pursuant to a shareholders’ agreement dated 24 August 2012 and between them. On 5 June 2013, GHI entered into a restated and amended shareholders’ agreement regarding its one-third equity investment in JHK. As mentioned in paragraph 20 above, that shareholders’ agreement was further amended on 20 January 2014 (which was the one which JHK filed for the purposes of the PPB inquiry).

165. As regards the business of JHK, clause 2.1 of the SHA states that:

“The business of the Jetstar Hong Kong Group will comprise the establishment and operation of an LCC applying the Jetstar Business Model that will operate Routes both to and from Hong Kong and any related flying or non-flying activities.”

and clause 1.1 of the SHA defines the Jetstar Business Model as:

¹³ It is wholly owned by Qantas Airways Limited

¹⁴ It is wholly owned by China Eastern Airlines Corporation Limited

¹⁵ It is wholly owned by Shun Tak Holdings Limited

“the business model adopted by the Jetstar Network Group, as described in the Business Service Agreement.”

166. JHK filed the BSA in support of its PPB submissions. The BSA was entered into by JAPL (as licensor) and JHK (as licensee). Specifically, schedule 3 to 11 to the BSA sets out the core business services that JAPL can provide to JHK.

167. In support of JHK’s claim that its PPB is in Hong Kong, JHK also filed the Supplemental Agreement (as explained in paragraph 45 above) and the Clarification Letter (as explained in paragraph 64 above). As contended by JHK, the Supplemental Agreement and the Clarification Letter seek to confirm that JAPL’s decisions regarding the provision of outsourced services under the BSA can be overridden by JHK Board.

D. The nature of JHK’s business

168. We appreciate that airline business of a full service carrier (“FSC”) is different as compared to that of an LCC. Even operating as LCC, the form in which the business is operated will vary from one operator to another.

169. When construing the term “PPB”, it would be important not just to have regard to what “principal” means in the context of common law test, it is equally important to look at the “business” because for obvious reasons, the nature of business will have bearing on how the effective exercise of ultimate management and control is exercised.

170. In the case of LCC operating as a licensed brand (as in the case of JHK), it seems to be relevant to look at the provisions of the licensing agreement (i.e. BSA) to assess how the licensed brand is operated and, in particular how and by whom the ultimate management and control of the licensed business is effectively exercised.

171. While the ACCC submission by Qantas and JAPL to the Australian government is not a contractual document from the perspective of JHK, it is a published document by JAPL and is useful for the purpose of understanding the nature of the Jetstar Business Model based on which JHK's business is going to operate.

172. JHK's business is governed by the BSA and the core business services are set out in Schedule 3 to 11 to the BSA. In determining the effective exercise of ultimate management and control of JHK's business, it may be relevant to look at how such individual core business services as well as the overall licensed business (including commencement and termination of the licensed business) are ultimately managed and controlled.

173. Given the nature of the Jetstar branded business to be operated by JHK, we have to see to what extent the flexibility and overriding powers conferred upon by the Supplementary Agreement and the Clarification Letter to JHK in the operation of the licensed business are going to affect the ultimate management and control of the business and, specifically, in a way that enables JHK to effectively exercise ultimate management and control of the licensed business.

6. APPLICABLE LEGAL PRINCIPLES

174. The only issue in this matter is the meaning of the term “PPB”. In dealing with this, the Applicant and the Objectors have filed a number of authorities relied upon in support of their contentions. These authorities can be grouped into three categories:

- (i) Basic Law;
- (ii) Case law on PPB; and
- (iii) International norms.

175. The Applicant and the Objectors made their submissions as to the relevance, weight and meaning of these three categories of authorities. The Panel will examine these authorities and set out the applicable legal principles or test, and the relevant factors and considerations that have to be taken into account.

A. Basic Law

176. As bestowed upon Hong Kong under the one country two systems principle, notwithstanding that the sovereignty of Hong Kong (including the air space within the boundary of the territory) remains that of the People’s Republic of China, Chapter V Section 4 of the Basic Law provides for how the civil aviation management matters in Hong Kong are to be dealt with by the HKSAR Government.

177. The following Articles are relevant:

“Article 128

The Government of the Hong Kong Special Administrative Region shall provide conditions and take measures for the maintenance of the status of Hong Kong as a centre of international and regional aviation.

...

Article 131

The Central People’s Government shall, in consultation with the Government of the Hong Kong Special Administrative Region, make arrangements providing air services between the Region and other parts of the People’s Republic of China for airlines incorporated in the Hong Kong Special Administrative Region and having their principal place of business in Hong Kong and other airlines of the People’s Republic of China.

...

Article 134

The Central People’s Government shall give the Government of the Hong Kong Special Administrative Region the authority to:

- (1) negotiate and conclude with other authorities all arrangements concerning the implementation of the air service agreements and provisional arrangements referred to in Article 133 of this Law;
- (2) issue licences to airlines incorporated in the Hong Kong Special Administrative Region and having their principal place of business in Hong Kong;
- (3) designate such airlines under the air service agreements and provisional arrangements referred to in Article 133 of this Law; and
- (4) issue permits to foreign airlines for services other than those to, from or through the mainland of China.

...

Article 135

Airlines incorporated and having their principal place of business in Hong Kong and businesses related to civil aviation functioning there prior to the establishment of the Hong Kong Special Administrative Region may continue to operate.”

178. As mentioned in paragraphs 7 to 18 above, subsequent to the procedural meeting on 28 March 2014, JHK and the Objectors agreed that the issues as to which body (i.e. HKSAR Government or ATLA) should determine JHK's PPB and whether the determination of JHK's PPB should be made before ATLA's determination of the application should be dealt with by ATLA in the first instance. A procedural hearing was scheduled for 27 September 2014 for ATLA to determine the preliminary issues as agreed by the parties. The parties do not dispute that Article 134 (2) covers the ATLA licence under consideration here and it is for ATLA to decide if the PPB criteria are met by an applicant.

179. The Basic Law does not set out any other elaboration on the meaning of PPB. The parties have not drawn our attention to any discussion pertaining to this matter during the drafting of the Basic Law which may be prayed in aid in interpreting this term. The Panel has to refer to authorities from other jurisdictions.

B. Case Law on PPB

180. The parties have drawn our attention to four cases that discuss the concept "principal place of business", three from the English authorities and one from the United States Supreme Court.

The Polzeath

181. In the case of *The Polzeath*, [1916] P. 241 (C.A.), the Court of Appeal of England has to consider the phrase of "principal place of business" in the

context of the Merchant Shipping Act 1894 during the war. The vessel was registered as a British ship and was owned by a company registered as a British company. The title of the ship was in issue and question as to whether it could be registered as a British ship arose.

182. In October 1914, the Commissioner of Customs and Excise being in doubt as to the title of the *Polzeath* asked for evidence to be given to his satisfaction that the vessel was entitled to be registered as a British ship under the Merchant Shipping Act. Evidence was adduced showing that the affairs of the company from the time the ship was bought were directed from Hamburg by the chairman of the board of directors, a naturalized British subject of German origin. The chairman held the majority of the shares and resided in Hamburg both before and after the outbreak of war between Great Britain and Germany. The evidence was found to be unsatisfactory and an action was instituted for the forfeiture of the ship to the Crown. The trial judge came to the conclusion that the business of the company was controlled and managed in Hamburg and therefore the requirements of Section 1 of the Merchant Shipping Act 1894, in particular, the requirements that the company had to have their principal place of business in her Majesty's Dominions, was not satisfied. The owner of *Polzeath* appealed.

183. The Court of Appeal first considered the case of *Palmer v. Caledonian Railway Co* [1892] 1 QB 823, 827, 829 and cited with approval the statement of Lord Esher stating,

“I should have thought without any authority that the principal office of the company must be the place at which the business of the company is controlled and managed. The only office that answers this description is the company’s office at Glasgow. No part of the business of the company is controlled or managed, in the sense that it is independently controlled or managed, at Carlisle.”

Lopes, L.J. elaborated in *Palmer* stating “*what I understand by principal office is that office where the general superintendence and management of the business of the railway is carried on...*”

184. At page 245, Swinfen Eady L. J. continued and held that:

“And so here, in considering what is the principal place of business of the company, one has to consider the centre from which instructions are given, and from which control is exercised on behalf of the company over the employees of and the business of the company, and where control is exercised, and the centre from which the company is managed without any further control except such control as every company or the directors of a company are liable to by the larger body which they represent, the shareholders of the company in general meeting.”

185. The Panel notes that the court was looking at where the business of the company was controlled and managed but also notes the emphasis placed by Lord Esher in *Palmer*, namely, “*in the sense that it is independently controlled or managed*” (underline emphasis added).

186. The Court of Appeal applied the principle to the facts of that case and concluded that the principal place of business of the company was in Hamburg.

187. It is pertinent therefore to look at the circumstances and materials that the Court of Appeal revealed when considering the issue.

- (i) The voting power of shareholders: by reason of the shareholding of the chairman, he, his wife and another German gentleman hold over 50% of the shares and therefore in any general meeting, these three could carry by a majority of votes any proposition, and no vote adverse to his view could be carried in general meeting [page 245 second paragraph].
- (ii) The board of directors: There were two Germans and two Englishmen. The chairman has the casting vote and therefore his views would prevail [page 245 third paragraph].
- (iii) The chairman: He had a close relationship with Germany. The court concluded that the chairman was manifestly exercising the control from Hamburg over the affairs of the company [page 246 first paragraph].
- (iv) The minute-book containing record of meetings of the board: That was in Germany. The correspondence before and since the war were examined and the court concluded that in relation to the position since the war, as the evidence on decisions to charter was not forthcoming it was not possible to see if it was made by the chairman [page 246-249].
- (v) Financial control: The court concluded that as the cheques were all signed by two directors in Hamburg acting under the chairman's instructions, the financial control was in Hamburg [Page 250].
- (vi) Insurance of the ship: This was carried out under the direction of the chairman, both before and after the war.
- (vii) Virtual control and management: The place of residence of the chairman and the secretary was considered. The manager at the port of King's Lynn was acting under the direction of the chairman in Hamburg [page 251 second paragraph].
- (viii) Place of meetings and attendance: apart from a yearly meeting in

London, all other meetings of the directors, by inference, were held in Hamburg.

188. It is on the basis of these evidence that the court concluded that both before and since the war the principal place of business of that company was in Hamburg, notwithstanding it is registered in Britain [Page 252 second paragraph].

The Rewia

189. The next case relied upon by the parties is *The Rewia* [1991] 2 Lloyd's Rep 325. In that case, the company Rewia was incorporated in Liberia. Board of directors of Rewia held a meeting in Hamburg where it resolved to purchase the vessel Rewi and registered it under the Liberian flag and renamed her Rewia. The officers of the company also executed an agreement between Rewia and Turbata, a Hong Kong company, whereby the operation and management of the ship was dedicated entirely to Turbata. The shares in Rewia were equally owned by a wholly-owned subsidiary of German banks who loaned money for the purchase of the vessel. Containers were lost in a voyage containing the plaintiff's cargo. The plaintiff obtained leave and served a concurrent writ on Rewia out of jurisdiction. Rewia applied to stay the proceedings on grounds *inter alia* that it was not a necessary or proper party to the bill of lading disputes. Rewia held another board of directors meeting in Hamburg resolving to sell Rewia, the vessel, to a Belgian company. The main issue in the case relates to the capacity of the signatories to the bill of lading, which need not be considered here. Insofar as the question of the principal place of business is concerned, the

court's analysis began on page 333.

“The court has to consider the domicile of the company Rewia. The trial judge concluded that the central management and control of the company was exercised in West Germany but regarded that it was unrealistic to regard the business of Rewia as having been carried on in Hamburg. This was so because the ship was managed in Hong Kong and therefore Rewia's principal place of business was in Hong Kong.”

190. Leggatt L.J. considered the arguments and stated at page 334 (left column):

“In support of this conclusion (namely the principal place of business of Rewia was in Hong Kong) the plaintiffs argue that “*principal*” means “*main*”. I disagree: in my view it means, in this context as well as generally, “*chief*” or “*most important*”. The principal place of business is not necessarily the place where most of the business is carried out. They argue that it is wrong to construe a maritime contract by reference to *The Polzeath* which was concerned with the forfeiture in wartime of a vessel that purported to be English rather than German. The plaintiffs maintain that [Rewia's] business was really carried out in Hong Kong, and that the judge was therefore right to conclude that that was where the principal place of business was. Rightly, in my judgement, [Rewia] underscores the fact that the shareholders, directors and mortgagee banks were German; that the meetings of directors took place in Hamburg; that charters, including the relevant time charter of January 8, 1988, had to be authorised specifically from Germany, that everything about the relevant charter was German except the fact that it was into the Hong Kong branch of a German bank that hire was to be paid; that by German law profits had to be repatriated to Germany; and that, as appears from the entries in the Lloyd's registers, [Rewia's] brokers, C.F. Ahrenkiel of Hamburg, played an important role in their affairs. True it is that the day to day management of the vessel was conducted by Turbata under the management agreement, but [Rewia] points out that the managers were always answerable, and subject, to the control and direction of the German officers of the company.”

191. The court considered the statement of Lord Esher in *Palmer* quoted above and observed that a number of other authorities adopted a similar approach. When *The Polzeath* was considered, Leggatt L.J. said at page 334,

“Under section 1 of the Merchant Shipping Act, 1894 the question whether she was a British ship depended on whether the company had its principal place of business in this country. In the leading judgment Lord Justice Swinfen Eady considered the shareholding and directors of the company, the company’s financial control and banking, and the chartering and insurance of the vessel, as well as the day-to-day management which obviously had to be conducted in England. Lord Justice Swinfen Eady concluded, and the other Lords Justices agreed with him –

...that both before and after the war, and at all the material dates, the control and management of this company were in Hamburg.”

192. The test propounded at page 245 of *The Polzeath* was then cited with approval.

193. In making the conclusion as to the issues in that case, Leggatt L.J. said at page 335:

“In my judgment that there is nothing uncommercial or inapposite about the conclusion that the principal place of business is in Hamburg of a company registered in Liberia owning a ship, the earnings of which would ultimately be remitted to Germany, and about which most important decisions would be taken in Germany. That is the conclusion to which the reasoning in *The Polzeath* inexorably leads, and it is applicable here. Although the Judge purported to apply the reasoning in that case, he never asked himself from which city the business of the third defendants was “independently controlled or managed”. Still less did he attempt to identify the centre from which the company was managed “without any further control”. Had he done so, he must have recognised that, although in practice Turbata had a free hand in the day-to-day management of the vessel from Hong Kong, all that they did was to subject to the control of the directors in Hamburg. That was the centre from which the instructions were given when necessary, and ultimate control exercised. I do not consider that the reference to the “principal place” of the [Rewia’s] business requires the identification of a particular building....”

194. The Panel observes that the emphasis placed by the Leggatt L.J. on “*independently controlled or managed*” emanated from the decision of Lord Esher in *Palmer* and cited with approval in *The Polzeath*. The court in *The Rewia* considered the additional factor of day-to-day management in a different

jurisdiction. The fact that the day-to-day operations were being carried out from the place of registration and that of control and management in Hong Kong, is not determinative. The test is where the independent control and management of the company is exercised. This has to be considered in the sense of the decision-making power and not merely the day-to-day operation.

Ministry of Defence and Support of the Armed Forces for the Islamic Republic of Iran v. Faz Aviation Limited and another

195. In 2007, a similar question arose in the case of *Ministry of Defence and Support of the Armed Forces for the Islamic Republic of Iran v. Faz Aviation Limited and another* [2007] EWHC 1042 (Comm).

196. The subject matter of the claim relates to the sale of an aircraft by the first defendant, a company incorporated in Nicosia. The first defendant was beneficially owned by the second defendant who was at all material times domiciled in Cyprus. The claimant commenced proceedings against the defendants in England. Under Article 60 of the Jurisdiction Regulation, a company was domiciled at the place where it had its statutory seat or “*central administration*” or “*principal place of business*”. The issue is whether the first defendant has its “*central administration*” or “*principal place of business*” in England. The first defendant had an office in London which was dormant and no business was transacted there.

197. Langley J dealt with the issue of central administration or principal place of business at page 605. He considered the cases of *The Rewia, Palmer*, as well as *The Polzeath*. His conclusion is at paragraph 29 on page 607:

“This decision supports a number of perhaps obvious propositions:

- i) The central administration and principal place of business of a company may be, and I would add, frequently will be, in the same country;
- ii) The focus, in matters of jurisdiction, is on the country rather than any more particular location;
- iii) The principal place of business (if there is one) is likely to be the place where the corporate authority is to be found (shareholders and directors), and to be the place from where the company is controlled and managed;
- iv) The place where the day-to-day activities of the company are carried out may not be the principal place of business if those activities are subject to the control of senior management located elsewhere.”

(Underline emphasis added.)

198. Applying the facts to these tests, the court concluded at page 611:

“Had the questions been whether there was a central administration or principal place of business of Faz in 2002-4 and perhaps 2005, and, if so, where were they, I think MODSAF’s case that there were, and that they were in England, would have required a fine balance to be made on the evidence, viewing as I do the evidence of Faz with some scepticism. There is very little evidence that Faz had any other business to administer than the aircraft transaction. 4 Stanhope Gate and Mr Davies were the day-to-day centre for that business. Mr Dunn’s letters speak for themselves. On the other hand, in a real sense, the business was carried on and controlled by Mr Al-Zayat from wherever he was and that was largely in and from Cyprus, although he was also a frequent visitor to England.

But I am satisfied that MODSAF has failed to show a good arguable case that Faz had any real business either to administer or to operate after May 2005. Insofar as administration was required, by that time those who were at all active for Faz were substantially to be found in Cyprus: see para 35. Mr Wilken’s connections with England were tenuous. I do not think there was “a principal place of business” anywhere else applying the words of Leggatt LJ in *The Rewia* which I have quoted in para 27 [above]. At all times, of course, Faz (and Mr Al-Zayat) could have been proceeded against in Cyprus. That is still the case.

....

It follows that this court does not in my judgment have jurisdiction over either Defendant in respect of this claim and the Defendants are entitled to orders accordingly.”

199. In that case, the court considered the role of Mr. Davies who was resident in and worked out of England. He was primarily in charge of the sole business of the company Faz. However for tax purposes, he emphasised decisions in relation to the business of Faz must be taken outside the UK and that he was under the direct supervision of Mr Al-Zayat who was domiciled in Cyprus. As a result, the court concluded that the first defendant was not a company domiciled in England and that under the principle of *forum non conveniens*, the case was dismissed.

200. The place where decisions are made is the focus and not where the chief or main staff member operates.

Hertz Corp. v Friend et al.

201. Apart from the three English cases, the parties have drawn the Panel’s attention to the decision of the Supreme Court of the United States in *Hertz Corp. v Friend et al.*, 559 U. S. ____ (2010). In that case, two Californian citizens sued Hertz, in the California State Court. Hertz filed a notice seeking removal to a Federal Court on the basis that the plaintiffs and Hertz itself were citizens of different states. The federal jurisdiction, it contended, was engaged and that by reason of 28 U.S.C. No. 1332 (c)(1) “*a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business*”.

202. The US Supreme Court noted a number of decisions in various State courts on the definition of “*principal place of business*” in different legislations. In the Bankruptcy Act, the phrase was discussed at a Judicial Conference Committee whereby it considered the language used and the chair stated:

“All of those problems have arisen in bankruptcy cases, and as I recall the cases—and I wouldn’t want to be bound by this statement because I haven’t them before me—I think the courts have generally taken the view that where a corporation’s interests are rather widespread, the principal place of business is an actual rather than a theoretical or legal one. It is the actual place where its business operations are coordinated, directed, and carried out, which would ordinarily be the place where its officers carry on its day-to-day business, where its accounts are kept, where its payments are made, and not necessarily a State in which it may have a plant, if it is a big corporation, or something of that sort....”

203. After this statement by the chair of the Judicial Conference Committee in mid-1957, cases have been developed applying the points made. The terminologies used in various State courts and Circuit courts would suggest that the “*principal place of business*” is determined by a “*nerve centre*” test or a “*centre of corporate activities*” test.

204. In delivering the judgment of the Supreme Court, Justice Breyer stated:

“In an effort to find a single, more uniform interpretation of the statutory phrase, we have reviewed the Courts of Appeals’ divergent and increasingly complex interpretations. We conclude that ‘principal place of business’ is best read as referring to the place where a corporation’s officers direct, control, and coordinate the corporation’s activities. It is the place that Courts of Appeals have called the corporation’s ‘nerve center’. And in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, i.e., the ‘nerve center,’ and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have travelled there for the occasion).

Three sets of considerations, taken together, convince us that this approach, while imperfect, is superior to other possibilities. First, the statute's language supports the approach. The statute's text deems a corporation a citizen of the 'State where it has its principal place of business.' 28 U. S. C. §1332(c)(1). The word 'place' is in the singular, not the plural. The word 'principal' re-quires us to pick out the 'main, prominent' or 'leading' place. And the fact that the word 'place' follows the words 'State where' means that the 'place' is a place within a State. It is not the State itself.

A corporation's 'nerve center,' usually its main headquarters, is a single place. The public often (though not always) considers it the corporation's main place of business. ... By contrast, the application of a more general business activities test has led some courts, as in the present case, to look, not at a particular place within a State, but incorrectly at the State itself, measuring the total amount of business activities that the corporation conducts there and determining whether they are 'significantly larger' than in the next-ranking State. ...

....

Second, administrative simplicity is a major virtue in a jurisdictional statute. ... Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims.

Simple jurisdictional rules also promote greater predictability. Predictability is valuable to corporations making business and investment decisions.... Predictability also benefits plaintiffs deciding whether to file suit in a state or federal court.

A 'nerve center' approach, which ordinarily equates that 'center' with a corporation's headquarters, is simple to apply comparatively speaking. The metaphor of a corporate 'brain,' while not precise, suggests a single location. By contrast, a corporation's general business activities more often lack a single principal place where they take place. ...

Third, the statute's legislative history, for those who accept it, offers a simplicity-related interpretive benchmark. The Judicial Conference provided an initial version of its proposal that suggested a numerical test. ... The Conference changed its mind in light of criticism that such a test would prove too complex and impractical to apply. ...That history suggests that the words 'principal place of business' should be interpreted to be no more complex than the initial 'half of gross income' test. A 'nerve center' test offers such a possibility. A general business activities test does not."

(Underline emphasis added.)

205. The *Hertz* case promulgated the “*nerve centre*” test whereby the “*principal place of business*” is to be governed by where the corporate brain is located. Review of the day-to-day activities which might be described as general business activities is not adequate. This approach is no different in substance to that of the English decisions. Day-to-day activities do shed light on its principal place of business but it must also be shown that it is not subject to control elsewhere. The factors to be looked at include those which relates to policy decisions and directions for the conduct of the business activities of that airline. This PPB issue should, according to *Hertz*, be determined by reference to what is described as the “*nerve centre*” test identifying where the control, direction, and coordination of the corporate activities take place.

The Panel’s Analysis

206. The Panel notes that there is no need to for it to decide where the principal place of business of the Applicant is. It is adequate to dispose of the PPB issue by deciding whether or not the principal place of business is in Hong Kong.

207. It is noted that unlike *The Rewia*, where the focus was on the country rather than a particular location, under the Basic Law, the Panel is focusing on the particular location, namely Hong Kong SAR rather than the state China.

208. Drawing together the threads from the authorities cited, the Panel concludes that the following would represent the applicable test in deciding whether an airline is able to satisfy the requirement that its principal place of

business is in Hong Kong.

- (i) In determining whether the principal place of business of an applicant is in Hong Kong, the answer is not confined to where the day-to-day operations are conducted.
- (ii) The day-to-day activities of the airline may be carried out in Hong Kong but to satisfy the PPB criteria, its activities must not be subject to the control of senior management, shareholders or related parties located elsewhere.
- (iii) The airline has to have independent control and management in Hong Kong, free from directions or decisions made elsewhere.
- (iv) The nerve centre has to be in Hong Kong. By nerve centre, the Panel looks at where and by whom the decisions regarding the key operations of an airline are made. Decisions are not those of the day-to-day operations only but also those which are relevant and crucial to the business of the airline.
- (v) The core business of an airline is the carriage of passengers and goods for reward. The decisions as to where the airline can fly (i.e. route and networking) and how much it can charge for the services rendered (i.e. pricing) are two important factors, among others, under our consideration. Decisions pertaining to these matters have to be independently controlled and managed in Hong Kong.
- (vi) The mode of operation of a passenger airline may take different forms which vary from an FSC in one case to an LCC to the other. Even for the case of LCC, an airline may operate the air services under its own brand, a licensed brand or other contractual arrangement with varying

degree of dependency and control which the airline and the contracting parties may be subjected to. In other words, whether an airline is operating under FSC or LCC is but a business decision and is irrelevant to the consideration of its compliance with PPB requirement. The root of the question goes to how the airline's business is independently controlled and managed in Hong Kong. The mode of operation as set out in the various documentations and the actual implementation of the same (which is not relevant in this application) may affect the weight by which certain factors have to be assessed.

209. The factors that have been looked at by the cases cited are applicable to our consideration. The operation of an airline contains other important matters, features and characteristics that are vital to its business and upon which the test of independent control and management would have to be applied.

210. The Panel sets out the relevant factors that would be applicable generally to all companies that would be required to satisfy the PPB requirement:

- (i) Voting rights at the shareholders' meeting;
- (ii) Voting rights of the board of directors;
- (iii) Place of these meetings;
- (iv) The powers of the senior management staff, e.g. Chairman of the Board or Chief Executive Officer;
- (v) Financial control;
- (vi) Insurance being taken out;
- (vii) The site of the corporate authority, namely the location or domicile of

- the shareholders and directors where decisions are made; and
- (viii) Whether the day-to-day operation is subject to decision or direction from elsewhere.

211. In the context of an airline, there are other special features that are important to its business which are not covered above or considered in the cases. The locale where the following decisions on operation are made is highly relevant to the PPB of an airline:

- (i) The decision to purchase and dispose of its fleet of aircraft;
- (ii) The flight network or route that are to be adopted by the airline;
- (iii) The fares that are to be fixed in conducting its airline business;
- (iv) The engagement, direction and termination of the senior management staff; and
- (v) Whether the airline's business is restricted such that it does not have the ability to decide with whom or how it would operate.

212. The Panel observes that the eventuality of an airline being terminated by factors such as financial difficulties and other matters are not directly pertinent to the decision of the PPB criteria. However if the arrangement of the setting up and operation of a Hong Kong airline is such that its autonomy to continue the business is not protected in the eventuality of the termination of a licence agreement or other service contracts, the Panel believes it indicates that it is not exercising independent control and management of its own airline business.

213. In the operation of an airline, and in this particular case, the structure and powers of the Flying Committee is of vital importance. The Flying Committee makes decisions regarding network (flight routes) with regard to routes to the mainland China, fare and other related matters.

214. In order to ensure that the business of the airline is independently controlled and managed, the Panel is also of the view that there should be no prohibition in its operation such that it would not be precluded from competing fairly in the open market with other airlines, including that of any shareholder. This is not a view from the perspective of compliance with competition laws but of the independent control and management that the airline has over its own business.

Prospective review at application stage

215. The next matter the Panel wishes to observe is the difference between the cases that have been cited and this current application. In those cases, the companies involved have been in operation and therefore the court could look at the actual operation to determine the principal place of business. In this instance, the airline is not in operation yet. The Panel therefore has to look at the contractual arrangements between the Applicant and its shareholders, its Licensor and/or service providers.

216. There are a lot of arguments about “form over substance” that has been raised by the Objectors, CPA-HKDA in particular. The Panel does not find that scepticism helpful. There is no actual fact that the Panel can look at in deciding

whether or not the independent control and management and the nerve centre of the Applicant is actually in Hong Kong.

217. In the premises it is important to look at the documents as are currently presented before the Panel in deciding the PPB issue. The Panel does not need to go into the cases cited by JHK to see if these documents are or are not sham. There is no evidence nor can there be that supports the Objectors' scepticism except some weak inference drawn by the Objectors by reason of Shun Tak being added as shareholder and that the Supplemental Agreement and the Clarification Letter were provided. Any applicant is free to modify its operation / structure so as to satisfy the requirements before any decision is made.

218. The cross examination conducted by the Objectors with the witness of JHK actually reinforces the intention that JHK intends to comply with what is in the agreements including that of the Supplemental Agreement and the Clarification Letter. The Panel will decide whether or not the PPB requirement is met by reference to the documents submitted. It is wrong, in the Panel's view, to proceed on a supposition that these documents will not be acted upon.

219. The Panel notes that under Regulation 15A of the Regulations, licence holders are required to, among others, submit audited financial statements to ATLA on an annual basis. In addition, under Regulation 15D, ATLA may at any time assess the financial position of licence holders and require the licence holders to provide any relevant information. Moreover, pursuant to Regulation 15E, ATLA may revoke, suspend, attach new condition to or vary existing conditions of the licence of a licence holder if ATLA is not satisfied with the

financial position of the licence holder according to the assessment under Regulation 15D. While Regulation 15A and 15D are related to the financial position of licence holder, it is important to note that under Regulation 4(8) of the Regulations, subject to the provisions of the Regulations, ATLA may determine its own procedure (which may include other assessments and reviews as ATLA thinks appropriate). If during its regular review or such other reviews that may be called upon by ATLA (be it conducted by ATLA itself or other persons appointed under Regulation 4(6)(b)), ATLA comes to the view that the control and management of an airline is no longer independent and therefore the PPB requirement is not met, it may be able to take such actions as it thinks appropriate in order for the airline to reinstate the position to meet the PPB requirement or alternatively to issue appropriate conditions regarding the licence granted or even suspend or revoke such licence.

C. International Norms

220. The Applicant drew the Panel's attention to the international norms by reference to a news release and a document recording the conclusions and recommendations of ICAO. The Objectors contend that these are not relevant considerations as they are not part of the domestic law.

221. The first document relied on is the "Consolidated Conclusions, Model Clauses, Recommendations and Declaration" of ICAO, ATConf/5, 31 March 2003 (revised 10 July 2003). In this document, pursuant to discussions at the international level, conclusions were reached on a number of agenda items. Under Agenda Item 2.1: Air Carrier Ownership and Control, the Conference

concluded that growing and widespread liberalization, privatization and globalization call for regulatory modernization in respect of the conditions for air carrier designation and authorization in order to enable carriers to adapt to the dynamic environment. In particular, the Conference concluded that:

“ICAO has played, and should continue to play, a leading role in facilitating liberalization in this area, should promote the Organization’s guidance, keep developments under review and study further, as necessary, the underlying issues in the broader context of progressive liberalization.”

222. Furthermore, it concluded that:

“States may choose to liberalize air carrier ownership and control on a unilateral, bilateral, regional, plurilateral or multilateral basis.”

223. These two conclusions were reflected in the press release issued on 1 April 2003 where ICAO recommended that air carrier designation and authorization for market access should be liberalized. It does not urge or prefer a broad definition of “*principal place of business*” nor does the Conference information provided by the Applicant shed light on how ICAO would interpret the phrase “*principal place of business*”.

224. In the model clause, Article X: Designation and Authorization, paragraph 2(a), the phrase “*principal place of business*” was used and in the Integral Notes it reads:

“evidence of principal place of business is predicated upon: the airline is established and incorporated in the territory of the designating Party in accordance with relevant national laws and regulations, has a substantial amount of its operations and capital investment in physical facilities in the territory of the designating Party, pays income tax, registers and bases its aircraft there, and employs a significant number of nationals in managerial, technical and operational positions.”

225. The Panel notes that the model clause also refers to “*effective regulatory control*” as being part of the national criteria which refers to “*financial health, ability to meet public interest requirement*”, safety and security etc.

226. The Applicant relies heavily on the Integral Notes referring to evidence of “*principal place of business*”. The Panel observes that this definition is not dealing with situations about liberalization of the open air transport market but the designation and authorization of airlines which have already met its national criteria whether it be SOEC or IPPB. The Integral Notes do not purport to limit the national licensing authority on how it approaches the question of PPB.

227. In the conclusions to Agenda Item 2.1, paragraph (b) mentioned a number of ways in which broadening of provisions beyond national ownership and control has been adopted. On that basis, a flexible approach to associate regulatory requirements is to be preferred. In sub-paragraph (g), the conclusions recorded encouragement of liberalization quoted in the press release dated 1 April 2003. The emphasis is on progressive liberalization and to suit the interests of the contracting States. It is naturally a matter of the State’s own prerogative as to how fast it wishes to adopt regulatory liberalization.

228. The Panel takes note of the factors to be considered as evidence of “*principal place of business*”. The Applicant does not suggest that this Panel is bound by such statement as indeed the Consolidated Conclusions itself recognized the State’s ability to adapt the approach to meet the progressive regulatory liberalization it recommended. The Panel takes note of the points

that are raised and do not dispute them. They relate, however, more to the day-to-day operation of the particular airline. As the Panel is not bound by it, these factors cannot be taken as exhaustive list of factors or evidence to be considered. The Panel has to look at the situation in Hong Kong by reference to the Basic Law and the case law in concluding what factors are relevant in the ICAO Consolidated Conclusions which are not to be treated as exhaustive.

229. The next document relied on is the ICAO news release dated 1 April 2003. After the Worldwide Air Transport Conference held in Montreal in March 2003, ICAO issued a press statement stating that “[a] strong global consensus on a framework for the economic liberalization of the air transport industry emerged out of the Worldwide Air Transport Conference: ‘Challenges and Opportunities of Liberalization’”. The Conference consisted of participants from 145 ICAO Contracting States and various organizations. Conclusions and recommendations were said to have been agreed by consensus on key liberalization issues including air carrier ownership and control, market access, fair competition etc. In particular, it stated “[o]n the crucial question of air carrier ownership and control, the Conference recommended that air carrier designation and authorization for market access should be liberalized, at each State’s pace and discretion, and that States may take positive approaches to accept designated foreign carriers that might not meet traditional national ownership and control criteria or the criteria of ‘principal place of business and effective regulatory control’.”

230. The passage specifically relied upon encourages contracting States to move further from the criteria of principal place of business and effective

regulatory control to one of foreign ownership. This is an encouragement that, under the Basic Law, Hong Kong has not yet progressed to. In Hong Kong, airlines designations are still made for airlines that satisfy the criteria of “incorporated and principal place of business” in Hong Kong.

7. THE EVIDENCE

231. The two main documents that set out the structure and modus operandi of the Applicant is the SHA and the BSA. These are further modified or clarified by the Supplemental Agreement and the Clarification Letter.

A. SHA

232. The Business of the Applicant is defined in the SHA. It is the establishment and operation of an LCC applying the Jetstar Business Model that will operate Routes both to and from Hong Kong and any related flying or non-flying activities. The Jetstar Business Model is a specific terminology that has to be understood in the context of the BSA which is considered below.

233. As to Routes, it is noteworthy that in the SHA, there are references to Strategically Sensitive Routes and Restricted Routes [page 62 and 63]. The Routes are to be considered and dealt with by the Flying Committee.

Flying Committee

234. Clause 2.5 of the SHA, on its face, provides JHK with the necessary degree of flexibility and autonomy to operate. However, particulars relating to the Flying Parameters are governed by Schedule 3. The perceived flexibility and autonomy is actually qualified as Flying Parameters are managed by the Flying Committee under Schedule 3.

235. The Flying Committee is the centre for all decisions on flight-related matters. It is established under Schedule 3. The membership of the Flying Committee comprised two representatives from CEA Group, one from Jetstar Group and one from JHK. All four members are entitled to vote. In other words, the two foreign shareholders, CEA and Jetstar Group, will have a majority over the Applicant in relation to decisions that would have to be made by the Flying Committee.

236. The functions and power of the Flying Committee is of importance. Clause 1 of Schedule 3 provides that while ultimately all network decisions is to be made by JHK, they are subject to the decisions of the Flying Committee. There is also a restriction on the Routes that the Applicant can operate. It cannot operate the Strategically Sensitive Routes unless otherwise approved by the Flying Committee [Clause 3 of Schedule 3], nor can it operate the Restricted Routes under Clause 4 of Schedule 3. Under Clauses 5 and 6, routes flying to and from the mainland China are not dealt with or decided by JHK but the Flying Committee.

237. The Flying Committee reviews and decides matters on the network planning arrangement such as routes, capacity and the Flying Parameters to ensure profitable operation of JHK “in conjunction with the operations of CEA members and Jetstar Group members” [Clause 8]. The Flying Committee of JHK does not only have the purpose of ensuring profitable operation of the Applicant, but also with that of the airlines of the other two shareholders.

238. In Clause 11 of Schedule 3 where a request is made by JHK to change the Flying Parameters or specific activities, and if no agreement is reached, the ultimate decision “shall be referred to the day-to-day managers (CEO or equivalent) of CEA, the Jetstar Group and Jetstar Hong Kong for resolution.” JHK would be in the minority in the meeting of day-to-day managers.

239. The Panel does not need to discuss the content of the Strategically Sensitive Routes or the Restricted Routes save to observe that the existence of these categories and its prohibitions or limitations under Schedule 3 indicates that JHK cannot decide for itself whether or not to pursue routes which may otherwise be profitable operation for its business.

240. These findings in relation to the Flying Committee are adequate to dispose of the PPB issue. JHK is structured in a way where its sole business is controlled not by itself but by two of the three shareholders, both of which are not based in Hong Kong. Its nerve centre is not in Hong Kong. The control and management of its sole business is not independent but subject to two foreign shareholders with their domicile outside Hong Kong.

Financial Contribution

241. The SHA indicates that the contributions to the Applicant are in equal amount amongst the three shareholders and to be paid in tranches.

JHK Board

242. JHK Board will generally manage the business of Jetstar (presumably meaning JHK) “save as otherwise provided in this agreement or the Articles” [Clause 7.1(a)].

243. The constitution of the Board comprises one Director from JIGH, one from CEA, three from Shun Tak and one will be a Shun Tak Approved Director and one will be an Airline Shareholder Approved Director. At least five of the directors will be Hong Kong permanent residents [Clause 7.1]. The constitution of JHK Board would mean that they are primarily based in Hong Kong or at least the majority are based in Hong Kong.

244. The Chairman of the Board may be nominated by Shun Tak but the appointment and approval of the Chairman requires Board Extraordinary Approval. Board Extraordinary Approval is a resolution of JHK Board passed by an affirmative vote of more than 50% of the votes cast by those directors present and entitled to vote and in which the majority includes the approval of at least one Director nominated by JIGH, one Director nominated by CEA and one Director nominated by Shun Tak [Page 5]. In other words, the appointment and removal of the Chairman would necessitate approval of the two foreign

shareholders' directors. The right of Shun Tak to nominate is therefore heavily qualified.

245. Under JHK Board, the Excom will be established. The constitution of the Excom is set out in Clause 7.6(b) [page 28]. It consists of five members, three from Shun Tak, one from CEA and one from JIGH. In accordance with Clause 7.6(e) of the SHA, a quorum of the Excom meeting is three members comprising one Shun Tak appointed member, one JAPL appointed member and one CEA appointed member. This has restricted Shun Tak's effective control over the decisions of Excom, not to mention those matters described in the Excom Authority Matrix that require unanimous consent of all Excom members present at the meeting. This shows that Shun Tak's control over the decisions of the Excom is subject to the agreement of members from CEA and JIGH.

246. The mandate of the Excom is set out in paragraph 5 of Schedule 2 which includes the authority to incur borrowings, to acquire, lease, purchase, hire purchase, sell, transfer or otherwise dispose of any asset [page 59]. The Excom Authority Matrix empowers it to purchase or hire aircraft.

247. The Excom also has the mandate to approve renewals or amendments of insurance policies, to approve the opening of bank accounts and banking facilities, and designate any person to act as the authorised signatories. The mandate and authority to take out insurance is an important one in the civil aviation industry. Furthermore, insofar as finance control is concerned, the power to open bank accounts and designate signatories as well as procuring banking facilities is important control on finances. These two powers are vested

with the Excom, not the full JHK Board.

248. As to the decisions of JHK Board, it is to be made by Board Majority.

Shareholders Meeting

249. Shareholders will make decisions by Shareholder Approval (a resolution passed by an affirmative vote of more than 80% of the votes cast by the Shareholders present and entitled to vote). In other words, no Shareholder Approval could be reached unless it is with the support of the two foreign shareholders. Shareholders Approval is needed for a number of important matters that are described as Shareholder Matters set out in Schedule 2. Paragraph 2 of Schedule 2 requires 80% of the affirmative vote even it relates to any matter that requires a shareholder resolution to be passed under the Companies Ordinance.

JHK CEO

250. The appointment or removal of the JHK CEO is also of importance in considering the question of independent control and management. Schedule 2 paragraph 3 stipulates that the Board Reserve Matters including the appointment or removal of the JHK CEO (and of the Chairman as explained above) requiring Board Extraordinary Approval. As already noted, the Board Extraordinary Approval whilst requiring more than 50% of the votes cast must also comprise one vote from the Director nominated by JIGH, one by CEA and one by Shun Tak. The fact that under Clause 10.1 of the SHA, JIGH has the right to

nominate JHK CEO for appointment and JHK CEO has a dual reporting line to both Jetstar Group and JHK Board has cast doubt on whether JHK CEO can act independently and only in the interests of JHK.

251. The CEO Authority Matrix is set out in paragraph 4 of Schedule 2 to the SHA and it reflects implementation of the authorities exercised by the Excom and the JHK Board.

Jetstar Business Model

252. The business of JHK, as defined in Clause 2.1, is to adopt the Jetstar Business Model which is defined as the business model adopted by the Jetstar Network Group, as described in the BSA [Page 10]. The adoption of the Jetstar Business Model is stipulated in Clause 2.3 of the SHA. JHK has to adopt the Jetstar Business Model including using the Jetstar brand, and entering into and observing the BSA [Clause 2.3(a)(b)]. Furthermore, the SHA obliges JHK to “closely align the Business with the business of the Jetstar Network Group, and will continue to do so in the future, to ensure that the profitability and coordination of ‘Jetstar’ branded airlines is achieved as underlined in the Business Service Agreement”. Of equal significance, clause 2.3(d) stipulates that the resolution of route overlap and shared routes between JHK and the Jetstar Network Group is governed by the BSA and the Coordination Agreement. In this aspect, clause 3.1 of Schedule 4 to the BSA has pointed out, among other things, that the Licensor reserves the right to determine pricing, scheduling and capacity allocation for each member of the Licensed Group where the Licensed Group carriers are not able to reach agreement on such matters.

B. BSA

253. The BSA was entered into between JAPL as Licensor and JHK. This is entered into pursuant to the SHA. The BSA takes the form of a licence agreement. However, a closer look at the actual arrangements may shed light on the true nature of this document.

254. There is a difference between a simple licence agreement whereby the licensee would, subject to the terms of the licence agreement, be able to use the intellectual property in its business in the way it desires free from control of the Licensor. Here, the extent of “service” rendered by the Licensor is not insignificant. JHK argues that such agreement is merely an agreement whereby the “service” was contracted out to the licensor and therefore it is not affecting its PPB status.

255. The Panel recognizes that if it is indeed merely a contract engaging a contractor to carry out certain services, the decision regarding what the contractor has to do would vest with the owner of the business, JHK here. Upon perusal of the BSA, the Panel takes the view that that is not the case.

Licence and Service Contract

256. JET plays a number of important roles in the BSA. JET is the licensor’s executive team and comprised the “Jetstar Group Chief Executive Officer, his or her direct reports and the CEOs (or the delegates) of such members of the Licensed Group as determined by the licensor from time to time.”

(page 7). The CEOs of members of the Licensed Group are those other airlines who have entered into the same or similar BSA with the Jetstar Group. Licensed Group is defined as meaning “the Licensor and any other person to whom the Licensor or a Qantas Group Company grants a license to use the Licensed Intellectual Property and the Business System in a business.” The Licensed Intellectual Property is the “Intellectual Property in the Business System including all Intellectual Property in the Licensed Brand, Marketing Material, the Services and the Products.” It is immediately apparent from this definition that JET comprises not just representatives from the Licensor that may include a number of unknown parties, the number of which may fluctuate depending on the decision of both Jetstar and Qantas. The only Hong Kong entity that would be within the Licensed Group would be JHK.

257. JHK’s business has to adopt the Jetstar Business Model and is subject to the BSA whereby Clause 13.2 provides that JHK will “[o]ffer the Products to customers in accordance with this agreement; and obtain the Licensor’s written consent before offering any products or services other than the Products to customers, in the conduct of the Licensed Business.” The operation of the licensee, JHK, in conducting its own business would, on the face of clause 13.2 be subject to consent of the Jetstar Group as opposed to its own decision to be made in Hong Kong.

258. The conduct of the business of JHK requires JHK to enter into a Business Service Agreement with the Jetstar Group under Clause 2.1 and 2.3 of the SHA. Furthermore, as JHK is using the brandname of the Jetstar Group, and there being no other provision for it to change its business model in the SHA,

the consent or willingness of the Jetstar Group to continue its services as well as licensing under the BSA become vital to the business of JHK.

259. The Panel therefore looks to ascertain whether the licensor can terminate the BSA and under what conditions. This is set out in Clause 26. Clause 26.1(a) provides the Licensor with the right to terminate the BSA upon certain breaches on the part of JHK. This is common in commercial arrangements and does not impact on the independent control and management of JHK.

260. Clause 26.1(b) further provides that the Licensor can terminate the BSA upon the operation of Clause 3.6 and 16.3 of the SHA. Clause 3.6 of the SHA deals with payment in tranches and amount of the shareholders whereby payment is due upon satisfying certain conditions precedent, one of which is the obtaining of the ATLA licence. There are also other conditions which are not related to Hong Kong such as approvals or other requirements that would have to be satisfied by the two foreign shareholders in their home jurisdiction. In other words, even if an ATLA licence is to be granted, the SHA may not continue if some other conditions precedent are not satisfied.

261. If indeed other conditions precedent have to be obtained before the SHA, in particular, payment in relation to tranche 2 can be complied with, the Panel observes that such conditions should have been shown to have been satisfied, albeit conditionally, before applying for the licence from ATLA in Hong Kong for it is not the role of ATLA to grant a licence to a company which may ultimately not be able to continue in operation by reason of the lack of other

foreign licences or approvals.

262. Clause 26.3 of the BSA provides the parties with the power to terminate at large by giving twelve month notice. This again is a commercial arrangement and would not in the Panel's view, affect the PPB status of JHK given that it is not to be issued before the last day of the Initial Term which would be ten years from the date when the Licensor starts providing Services to the Licensee under this agreement. This matter may be a subject of review in due course if JHK obtains a licence and is thereby subjected to the regular review by ATLA.

Dispute Resolution

263. It is important to look at how differences or disputes are to be resolved under the BSA. The contract adopts a multi-tiered approach escalating the resolution process from a lower to a higher level. In the event of the dispute not being resolved, it will result in a JET Dispute Notice. This will then be dealt with in a JET Meeting. It must be remembered that JET comprises the Licensor's executive team, represented by the Jetstar Group CEO as well as CEOs from other members of the Licensed Group as determined by the Licensor from time to time. In other words, the JET meeting will be conducted amongst Jetstar Group members rather than just between JHK and the Licensor. Furthermore, as can be seen in Clause 29.1(f), the BSA provides:

“should JET be unable to agree on a satisfactory resolution to the JET Dispute at the JET meeting, the Jetstar Group Chief Executive Officer will decide the matter and that decision will be final and binding on all parties, except as specified under clause 29.2 below. In reaching any decision, the Jetstar Group Chief Executive Officer must have regard to the benefit of all members of the Licensed Group.”

264. Clause 29.2 provides for arbitration by a sole arbitrator in Singapore where the JET Dispute relates to a monetary amount payable and where it was resolved by a decision of the Jetstar Group CEO under clause 29.1(f). Whilst this arbitration clause would arguably or probably allow the decision of the CEO of the Jetstar Group to be re-opened, that decision would remain final and binding under the contract pending the decision of the arbitrator. In other words, it is not JHK who can make the final decisions about its business, but that decisions on how to proceed is to be subject to review and decision by Jetstar Group, with the interests and benefits of all members of the Licensed Group in mind.

Services relating to Flights

265. The Panel then turns to the commercial services that are to be provided by the Licensor under the BSA to determine whether the independent of management and control rests with JHK. We have come to the view that it does not.

266. Under clause 6 of Schedule 4 to the BSA, the pricing mechanism is actually determined by the Licensor. Understandably, the Licensor will not just have the interests of JHK in mind but also take into account interests of other members of the Jetstar Group or the Licensed Group. Clause 6.1 empowers the Licensor to establish a system of fare structure, channel pricing and fare rules. It will develop and publish specifications for implementing the fare and tariff. As to the setting of the fare and tariff, Clause 6.2 provides that the Licensor will make decisions as to pricing levels, including any related currency conversion

and make decisions as to offset pricing levels as they relate to sales channels including channel offsets for GDS as telephone sales bookings. This, as the Panel accepts, has to be read together with the Supplemental Agreement and the Clarification Letter. The Panel's views as regards the Clarification Letter are set out in paragraph 117 to 120 above.

267. The Licensor is also empowered to set the level of all fees and surcharges, the related booking fees including seat selection fees, charges for pre-purchased in-flight product, credit card, late fees etc. The pricing systems would be managed by the Licensor and JHK merely participates in the fare and tax publishing system. It has no control on fees setting.

268. As to network decisions, the Licensee is only there to provide advice and guidance but the Licensor "will support" the Licensee by, inter alia, "determine any changes required to improve the efficiency, productivity and profitability of the scheduled services." Importantly, Clause 7.2(c) in the same Schedule provides that all network decisions will be discussed and validated through JET prior to final approvals. In gist, JHK does not have any control on decisions regarding network. They are to be determined by the Licensor so as to "improve the efficiency, productivity and profitability of the scheduled services" and in any event, all network decisions will have to be validated through JET, a body that comprised entirely foreign persons or entities, before it can be approved and then implemented.

269. In terms of aviation charges and support services at airports, the arrangements are also clearly not within the control of JHK. Clause 8 of Schedule 4 empowers the Licensor to decide who should participate in

negotiations of aviation charges with airports. The interests of JHK is closely aligned or affected by the interest of foreign carriers within the Licensed Group. The person who goes to negotiate is entirely dictated by the Licensor and indeed JHK may not even be nominated as a member to participate in negotiations of aviation charges affecting its business.

270. Inventory management, in particular flight management is to be managed by the Licensor. The Licensee can give reasonable direction but the Licensor has a right to decide whether such direction is reasonable. If there is a dispute, the Jetstar Group CEO will have a final say as provided for in Clause 29.1(f).

271. Another very important feature in an airline business is its finance policy. Schedule 5 of the BSA sets out how such policy is to be formulated and implemented. It is the Licensor who will develop a finance policy for the Licensed Business. The Licensee may reasonably object to the changes of the finance policy that may be made by the Licensor that any such objection will be finally resolved under clause 29, namely to be decided by the Jetstar Group CEO. This indicates that the finance policy is not within the independent control and management of JHK.

272. The Panel is not concerned with the fees that would be paid to the Licensor under the BSA but would observe that if the revenue generated by the Licensed Business is effectively shared with the Licensor as opposed to payment of reasonable remuneration for the provision of service, it would indicate a lack of independent control of its finance.

C. Supplemental Agreement and Clarification Letter

273. Notwithstanding the above, the Panel accepts that it is necessary to read the Supplemental Agreement and the Clarification Letter in the interpretation of the relevant provisions of the BSA.

274. The Supplemental Agreement made some revisions to Schedule 3 “Marketing and Sale Services” to the BSA to the effects of clarifying that the Licensor will follow any reasonable direction from the Licensee’s CEO in relation to a number of areas including pricing, inventory management, alternative booking channels and technologies etc. In this respect, the Panel repeats *mutatis mutandis* its observations in paragraph 270 above.

275. The Clarification Letter goes further to, inter alia, confirm the agreement between the Licensor and the Licensee that any decisions made by the Licensor in the delivery of any of the outsourced services as set out in Schedules 3 to 11 to the BSA can be overridden by Licensee. It is a double-barrelled approach.

276. While the Panel is not sceptical about the authenticity of the Supplemental Agreement and the Clarification Letter, the Applicant cannot demonstrate to us the practicability of putting such provisions of the Supplemental Agreement and the Clarification Letter in place amid the integrated operations of the Jetstar branded airlines, the Licensed Group, including JHK under the BSA.

277. The panel is unable to form an opinion as to what constitutes a ‘reasonable’ direction of JHK that the Licensor will follow, in support of JHK’s claim that the ultimate management and control is vested in the JHK Board. Turning to the Clarification Letter, we note that such overriding power of JHK Board, if exercised, will go against the underlying objective of operating the Jetstar branded airlines under the BSA. We do not see how such overriding power can be reconciled with the continual integrated operations of the Jetstar network and more importantly, it would have led to an impasse (before a unilateral termination of the license agreement) when JHK exercised such power to reject a JAPL’s decision which was in the best interests of the overall Jetstar Group.

278. Last but not least, while noting that the Supplemental Agreement and the Clarification Letter are to be read in conjunction with and have indeed changed certain provisions of the BSA, we do not see how they could have affected the SHA as regards the control of CEA or Jetstar. The BSA binds JAPL and JHK as far as the delivery of the licensed business is concerned. In contrast, the SHA goes to the root of the joint venture as it binds CEA, Jetstar and Shun Tak and delineates the underlying basis and principle on which the business of JHK is to be undertaken.

8. CONCLUSION

279. Summarising the above observations, the Panel is of the view that JHK cannot make its decisions independently from that of the two foreign

shareholders. This can be seen from the SHA. Its business is mandated to be linked with the Jetstar Group by reason of the definition of Business within the SHA and the requirement to enter into a business service agreement with the Jetstar Group (i.e. the BSA). It has no freedom to operate and obtain licence from any other airlines to operate an LCC. Furthermore, when the BSA is studied, it can be seen that it is not a mere licence of intellectual property relating to software and branding but actually a surrender of the right to determine its own network, fare structures and other flight-related matters to Jetstar Group and/or JET and/or the Jetstar Group CEO. Some of the matters are also determined by votes of members of the Licensed Group, whose identity is clearly foreign albeit unknown. There is no dispute that the day-to-day management would be conducted in Hong Kong and managed by the JHK CEO in Hong Kong. However as the cases unequivocally indicate, that is not sufficient to establish and meet any PPB criteria.

280. The Panel does not have to decide whether its nerve centre or whether its principal place of business is in Australia or the mainland China. The Panel needs only to determine whether JHK has its PPB in Hong Kong. We are of the view that it is not and therefore the PPB requirement is not satisfied.

(Signed)

Ms Teresa CHENG Yeuk-wah,
GBS, SC, JP
(Chairman)

(Signed)

Mr Peter CHOY Chak-wa
(Member)

(Signed)

Mr Adrian WONG Koon-man,
BBS, MH, JP
(Member)

(Signed)

Professor Becky LOO Pui-ying
(Member)

(Signed)

Mr Nelson LAM Chi-yuen
(Member)

ATLA Secretariat
25 June 2015

Appearances

Mr Johnny Mok, SC and Mr Abraham Chan, instructed by Minter Ellison for Jetstar Hong Kong Airways Limited

Mr Benjamin Yu, SC and Mr Alexander Stock, instructed by Mayer Brown JSM for Cathay Pacific Airways Limited and Hong Kong Dragon Airlines Limited

Mr Holden Slutsky, instructed by Hoosenally & Neo for Hong Kong Airlines Limited

Mr Anthony Chow of CWL Partners for Hong Kong Express Airways Limited

In attendance

Ms Candy Nip, Principal Assistant Secretary for Transport and Housing (Transport), for ATLA Secretariat