

ICSID Case No. ARB(AF)/15/1

STRABAG SE  
Claimant

-v-

LIBYA  
Respondent

Partial Dissenting Opinion

1. I firmly believe that dissenting opinions should be resorted to only in the event of serious disagreements over matters of principle. While I fully respect the views of my two distinguished colleagues and value the thoroughness with which our deliberations have been conducted, I am unable to support their decision on the important issues of advance payments and set-off described below. I thus respectfully dissent with respect to these issues only.
2. For the sake of clarity, I set out below the main facts relevant to the present opinion. These facts are extensively developed in the Award.
3. Claimant, Strabag SE, is a large international construction firm incorporated in Austria. Following the relaxation of international sanctions against Libya, Claimant saw opportunities for large construction projects in Libya and, through its wholly owned German subsidiary Strabag International Ltd., secured contracts with the Libyan Roads and Bridges Authority (“RBA”) in 2006 and 2007 for two major road projects in Benghazi<sup>1</sup> and Misurata.<sup>2</sup>
4. Following Libya’s decision to require foreign construction firms to carry on their business jointly with a Libyan partner,<sup>3</sup> Strabag International Ltd. joined with the Libyan Investment and Development Company (“LIDCO”) in 2007 to create a joint

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<sup>1</sup> Exhibit C-9, Benghazi contract, October 18, 2006.

<sup>2</sup> Exhibit C-16, Misurata contract, April 19, 2007.

<sup>3</sup> Exhibit C-11, General People’s Committee Decision No. 443 of 2006 for specifying certain provisions for performance of foreign companies for their activities in the Great Jamahiriya, November 14, 2006.

venture company under the name of Al Hani General Construction Co. (“Al Hani”).<sup>4</sup> Claimant indirectly owns 60% of Al Hani and LIDCO owns the remaining 40%.

5. In 2009, with the approval of RBA, Strabag International Ltd. assigned the Benghazi and Misurata contracts to Al Hani.<sup>5</sup> Al Hani also entered into several other contracts for construction works in Libya. They included the TIAR contract with RBA for the reconstruction and upgrading of the Tripoli International Airport Road,<sup>6</sup> the TIAR-NE contract with RBA for technical studies and designs for the northern extension of the Tripoli International Airport Road,<sup>7</sup> the Garaboulli contract with the Transportation Projects Board (“TPB”) for the maintenance of the coastal road between Ras Ejdir and Garaboulli and the development and upgrading of the Tripoli Western Access Road,<sup>8</sup> and the Tajura contract with the Housing and Infrastructure Board (“HIB”) for design and construction work in connection with a major new urban development in the city of Tajura, a suburb of Tripoli.<sup>9</sup> The latter was the largest contract, with an estimated value of over 778 million Libyan Dinars (“LYD”).
6. Article 10(a) of the Tajura, TIAR, and Garaboulli contracts and Article 2(1) of Appendix B of the TIAR-NE contract provided for an advance payment to be made to Al Hani by the relevant contractual counterparty on Respondent’s side. (Article 10(a) of the Benghazi and Misurata contracts provided for the advance payment to be made to Strabag International Ltd.) The advance payment constituted part of the total value of the contract and its purpose was to help Al Hani/Strabag International Ltd. cover the initial costs incurred in starting the project.
7. In the Benghazi, Misurata, TIAR, TIAR-NE, and Garaboulli contracts, the advance payment amounted to 15% of the total contract price. In the Tajura contract, it represented 20% of the contract price.

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<sup>4</sup> Exhibit C-19, Memorandum of Association of Al Hani, July 12, 2007.

<sup>5</sup> Exhibit C-65, assignment agreement relating to the Benghazi contract, October 27, 2009; see also Exhibit C-45, assignment agreement relating to the Misurata contract, June 18, 2009.

<sup>6</sup> Exhibit C-32, TIAR contract, November 2, 2008.

<sup>7</sup> Exhibit C-53, TIAR-NE contract, August 23, 2009.

<sup>8</sup> Exhibit C-108, Garaboulli contract, August 24, 2010.

<sup>9</sup> Exhibit C-27, Tajura contract, May 18, 2008.

8. Because the advance payments were made under each contract prior to the performance of any works by Strabag International Ltd. (for the Benaghazi and Misurata contracts) and Al Hani (for the remaining contracts), they were intended to be recouped through pro rata deductions from Strabag International Ltd.'s/Al Hani's invoices during the life of the relevant contract. Strabag International Ltd. or Al Hani, as the case may be, would repay the advance payments through the deduction of the amount of 15% (or 20% in the case of the Tajura contract) from each Payment Certificate until the advance payments were repaid in full. Each Payment Certificate required Strabag International Ltd./Al Hani to submit proof of works on the specific project.
9. Each contract required that the advance payments be guaranteed by unconditional and irrevocable letters of credit obtained by Al Hani (or Strabag International Ltd. for the Benghazi and Misurata contracts prior to their assignment to Al Hani in 2009) in favor of the relevant contractual counterparty on Respondent's side, except for the TIAR-NE contract, in which Article 2(1) of Appendix B merely provided that the advance payment should be paid by RBA to Al Hani "in exchange for a letter of guarantee in the same amount," without specifying that the letter of guarantee should be unconditional and irrevocable.<sup>10</sup>
10. It is undisputed between the Parties that Strabag International Ltd. (for the Benghazi and Misurata contracts) and Al Hani (for the remaining contracts) received all the contractually mandated advance payments. The amounts of the advance payments were, for the Benghazi contract, LYD 4,870,803 and EUR 2,949,640;<sup>11</sup> for the Misurata contract, LYD 7,419,344;<sup>12</sup> for the Tajura contract, LYD 155,717,915;<sup>13</sup> for the TIAR contract, LYD 11,124,958;<sup>14</sup> for the TIAR-NE contract, LYD 742,500;<sup>15</sup> and for the Garaboulli contract, LYD 25,903,040.<sup>16</sup>

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<sup>10</sup> Exhibit C-53, TIAR-NE contract, August 23, 2009, Appendix B, Article 2(1).

<sup>11</sup> Exhibit R-5, Benghazi payment authorization (advance payment), February 11, 2007.

<sup>12</sup> Exhibit R-37, Misurata payment authorization (advance payment), September 5, 2007.

<sup>13</sup> Respondent's Counter-Memorial, ¶ 170; see also FTI Exhibit 18, p. 6, Tajura invoice no. 2.

<sup>14</sup> Exhibit R-215, TIAR payment authorization (advance payment), December 30, 2008; see also FTI Exhibit 9(2), p. 4, TIAR contract particulars.

<sup>15</sup> Exhibit R-216, TIAR-NE payment authorization (advance payment), December 28, 2009.

<sup>16</sup> Respondent's Counter-Memorial, ¶ 252; see also FTI Exhibit 14(1), p. 6, Garaboulli contract particulars.

11. It is also undisputed that Strabag International Ltd. and Al Hani, directly or through Claimant, provided the contractually required unconditional and irrevocable advance payment guarantees, in the form of letters of credit, in favor of the various counterparties on Respondent's side.
12. It is likewise undisputed that through the deduction mechanism of Article 10(a), Respondent completely recovered the advance payments on the Benghazi and Misurata road contracts.
13. Respondent contends, however, that Al Hani still holds EUR 98,128,159 in unearned advance payments under the Tajura, TIAR, TIAR-NE, and Garaboulli contracts,<sup>17</sup> and that Al Hani has an obligation to repay those unearned amounts since they pertain to work that was never performed by Al Hani under the contracts.<sup>18</sup>
14. Accordingly, Respondent contends that if the Tribunal determines that any amounts are owed to Al Hani under the contracts, such amounts should be set off against the unearned amounts of the advance payments.
15. Claimant, on the other hand, argues that there are no remaining unearned amounts from the advance payments, since all the advance payments were applied to work on Al Hani's projects and have been used up. It also expresses concern that some letters of credit in relation to some of the projects remain a potential liability. Claimant contends that it would suffer significant prejudice and face "double jeopardy" if the Tribunal were to accept Respondent's set-off argument and if it then had to honor a call from the banks, which it would be unable to contest as the bank guarantees are unconditional.<sup>19</sup>

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<sup>17</sup> Respondent's Post-Hearing Brief, ¶ 208; see also Exhibit RH-15, presentation on quantum by Ian Michael Osbaldeston, slide 7, column J. According to column H, the amounts of unearned advance payments are as follows: for the TIAR contract, LYD 1,491,601; for the TIAR-NE contract, LYD 556,875; for the Garaboulli contract, LYD 24,230,566; and for the Tajura contract, LYD 148,570,399. They total EUR 98,128,159. Claimant's quantum expert, Patrick A. McGeehin, also states that the balance of the advance payments is around EUR 90 million: "it's safe to say that the current balance of the Advance Payment is somewhere in the 90-some million range." See Hearing Transcript, July 19, 2018, 2126:6-8.

<sup>18</sup> Respondent's Post-Hearing Brief, ¶ 224; see also, for instance, Respondent's Post-Hearing Brief, ¶ 246 ("TPIB paid Al-Hani an Advance Payment of LYD 25.9 million, representing 15% of the Garaboulli Contract price. However, as of the time Al-Hani ceased activities in 2011, it had only performed about 6% of the works on the Garaboulli Project.").

<sup>19</sup> Claimant's letter of November 15, 2019 to Tribunal, p. 5.

16. Claimant alleges that three bank guarantees continue to represent liabilities<sup>20</sup> for it: (1) the advance payment guarantee for the Tajura project, Letter of Credit 12293,<sup>21</sup> in an amount of EUR 51,905,971.53; (2) the performance guarantee for the Tajura project, Letter of Credit 12295,<sup>22</sup> in an amount of EUR 5,190,597.15; and (3) the performance guarantee for the TIAR project, Letter of Credit 12402,<sup>23</sup> in an amount of LYD 1,002,747.58.
17. The advance payment guarantee for the Tajura project and the performance guarantees for the Tajura and TIAR projects each consisted of (1) an unconditional and irrevocable “fronting guarantee” in the form of a standby letter of credit from Gumhouria Bank in Libya in favor of HIB (for the Tajura guarantees) and RBA (for the TIAR performance guarantee) and (2) a “backing guarantee” in the form of a counter-guarantee letter of credit issued by Claimant’s bank, namely ABC International Bank (for the Tajura guarantees) and Deutsche Bank (for the TIAR performance guarantee), in favor of Gumhouria Bank. Claimant had to pay fees to ABC International Bank and Deutsche Bank to maintain the letters of credits.
18. As for the TIAR advance payment guarantee and the TIAR-NE and Garaboulli guarantees, Claimant does not seem to consider them a potential liability as these were provided by Al Hani, not by Claimant itself.<sup>24</sup>
19. It was Respondent’s understanding in late 2019 that the TIAR, TIAR-NE, and Garaboulli advance payment guarantees were still valid,<sup>25</sup> and likewise the TIAR-NE performance guarantee.<sup>26</sup> With respect to the Tajura guarantees (for advance payment

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<sup>20</sup> Ibid., pp. 2-3.

<sup>21</sup> Exhibit C-821, Swift communication from ABC International Bank to Gumhouria Bank regarding the Tajura advance payment guarantee, June 27, 2008; see also Exhibit C-30, Letter of Credit No. 12293, August 3, 2008.

<sup>22</sup> Exhibit R-68, Letter of Guarantee No. 12295, August 7, 2008.

<sup>23</sup> Exhibit C-35, Letter of Guarantee No. 12402, December 30, 2008.

<sup>24</sup> Claimant’s letter of December 10, 2019 to Tribunal, p. 4; see also Award, ¶ 894.

<sup>25</sup> Respondent’s letter of November 15, 2019 to Tribunal, p. 2; see also Respondent’s letter of December 10, 2019 to Tribunal, p. 3.

<sup>26</sup> Respondent’s letter of November 15, 2019 to Tribunal, p. 2.

as well as for performance), Respondent asserts that they had expired by 2012 and 2013.<sup>27</sup>

20. The majority of the Tribunal finds that “[t]he testimony at the Hearing and the evidence on record show that significant elements in the chain of guarantees securing the Tajura advance payment remain in effect, as does the entire TIAR guarantee and the separate performance guarantees for both of these Contracts.”<sup>28</sup> It concludes, therefore, that “the guarantees, including at least the Tajura backing guarantee and Strabag’s related obligations to ABC Bank, remain in effect and must be taken into account in assessing the claimed set-off.”<sup>29</sup>
21. The majority’s finding that the Tajura guarantees remain valid is premised on (1) the hearing testimony of Mr. Al Naas, HIB’s senior official responsible for letters of credit, who stated that HIB was contemplating a possible call on the Tajura guarantees,<sup>30</sup> and (2) “a substantial body of evidence ... showing that Strabag has for many years paid bank charges to maintain the Tajura and TIAR advance payment and performance guarantees.”<sup>31</sup> According to the majority, “Claimant presumably did not pay these significant amounts in respect of allegedly ‘non-existent’ guarantees.”<sup>32</sup>
22. However, the evidence on the record regarding the Tajura advance payment guarantee in the amount of EUR 51,905,971.53 (by far the most substantial guarantee) casts serious doubt on its continuing validity. The record shows that both Gumhouria Bank and ABC International Bank regarded at least the fronting guarantee component of the Tajura advance payment guarantee as having expired.
23. According to the very wording of Letter of Credit 12293, the fronting guarantee was supposed to remain valid until May 31, 2012, after which date, “and in absence of [HIB] instructions within its validity, it will be automatically considered as null and void.”<sup>33</sup>

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<sup>27</sup> Ibid., p. 1; see also Respondent’s letter of December 10, 2019 to Tribunal, p. 3.

<sup>28</sup> Award, ¶ 905.

<sup>29</sup> Ibid., ¶ 909.

<sup>30</sup> Ibid., ¶ 906.

<sup>31</sup> Ibid., ¶ 907.

<sup>32</sup> Ibid.

<sup>33</sup> Exhibit C-821, Swift communication from ABC International Bank to Gumhouria Bank regarding the Tajura advance payment guarantee, June 27, 2008, p. 2.

The backing guarantee was supposed to be “valid 30 (thirty) days beyond the expiry date of [the fronting guarantee].”<sup>34</sup>

24. A Swift communication from Gumhouria Bank to ABC International Bank dated July 17, 2012, shows that (1) on March 15, 2012, HIB delivered instructions to Gumhouria Bank to renew the fronting guarantee, but that those instructions were sent to the wrong branch of Gumhouria Bank; (2) on July 5, 2012, ABC International Bank sent a Swift message to Gumhouria Bank asking to be “release[d]” from the backing guarantee; and (3) on July 17, 2012, Gumhouria Bank requested ABC International Bank to “reinstate” the guarantee until the end of June 2013.<sup>35</sup>
25. From the foregoing, one may reasonably infer that ABC International Bank considered the fronting guarantee to have expired given that no request for extension was made within its validity period. ABC International Bank accordingly asked to be “release[d]” from the backing guarantee.
26. The record shows that ABC International Bank considered the backing guarantee to have expired as well. On December 23, 2015, in response to a Swift communication from Gumhouria Bank dated November 16, 2015, ABC International Bank stated that “[a]s advised to you previously, *your standby LC* reference ST-BY L/C 12293 [i.e., the fronting guarantee] *and our counter guarantee in your favour* with Ref No. 10/08/0526 *have both expired.*”<sup>36</sup>
27. ABC International Bank informed Claimant of its understanding on this matter in a letter of December 29, 2015.<sup>37</sup> Thus, Claimant was aware of ABC International Bank’s position that both the fronting guarantee and the backing guarantee had expired.
28. Moreover, this position was shared by Al Hani. In a letter it sent to HIB as far back as March 11, 2013, it referred to the Tajura advance payment guarantee as having

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<sup>34</sup> Ibid.

<sup>35</sup> Exhibit C-822, Swift communication from Gumhouria Bank to ABC International Bank regarding the Tajura advance payment guarantee, July 17, 2012; see also Exhibit R-193, letter from HIB to Gumhouria Bank, March 15, 2012.

<sup>36</sup> Exhibit C-375, letter from ABC International Bank to Claimant plus copies of Swift communications with Gumhouria Bank, December 29, 2015, p. 5 (emphasis added).

<sup>37</sup> Ibid., p. 1.

expired.<sup>38</sup> This understanding was also made clear in Claimant's submissions in the course of the proceedings and in statements made by one of Claimant's witnesses.

29. In its Reply, Claimant states the following:

The Respondent in its Counter-Memorial contends that Al Hani's failure to renew the advance payment guarantee, which had lapsed, explains why the recommencement agreement for the Tajura Contract was never agreed. The Respondent's position is misleading: the disagreement with the advance payment guarantee was in the context of the negotiations with Gumhouria Bank, which refused to renegotiate the interest that Al Hani was paying on its credit facility unless it re-established the guarantee which, as Mr. Knaack explained in his first witness statement, Al Hani was unwilling to agree to renew while it was still uncertain whether Al Hani could proceed with the project.<sup>39</sup>

30. Claimant's assertion in its Reply is borne out by the testimony of Mr. Knaack, the commercial manager of Al Hani. Mr. Knaack made it clear that Al Hani understood the Tajura advance payment guarantee, including the backing guarantee between Gumhouria Bank and ABC International Bank, to have expired:

At this time, I also had a number of meetings with Gumhouria Bank. As I mentioned above, Al Hani had taken out a credit facility with Gumhouria Bank in 2010 which we had exhausted, and I tried to negotiate with the bank a moratorium on interest. However, our negotiations with Gumhouria Bank were difficult since the bank would always insist that we agreed to renew the advance payment guarantee for the Tajura contract. *The counter-guarantee between Gumhouria Bank and ABC Bank had expired* due to an administrative oversight and Gumhouria Bank tried to get us to agree to rectify this, which we refused to do since it was still uncertain that we would be able to continue with the project.<sup>40</sup>

31. Notwithstanding all of the above, Claimant was charged by ABC International Bank and agreed to pay it fees for the backing guarantee,<sup>41</sup> despite ABC International Bank's clear belief, which Claimant shared, that both the fronting guarantee and the backing guarantee relating to the advance payment under the Tajura contract had expired.

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<sup>38</sup> Exhibit C-824, letter from Al Hani to IIB, March 11, 2013, p. 1.

<sup>39</sup> Claimant's reply, ¶ 369 (footnotes omitted).

<sup>40</sup> Mr. Knaack's First Witness Statement, ¶ 37 (emphasis added).

<sup>41</sup> FTI Exhibit 157, Strabag's accounting data relating to payments for the Tajura bank guarantees up to June 2017.



32. The conclusions reached by the majority with respect to the issues of the advance payments and the guarantees are untenable for the reasons given below.
33. *First*, the Tribunal unanimously observes that “the state of the Libyan courts remains very critical,”<sup>42</sup> that “Libyan courts are not a practicable and safe option,”<sup>43</sup> and that Claimant had “no viable mechanisms for settling disputes with the Libyan State entities involved ... other than resorting to Treaty arbitration.”<sup>44</sup> Yet, when it comes to Respondent’s request for set-off, the majority states that this is a “matter that must be addressed by the Parties, if it is to be addressed, outside the context of this arbitration,”<sup>45</sup> without indicating in which forum. The practical implications of this distinction is that contractual claims, insofar as they address Claimant’s rights, are selectively elevated into treaty claims, while Respondent’s set-off requests arising from the same contractual relationship are denied similar treatment and are to be addressed “outside the context of this arbitration” in a forum yet to be identified by Respondent.
34. Having determined that it had jurisdiction over Claimant’s contractual claims, and having supplanted Libyan courts for the purpose of deciding those claims, the Tribunal was under the obligation to comprehensively resolve the dispute, as Libyan courts would have done. Consequently, it was incumbent on the Tribunal to rule on the issue of the advance payments with a view to settling all amounts against all contracts.
35. Respondent’s proposition that the amounts resulting from Claimant’s claims for damage had to be set off against the unearned portions of the advance payments finds support in Libyan law, which is the law applicable to the underlying contracts. Article 184(1) of the Libyan Civil Code states: “Whoever receives, by way of payment, what is not owed to him must return it.” Similarly, Article 185 of the Libyan Civil Code provides: “A payment which was not due may be recovered if it was made in the performance of an obligation whose cause had not materialized or had ceased to exist.” In the same vein, Article 349 of the Libyan Civil Code (entitled “debts capable of set-off”) allows the amount owed by a debtor to a creditor to be set off against the amount

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<sup>42</sup> Award, ¶ 203.

<sup>43</sup> *Ibid.*, ¶ 208.

<sup>44</sup> *Ibid.*, ¶ 204.

<sup>45</sup> *Ibid.*, ¶ 921.

owed by the creditor to the debtor. This is possible even when the claims do not arise from the same source, i.e., if the claimant is seeking a claim under one contract and the respondent is seeking set-off for overpaid funds under another contract.

36. *Second*, the majority expresses concern regarding the “continued existence of the unconditional and irrevocable guarantees created to secure the advance payments and other aspects of Al Hani’s performance.”<sup>46</sup>
37. However, the evidence on record from both Parties with respect to the advance payment guarantees is confusing and contradictory, and any assertion that the Tajura guarantees (by far the most substantial ones) are still valid is speculative. It is noteworthy that the majority gives undue weight to the testimony of one of Respondent’s witnesses, Mr. Naas, in relation to the Tajura bank guarantees, even though Respondent distanced itself from the testimony of Mr. Naas in its letter to the Tribunal of November 15, 2019.<sup>47</sup> It is striking that while the Award frequently casts doubts on Respondent’s witnesses and their testimonies, qualifying them as contradictory, inconsistent, or unconvincing,<sup>48</sup> the majority makes a positive assessment of the testimony of one of Respondent’s witnesses on this particular issue.
38. The majority posits that it “could not apply the requested set-off without firm arrangements in place to assure that Claimant’s exposure under the guarantees would at the same time be reduced or ended to the extent of any set-off.”<sup>49</sup> It adds that the Tribunal “has no authority to address this difficulty without the agreement of the Parties.”<sup>50</sup> Both assertions are arguable.
39. As indicated in the Award, the drafters of the Austria-Libya BIT saw set-offs as lying within a tribunal’s jurisdiction per Article 13 of the treaty, and Respondent’s claimed set-off can reasonably be viewed as an “incidental or additional claim” for purposes of Article 47 of the ICSID’s Arbitration (Additional Facility) Rules.<sup>51</sup> The Tribunal

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<sup>46</sup> Ibid., ¶ 918.

<sup>47</sup> Respondent’s letter of November 15, 2019 to Tribunal, p. 1.

<sup>48</sup> Award, ¶¶ 347-348, 377, 387, 390, 750, 788-790, 804.

<sup>49</sup> Ibid., ¶ 919.

<sup>50</sup> Ibid., ¶ 920.

<sup>51</sup> Ibid., ¶¶ 896-897.

therefore has jurisdiction over the advance payment issue, irrespective of any jurisdiction it has to rule on the bank guarantees. Even if all the bank guarantees were deemed still to be valid and any decision on the advance payment were to be made conditional on the prior resolution of the issue of the bank guarantees (which is the approach taken by the majority), it would have been possible to determine the amount of the unearned portions of the advance payments and allow Respondent to proceed with set-off *only after* releasing all the bank guarantees still in its possession. Alternatively, Respondent could have been requested to provide evidence that the guarantees had been cleared prior to any ruling on set-off.

40. *Third*, while the majority stresses the necessary link between the advance payments and the bank guarantees, it overlooks the obvious overlap between the advance payments and some of Claimant's claims for damages.
41. While Respondent and its expert provide detailed figures for advance payments that they consider not yet to have been earned,<sup>52</sup> Claimant states vaguely, with little supporting documentation, that the full advance payments had been fully used up to finance "significant costs that Strabag incurred upfront at the outset of the projects (for example, in recruiting and mobilising personnel, constructing site facilities, purchasing equipment and machinery, and engaging sub-contractors)."<sup>53</sup> By its own admission, Claimant used unearned portions of the advance payments to buy equipment and supply the joint venture with cash.
42. The Tribunal nonetheless awards Claimant compensation for some of the aforementioned up-front costs, including for lost or damaged equipment and damages caused by delay. Without proper consideration of the issue of advance payments, it may well turn out that the Award compensates Claimant for equipment and other costs that, by Claimant's own admission, have already been covered using unearned portions of the advance payments, i.e., monies from Respondent.
43. As Respondent states in its written submissions:

If the Tribunal awards damages for loss of equipment as requested by Claimant without offsetting the unearned portions of the

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<sup>52</sup> See *supra* footnotes 17 and 18 and their accompanying texts.

<sup>53</sup> Claimant's Reply, ¶ 837; see also *ibid.*, ¶¶ 9, 64, 88 and 838.

Advance Payments, then Al-Hani would have received twice the value of the equipment: first by way of damages and second by means of the unearned retained Advance Payments. This double recovery is impermissible.<sup>54</sup>

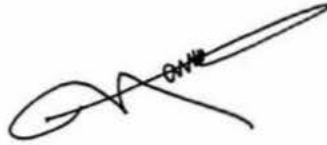
44. A task partially completed may prove in practice to be more problematic than a task not initiated at all. The majority's decision to summarily deny Respondent's requested set-off<sup>55</sup> fails to recognize that the issues of the advance payments, the bank guarantees, and Claimant's claims for damages are intertwined and cannot be resolved separately. This fragmentation is not conducive to "good order and fundamental fairness,"<sup>56</sup> to which the majority and indeed the entire Tribunal aspired.

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<sup>54</sup> Respondent's Rejoinder, ¶ 634 (footnote omitted).

<sup>55</sup> Award, ¶ 921.

<sup>56</sup> Ibid., ¶ 919.

A handwritten signature in black ink, appearing to be 'Nassib G. Ziadé', written over a horizontal line.

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Professor Nassib G. Ziadé  
*Arbitrator*

Date: June 22, 2020