IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2020] SGHC(I) 17

Originating Summons No 1 of 2020

Between

(1) CBX
(2) CBY

… *Plaintiffs*

And

(1) CBZ
(2) CCA
(3) CCB

… *Defendants*

JUDGMENT

[Arbitration] — [Award] — [Recourse against award] — [Setting aside]

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CBX and another
v
CBZ and others

[2020] SGHC(I) 17

Singapore International Commercial Court — Originating Summons No 1 of 2020
Anselmo Reyes IJ
15 June 2020

16 July 2020 Judgment reserved.

Anselmo Reyes IJ:

I. Introduction

1 The Plaintiffs apply to set aside parts of two Partial Awards dated 5 June 2019 (the "**Phase II Partial Awards**") and the whole of a Final Award (Costs) dated 9 August 2019 (the "**Costs Award**"). All three awards were by the same tribunal (the "**Tribunal**"). The relevant parts of the Phase II Partial Awards concern the Tribunal's decisions that the Plaintiffs should pay the Defendant certain amounts pursuant to the parties' agreements (the "**Remaining Amounts Orders**") and that compound interest should run on those amounts (the "**Compound Interest Orders**"). The grounds advanced for setting aside the Remaining Amounts and the Compound Interest Orders are that, in coming to its decisions, the Tribunal exceeded its jurisdiction, failed to afford the Plaintiffs a reasonable opportunity to present their case, and contravened Singapore public

policy. The ground alleged for setting aside the Costs Award is that it was consequent upon the impugned parts of the Phase II Partial Awards. Thus, if the Remaining Amounts and the Compound Interest Orders are set aside, the Plaintiffs say that the Costs Award must likewise be set aside. The Plaintiffs additionally submit that, in substitution for the Costs Award, I should order that the Defendants pay 100% of the Plaintiffs' costs of the entire arbitration proceedings. In those proceedings, the Plaintiffs were the Respondents and the Defendants were the Claimants. However, to avoid confusion, I shall refer here to the Claimants in the arbitration proceedings as "the Defendants" and to the Respondents as "the Plaintiffs". The Phase II Partial Awards are in similar (but not identical) terms. When referring in this judgment to passages in the Phase II Partial Awards, I shall only quote from one award. Unless stated otherwise, it may be assumed that there is an analogous passage in the other award.

2 By a Sale and Purchase Agreement dated 19 June 2015 (the "**CBX SPA**"), the 1st Defendant ("**CBZ**") agreed to sell, and the 1st Plaintiff ("**CBX**") agreed to buy, 49% of the share capital of company [AAA] ("**AAA**"). By another Sale and Purchase Agreement dated 19 June 2015 (the "**CBY SPA**"), the 2nd and 3rd Defendants (respectively, "**CCA**" and "**CCB**") agreed to sell, and the 2nd Plaintiff ("**CBY**") agreed to buy, 48.94% of the share capital of AAA. I shall refer collectively to the CBX and CBY SPAs as the "**SPAs**".

3 The governing law of the SPAs was Thai law. The SPAs provided for ICC arbitration seated in Singapore in the event of dispute. When the SPAs were executed, AAA held 59.46% of [BBB] ("**BBB**"). Through various companies, BBB owned three existing projects (the "**Existing Projects**") and five developing projects (respectively, "**A1**", "**A2**", "**A3**", "**A4**" and "**A5**"; collectively, the "**Future Projects**"). Mr. [CC] ("**CC**") controls the Plaintiffs.

Mr. [DD] ("**DD**") controls the Defendants. As a result of the SPAs, the Plaintiffs came into control of AAA and BBB.

4 CBX was to pay a first instalment to CBZ under the CBX SPA. CBY was to pay a first instalment to CCA and CCB under the CBY SPA. The first instalments were due within 60 days after the closing dates of the respective SPAs. By Article 3.1(ii) of the SPAs, subject to a proviso relating to the initial public offering of BBB which is not material to this judgment, the balance of the consideration under the SPAs (the "**Remaining Amounts**") was to be paid in tranches within 45 business days of each of the milestone dates identified in Schedule 5 ("**Schedule 5**") of the SPAs. The milestone dates were in turn calibrated to the Commercial Operation Dates ("**CODs**") for the Future Projects specified in Schedule 4 of the SPAs. The closing date of the CBY SPA was 27 July 2015, while that of the CBX SPA was 24 August 2015. The original deadline for the first instalment under the CBY SPA was 25 September 2014, while that for the first instalment under the CBX SPA was 23 October 2015. The parties, however, discussed the postponement of the deadlines for the first instalment. As became apparent in the arbitration proceedings, the parties differed as to what precisely had been agreed about the postponement of payment.

5 CBX did not pay the first instalment under the CBX SPA. CBY paid the first instalment under the CBY SPA, partly on 30 November 2015 and partly on 29 December 2015. It did not pay interest for late payment. The Defendants contended that the Plaintiffs were in default due to non-payment or late payment. The Defendants maintained that, in consequence, they could treat the CBX SPA as rescinded. The Defendants further alleged that, not only were the outstanding principal and interest of the first instalments due, but the Remaining Amounts had additionally become accelerated and so immediately payable in

full. The Plaintiffs denied that the Defendants were entitled to treat the CBX SPA as rescinded. They argued that the payment dates for the first instalments had been postponed and that the Remaining Amounts had not been accelerated. The Plaintiffs also raised set-offs and counterclaims which it submitted had the effect of reducing or extinguishing any amounts (including the Remaining Amounts) payable to the Defendants. Those set-offs and counterclaims were for damages arising from the Defendants' wrongful rescission of the SPAs and from the Defendants' "wrongful attacks" which (the Plaintiffs asserted) had brought about a significant diminution in the commercial value of AAA and BBB.

6 CBZ commenced arbitration (the "**CBX arbitration**") against CBX on 26 January 2016, while CCA and CCB instituted proceedings (the "**CBY arbitration**") against CBY on 25 March 2016. Although the two arbitrations were not formally consolidated until shortly before the Costs Award, the Tribunal heard the references together. However, it divided the procedural timetable into a Phase I on liability and a Phase II on damages (respectively, "**Phase I"** and "**Phase II**"**)**. On 22 September 2017, the Tribunal issued its Phase I Partial Awards (the "**Phase I Partial Awards**") in the two arbitrations.

7 The Phase I Partial Awards are similar, but not identical. The Tribunal dismissed the Defendants' claim for rescission of the CBX SPA, as well as the Defendants' claim for payment of the alleged shortfall in the first instalment due under the CBY SPA. It ordered that the Plaintiffs pay to the Defendants the first instalment under the CBX SPA and 15% annualised compound interest on the first instalments under both SPAs. The Tribunal directed that the Defendants' claim for accelerated payment of the Remaining Amounts and the Plaintiffs' set-offs and counterclaims be hived off to Phase II. This was because the Tribunal felt that the parties would benefit from a chance to put in "a full

pleading on the issues of liability and damages" after having heard the evidence in Phase I. The costs of Phase I were reserved to Phase II.

8 The parties submitted further pleadings in the run-up to the Phase II substantive hearing. In their pleadings and submissions, the Defendants (among other contentions) introduced claims for "incidental fraud" and "fraudulent inducement". The Plaintiffs objected to those claims as falling outside Phase II and outside the Tribunal's jurisdiction. The Phase II substantive hearing took place on 30 and 31 August, and 1 and 4 September 2018. Afterwards, the parties exchanged several rounds of Post-Hearing Briefs ("**Post Hearing Briefs**") (including submissions on costs). Phase II formally closed on 30 May 2019 when the Tribunal forwarded final drafts of the Phase II Partial Awards to the ICC Secretariat following scrutiny by the ICC Court of Arbitration. On 5 June 2019, the Tribunal issued the Phase II Partial Awards. Those ordered that the Plaintiffs pay (a) the Remaining Amounts to the Defendants in accordance with Schedule 5; and (b) 15% interest compounded annually from the date of the Phase II Partial Awards. The latter two determinations are the Remaining Amounts Orders and the Compound Interest Orders mentioned above. The Tribunal dismissed the remainder of the Defendants' claims (including the Defendants' fraud allegations) and all of the Plaintiffs' set-offs and counterclaims.

9 On 28 June 2019, the Defendants applied to the Tribunal for a correction of the Compound Interest Orders. The Defendants pointed out that, between Phases I and II, the parties' Thai law experts had revised their opinions on compound interest under Thai law. In Phase I, the Defendants' expert had thought that it was permissible under Thai law to award 15% annualised compound interest on monies due under loan agreements (including the SPAs). The Tribunal had accepted this evidence in ordering 15% compound interest in

its Phase I Partial Awards. But, in the course of Phase II, the parties' experts had become unanimous that Thai law did not allow interest payable under the SPAs to be compounded at all. Article 12.9 ("**SPA Article 12.9**") in the SPAs, which permitted 15% compound interest to be imposed on overdue amounts, was therefore contrary to Thai law in both experts' view. The Defendants observed in their correction application that, for this reason, in their Phase II Reply Submissions dated 15 July 2018 (the "**Phase II Reply**"), they had moderated their original prayer for 15% compound interest to one only seeking "15% interest". The Defendants requested the Tribunal to correct the Phase II Partial Awards accordingly. However, in its Decision (the "**Correction Decision**") dated 5 August 2019, the Tribunal declined to do so.

10 On 9 August 2019, the Tribunal issued the Costs Award covering the costs of Phases I and II of both arbitrations (which had by then been consolidated). The Tribunal ordered the Plaintiffs to pay 66% of the Defendants' costs of the two arbitrations, together with simple interest of 7.5% per annum from the date of the Costs Award.

II. Discussion

A. The challenge to the Remaining Amounts Orders

A.1 Additional background

11 The Existing and Future Projects relate to wind farming. They have largely been carried out on land designated for land reform under Thailand's Agricultural Land Reform Act B.E. 2518 (1975) (the "**ALRA**"). The land had been leased to BBB by Thailand's Agricultural Land Reform Office ("**ALRO**") pursuant to the ALRA. By a ruling dated 26 January 2017 (the "**Thai court ruling**"), the Supreme Administrative Court of Thailand held that a company

("**T Wind**") had misused ALRO-leased land by operating a wind farm there. The court ruled that wind farming was incompatible with the ALRA. The court suspended T Wind's permission to run a wind farm business on the land. The Thai court ruling generated uncertainty among wind farm developers (including BBB) which were in similar positions to T Wind. To address these concerns, Thailand's National Council for Peace and Order passed Order No. 31/2560 (the "**NCPO Order**") on 23 June 2017. The NCPO Order amended the ALRA to enable ALRO to approve the use of agricultural reform land to benefit the energy sector, improve the utilisation of natural resources, or further the public interest. The NCPO Order thus allowed ALRO to lease agricultural reform land for wind farming, but subject to ministerial regulations (the "**ministerial regulations**"). Those were issued on 29 December 2017. BBB applied for new leases in February 2018 in accordance with the ministerial regulations.

12 On 28 September 2018 the Plaintiffs started a separate ICC arbitration (the "**ALRO arbitration**") against the Defendants before a differently constituted tribunal. In the ALRO arbitration (which is ongoing), the Plaintiffs contend that a "fundamental premise" underpinning their acquisition of AAA shares under the SPAs was that the Existing and Future Projects were on land leased by ALRO on certain terms and conditions. The Plaintiffs argue that the Thai court ruling, the NCPO Order, and the ministerial regulations vitiated that fundamental premise, rendering the payment terms in the SPAs (including for the Remaining Amounts) incapable of performance. The Plaintiffs say that, as a result, they became entitled under Thai law "to withhold the Remaining Amount (as and when the Payment Conditions materialise) and claim damages suffered as a result of the defective Acquisition". Although the Plaintiffs have applied to ALRO for new leases under the ministerial regulations, any new

leases are likely (the Plaintiffs allege) to be on different terms and conditions from before.

There is no dispute that, by the time of the Phase II Partial Awards, the CODs of the Future Projects had been achieved. A1 reached COD on 23 November 2018, A2 on 28 September 2018, A3 on 28 September 2018, A4 on 14 March 2019, and A5 on 28 December 2018. Consequently, the CODs being themselves among the milestone dates identified in Schedule 5, some of the Remaining Amounts had fallen due under Schedule 5 by the time the Phase II Partial Awards were published.

13 Between the conclusion of the Phase II substantive hearing and the close of Phase II on 30 May 2019, the parties updated the Tribunal on the attainment by the Future Projects of their CODs. The Tribunal was also provided with copies of payment demand notices sent by the Defendants to the Plaintiffs and the parties' correspondence in connection with those demands. In these demand notices, the Defendants claimed that, COD having been achieved on specified Future Projects, certain of the Remaining Amounts had become due. In their replies, the Plaintiffs refused to pay the demands, pending the outcome of the two arbitrations, the ALRO arbitration, and various other proceedings between the parties.

A.2 The Plaintiffs' case

14 The Plaintiffs complain that, in making the Remaining Amounts Orders, the Tribunal exceeded its jurisdiction. This is because, according to the Plaintiffs, the payment of the Remaining Amounts as per Schedule 5 was not an issue before the Tribunal in Phases I and II. The Plaintiffs suggest that they were taken "wholly by surprise" by the Tribunal's Remaining Amounts Orders. The Plaintiffs have sought to make good their contention by taking me through the

pleadings and submissions in Phases I and II in detail. They say that, as far as the Remaining Amounts and Phase II were concerned, the only live issues were (a) whether the payment of the Remaining Amounts had been accelerated; and (b) whether the Tribunal should order that the Plaintiffs provide security to the Defendants for the payment of the Remaining Amounts. On these issues, the Plaintiffs claim to have prevailed, the Tribunal having rejected the Defendants' case for accelerated payment and the Tribunal not having ordered any security.

15 To bolster their argument, the Plaintiffs submit that the payment of the Remaining Amounts pursuant to Schedule 5 could not have been an issue as a matter of principle. They argue that, the Phase II Hearings of the CBX and CBY arbitrations having started and ended *before* the Future Projects attained their CODs, the Defendants could not have demanded payment of the Remaining Amounts under Schedule 5. The Remaining Amounts would not yet have fallen due and so the Plaintiffs could not have been in breach of any obligations to pay the same. It follows (the Plaintiffs suggest) that, the Defendants not having pleaded anticipatory breach of the Schedule 5 obligations, and the Defendants not having sought a declaration to such effect, the payment of the Remaining Amounts per Schedule 5 could not have been an arbitrable dispute in Phase II.

16 The Plaintiffs further submit that the Remaining Amounts Orders unfairly prejudice their position in the ALRO arbitration and other proceedings between the parties. The Plaintiffs' case in all of those proceedings is that, the fundamental premise underpinning the SPAs having been altered, the Remaining Amounts can no longer be paid pursuant to Schedule 5. The ALRO arbitration (the Plaintiffs submit) is the proper forum to deal with disputes as to the payment of the Remaining Amounts pursuant to Schedule 5. The Plaintiffs submit that the Tribunal ought to have realised this, pointing out that the Tribunal itself stated in the Phase II Partial Awards:

> 311. The Arbitral Tribunal recalls that Claimants [the Defendants] have made payment demands on the basis of the CODs and that Respondents [the Plaintiffs] while not refusing payment in principle, consider that such payment is premature due to, *inter alia*, the pending counterclaims in this arbitration, pending proceedings before the Thai courts, as well as the third ALRO arbitration.
>
> 312. The Arbitral Tribunal cannot rule on the pending claims before other *fora* or arbitral tribunals, however, as far as these two parallel arbitrations are concerned, and more importantly for the present arbitration proceedings, the payments set out in … Schedule 5 above have now become due and payable, from the date of this Partial Award with interest. The question of the applicable interest shall be examined below.

But (the Plaintiffs complain) the Tribunal failed to adhere to its own words.

17 The Plaintiffs observe that, as a result of the Remaining Amounts Orders, they continue to suffer prejudice because the Defendants have been deploying those Orders to mount "ongoing legal assaults" on the Plaintiffs in the ALRO arbitration and other proceedings (such as an English court action brought by the Defendants against the Plaintiffs). According to the Plaintiffs, the Defendants have submitted in the ALRO arbitration and other proceedings that the obligation to pay the Remaining Amounts per Schedule 5 is now *res judicata* by reason of the Remaining Amounts Orders.

18 The Plaintiffs finally claim that by the Remaining Amounts Orders they were denied natural justice by the Tribunal. The Plaintiffs say that, had they known that the Tribunal was considering making the Remaining Amounts Orders, they would have "raised jurisdictional objections and substantive defences (now being marshalled in the ALRO Arbitration)".

A.3 Analysis of the Plaintiffs' case

(1) Whether there has been excess of jurisdiction

19 In my view, the payment of the Remaining Amounts pursuant to Schedule 5 was squarely in issue in Phases I and II. This is evident from the Defendants' Phase II Reply, where the Defendants pleaded as follows:

> 13.2 ...
>
> > 13.2.1 According to Schedule 4 to the SPAs, all [BBB] Future Projects should have reached COD by July 31, 2018. Although the development of the Projects has been delayed, primarily because of Respondents' wrongdoings, all Projects will have reached COD by early 2019, according to Mr. [CC]'s own public statements. By the time the final award is likely to be rendered, all the [BBB] Future Projects will therefore reach COD, and Claimants are therefore entitled to the Remaining Amount due under the SPAs according to Schedule 5 to the SPAs...
>
> ...
>
> **VI. IN ADDITION TO THE DAMAGES PAYABLE TO THEM AS A RESULT OF INCIDENTAL FRAUD, [CCA] AND [CCB] ARE ENTITLED TO IMMEDIATE PAYMENT OF THE REMAINING AMOUNT PLUS APPLICABLE INTEREST UNDER THE [CBY] SPA**
>
> 210. Claimants maintain that in addition to the damages payable to them as a result of incidental fraud, [CCA] and [CCB] are entitled to immediate payment of the Remaining Amount, together with applicable interest, on multiple independent legal basis, namely: (i) [CBY] is liable for the [BBB] Share Disposal that qualifies as an 'abuse of right' entitling [CCA] and [CCB] to damages (**sub-Section VI.B** below); (ii) [CBY] willfully breached its contractual Covenants set out in Articles 3.1(ii), 10.1 and 10.2 of the [CBY] SPA, entitling [CCA] and [CCB] to damages (**sub-Section VI.C** below); and (iii) assuming [CBY] persists in denying that it maintains control over the [BBB] Shares, it has thereby frustrated the Payment Conditions set out in the SPA, thereby triggering their fulfillment and rendering the Remaining Amount due (**sub-Section VI.D** below).
>
> 211. On a very subsidiary basis and coming back to the spelled-out terms of the SPAs, at the very minimum and by default, all five [BBB] Future Projects should have reached COD by July 2018 (as per Schedule 5 of the SPAs) and will have

reached COD by the expected time of delivery the Final Awards (as per Mr. [CC]'s latest, upon oath affirmation), rendering the Remaining Amount contractually due as per Schedule 5 to the SPAs (sub-Section VI.A below).

A. Under Article 3.1 of the [CBY] SPA, payment of the Remaining Amount will be contractually due by the expected time of delivery of the Final Awards in view of the acknowledged *de facto* CODs of [BBB]'s Future Projects

212. As explained at paragraphs 119 *et seq*. above, the CODs of [BBB]'s five Future Projects are substantially lagging behind the SCOD [Scheduled COD] dates set in Schedule 5 of the [CBY] SPA. Although this in itself constitutes a stand-alone trigger for payment of the Remaining Amount as set out in Section VI.D below, even taking the *de facto* CODs as payment trigger, by the time the Final Awards is expected to be delivered (in early/mid-2019), the [BBB] Future Projects will be operational.

213. This was confirmed, upon oath, by Mr. [CC] himself in his very recent Hong Kong Affidavit: (i) two projects will reach COD by the time of the Singapore Hearing (e.g. "*by end of August 2018*"); (ii) another two projects will reach COD shortly thereafter (e.g. "in October-November 2018"); and (iii) the last project will reach COD by the time expected time of delivery of the Final Award (e.g. *"in early 2019"*).

214. Acting upon [CBY]'s ceaseless assurances throughout this arbitration that it intends to perform the SPAs, the Remaining Amount for all five [BBB] Future Projects will be contractually due and payable by the expected time of the Final Award. Moreover, as two of the five [BBB] Future Projects have been confirmed to reach COD by the time of the Singapore Hearing, Claimants deem it necessary to have Respondents and Mr. [CC] enter into a suitable form of guarantee or undertaking – before the Tribunal and counsel of both parties – so as to ensure timely payment of the amounts uncontestably due.

215. Claimants submit, however, that the Remaining Amount under the [CBY SPA] became immediately due earlier, under one of the three legal basis set out in the following sub-Sections.

…

E. Conclusion

265. To summarize Claimants' arguments in this Section VI, unless the Tribunal were to only grant Claimants' very subsidiary claim, i.e. the Remaining Amounts are due based on the affirmed, *de facto* CODs of all [BBB] Future Projects (e.g. by early 2019, the expected time of delivery of the Final Awards),

> [CCA] and [CCB] are entitled to the payment of the Remaining Amount (contractually or its equivalent as damages) and applicable interest calculated from the date of breach under any of the following three legal or contractual grounds:...
>
> [emphasis added in underline]

20 The underscored words made it plain that the Defendants were seeking payment of the Remaining Amounts pursuant to Schedule 5, albeit as a "very subsidiary claim" or bottom-line position. Further, I do not think that the Plaintiffs' application for security in respect of the Remaining Amounts can be regarded as a claim for security alone in a vacuum. From paragraph 214 of the Phase II Reply, it was implicit that security was being requested not for its own sake, but "so as to ensure timely payment" of the Remaining Amounts pursuant to the SPAs. Thus, although it refused security, the Tribunal was entitled to deal with the related question of the timely payment of the Remaining Amounts as per Schedule 5. Given the above, I do not believe that the absence of an allegation of anticipatory breach or of a prayer for declaratory relief, means that timely payment of the Remaining Accounts pursuant to Schedule 5 was outside the Tribunal's purview in Phase II.

21 Although the Plaintiffs say that the Remaining Amounts Order took them by surprise, their conduct during the CBX and CBY arbitrations would have conveyed a different impression to the Tribunal. In particular, the Plaintiffs' counsel submitted the following on the first day (30 August 2018) of the substantive hearing:

> (a) At 2.34pm: "[W]e accept that payment is to be made according to the milestones, we simply say we should be allowed to set off our counterclaim against those payments, whatever is the counterclaim, this tribunal decides. What we disagree with them is that they have any basis to claim an acceleration."

(b) At 4.24pm: "And, hence, we say, at the end of Phase II the tribunal will make a decision on whether there is going to be any acceleration or not and, if not, then essentially payments would follow according to the milestones."

(c) At 5.50pm: "When you hit each milestone, 45 days after, you pay."

22 The Tribunal would reasonably have understood from counsel's remarks that, subject only to their case on set-offs and counterclaims in Phase II, the Plaintiffs intended to comply with their obligations under the SPAs and to pay the Remaining Amounts within 45 business days of the Schedule 5 milestones. The quotation from the Phase II Partial Awards at [16] above shows that the Tribunal had counsel's remarks firmly in mind. Indeed, counsel's qualification (to the effect that the Plaintiffs should be allowed "to set off our counterclaim against those payments, whatever is the counterclaim, this tribunal decides") acknowledges that there was an arbitrable issue in Phase II as to whether the Remaining Amounts were payable at all, whether in whole or part, pursuant to Schedule 5. The parties' dispute was not merely as to whether the Remaining Amounts should be accelerated or whether there should be security for their due payment. The parties were also arguing about the extent (if at all) to which the Plaintiffs' counterclaims could be set off against any monies (including the Remaining Amounts) due to the Defendants under the SPAs, regardless of when such monies were payable.

(2) Whether there has been unfair prejudice

23 Nor am I persuaded that the Plaintiffs have suffered unfair prejudice by the Remaining Amounts Orders. In this connection, I will first consider the alleged unfair prejudice to the Plaintiffs' position in the ALRO arbitration. I will

then briefly comment on the alleged prejudice to the Plaintiffs' position in other proceedings.

24 I begin by outlining what the Plaintiffs told the Tribunal in Phase II about the ALRO issue (that is, the repercussions of the Thai court ruling) (the "**ALRO issue**").

25 In his opening on the first day of the substantive hearing, Plaintiffs' counsel alluded to the ALRO issue as follows:

> [T]he [Defendants] have stated in their Phase II statement of claim ... that the Agricultural Land Reform Office issue has been definitively resolved by 23 June 2017 [that is, the date of the NCPO Order]. Not so. We have taken the position that it only began to be resolved because essentially that's when parties could start applying for permission to have wind farms on their agricultural lease.
>
> Members of the tribunal, for completeness, I would inform you our clients have applied to the ALRO for these leases to carry out wind farm projects, but we have not received final approval for these lease terms. We have not.
>
> We were hoping to resolve this issue because we would have then brought this claim in this arbitration, but the lease terms have not been approved or finalised and it may well be the subject of a further arbitration we will bring, and I just want to mention it not because it's before this tribunal, but I don't want it to be said that somehow we have waived our rights or treated this issue as settled in this arbitration. It is a live issue. It is not before the tribunal. It may well be the subject of a further arbitration our clients will bring against the claimants.

26 Counsel thus suggested that the resolution of the ALRO issue would depend on the Thai government's approval of the Defendants' new lease application. He foreshadowed the possibility of an additional counterclaim within the CBX and CBY arbitrations or a claim in a future arbitration, depending on when the new leases were issued and the terms thereof. He gave no details as to the thrust of the Plaintiffs' potential claim, but reserved the Plaintiffs' position on whether the ALRO issue would ultimately be resolved.

27 CC gave the following evidence on re-examination by Plaintiffs' counsel ("**P**") on the third day (1 September 2018) of the substantive hearing:

> [P]: … Just before [the Defendants' counsel ("**D**")] ended his cross-examination…., the question is put…:
>
> > "[D]: So it means you are promising that in your personal capacity, [CC], you intend to pay whatever [CBX] and [CBY] are ordered to pay?
> >
> > [CC]: I intend to pay and I believe you know, subject to whatever damage, that up to tribunal to decide."
>
> When you said "subject to whatever damage", what did you mean?
>
> [CC]: The -- I think all along, you know, if you look at the timeline since beginning of January [2016], the letter is flying around to many people not only in Thailand, even landed in Middle East to someone that I really don't know, and that's also damage my reputation, the company reputation. And not only that, with the media campaign attack on me and the company.
>
> ….
>
> [P]: … after you said 'Subject to whatever damage, that's up to tribunal to decide' …, [D] goes on to say:
>
> > "[D]: And it means doing whatever it takes to pay; right?
> >
> > [CC]: I'll try my best to pay."
>
> How will you try, Mr. [CC]?
>
> [CC]: I think if we can achieve the target and everything goes smoothly which -- for example, for the land issue, if we can solve the land issue, I think I'll live up to my obligation.
>
> …
>
> [The Chairman seeks clarification of whether CC was referring to the "lend" or "land" issue.]
>
> …
>
> [CC]: In early 2017, the Thai court decided the land that we use to build wind farm, it's illegal. So we have to resubmit and we're still waiting for the new regulations to come out.
>
> [P]: When you say you are waiting for the new regulations to come out, what regulations are those?
>
> [CC]: The existing land lease, basically it's illegal now and it's covered by section 44 in Thailand temporary for us to operate

> and then they'll come out with the new rules and regulations for that.
>
> [P]: I see. Thank you.

28 The thrust of CC's re-examination evidence was consequently that he would honour the CC companies' obligations under Article 3.1(ii) and Schedule 5 of the SPAs, subject to the issue of "new regulations". According to CC, because of the Thai court ruling, the existing land lease was "basically ... illegal now". There were temporary arrangements enabling the Plaintiffs to operate, but the Plaintiffs were waiting for "new rules and regulations" to cure the situation. CC's evidence is puzzling because the ministerial regulations had been issued at the end of December 2017, well before CC gave evidence. On a generous reading, what CC probably meant was that the Plaintiffs were awaiting the issue of a new lease under the ministerial regulation to enable the Plaintiffs to operate on a long-term (as opposed to merely temporary) basis. Once the ALRO issue had been resolved through the issue of a new lease, CC would then "live up to [his] obligation". There were no specifics in CC's re-examination evidence that would have indicated to the Tribunal that, apart from the set-offs and counterclaims being asserted in Phase II, the Plaintiffs were objecting to the payment of the Remaining Amounts as per Schedule 5 in any circumstances.

29 On the last day (3 September 2018) of the substantive hearing, the following closing exchange (the "**closing exchange**") took place between the Tribunal and the parties' counsel:

> THE CHAIRMAN: We have considered the situation, we have to set the follow-up procedure. What we also considered and which the parties are obviously quite aware of, is that some of these various milestones come up fairly soon, some apparently by end of September, with payment dates, if you remember correctly, somewhere in November; others come up early next year. We also have taken note of Mr. [CC's] position, that he will pay, under the sale agreement, which stipulates the $700 million, he will pay. That will of course also be important to see.

So we do not think that it is necessary to have an accelerated post-hearing process, because that will allow the parties to update us on what is going to happen. Yes? And for the tribunal to take that onboard. That is a possibility. I think claimants have all the time been pushing for a very, very quick award, [D]?

[D]: Yes.

THE CHAIRMAN: You will have to consider that.

[D]: If I may, one comment on that point? I would like to share with the tribunal Mr. [DD's] position. Again, Mr. [DD] fully appreciates what the tribunal just described, which is the coming milestone and the fact that it is of course critical to see what is going to happen. At the same time, [DD's] position is that, as you know, he is entitled to the payment of the [CBX] first instalment since now almost two years and although it is not directly related to this arbitration, as he told you, he has invested the vast majority of the funds he received from this transaction in a new venture called Blade which is preparing for a new round of equity raising. Again, I am just sharing information. That is going to happen before the end of this year, probably in October, so I am pointing out and stressing for the tribunal's information that he would hope to be able to finance the continued development of this new project, which is very fast growing, and so, again, that he would expect a pretty quick resolution of the arbitration.

THE CHAIRMAN: It is your call, sir. You may consider various angles, but that is fine. If there is not a voluntary payment coming up, there is no prospect for you to get an award before the end of the year, I can tell you right now, so you may want to take that onboard. We have decided, given the complexity, we want to have two rounds of post-hearing briefs, simultaneous. If you want to do it properly, you need for the first round at least six weeks and then another few weeks for the second round, and then the tribunal will set to work, and occasionally the tribunal also has other work and there is the Christmas/New Year period coming up. On many sides there should be a little bit more realism. I was perhaps a little bit harsh by telling this, … but inject some realism in your thinking, but it is fine. We will establish a calendar as you seem to suggest and you will live with it.

…

[Defendants' counsel proposes a timetable for Post-Hearing Briefs.]

…

> THE CHAIRMAN: Still it is not possible to make the award before the end of the year. Even under the strictest ICC timeline, which is now three months, after the last submissions of the parties. You realise that?
>
> [D]: Yes, I fully realise because you have to draft the award.
>
> …
>
> [Discussion on the length and format of the Post-Hearing Briefs.]
>
> …
>
> THE CHAIRMAN: … We have now a fair understanding, this case has been going on for some time, many of the arguments exchanged are not entirely new, so we can live with summarised briefs. Any other point which I may have forgotten? Anything which needs to be clarified? Of course, we are available if today we forgot a point, we can always come back to you.
>
> …
>
> [Defendants' counsel asks permission to submit a copy of a previously discussed email. After checking with Plaintiffs' counsel, the Tribunal agrees.]
>
> …
>
> THE CHAIRMAN: …. Any other points?
>
> [P]: Not from the respondents [that is, the Plaintiffs].
>
> [D]: Not from the claimants [that is, the Defendants].
>
> THE CHAIRMAN: We come to the end of our hearing. Thank you very much, ladies and gentlemen, it was as usual interesting and lively. We will do our best on our side to follow up with it and we are waiting with interest for your post-hearing briefs. Thank you and have a good evening and also travel.
>
> …
>
> [The hearing concluded]

30 The Tribunal frankly told the parties that, realistically, the Phase II Partial Awards would not be ready until some point in 2019. By such time, on the evidence, the CODs for the Future Projects would have been attained. The Tribunal then referred to CC's remaining evidence that he would pay the Remaining Amounts pursuant to the SPAs. In light of that evidence and despite

the question of accelerated payment of the Remaining Amounts being an issue in Phase II, the Tribunal felt that it was unnecessary to have an accelerated process for Post-Hearing Briefs.

31 Given what Plaintiffs' counsel had foreshadowed in his opening and the Tribunal's express reference to CC's re-examination evidence, it was incumbent on the Plaintiffs to have unambiguously clarified their true position on the ALRO issue during the closing exchange. In the ALRO arbitration, the Plaintiff is contending that the Thai court ruling, the NCPO Order and the ministerial regulations nullified the fundamental premise of the CBX and CBY SPAs. This is regardless of the outcome of the Plaintiffs' application for a new lease (including the terms and conditions thereof). Indeed, the application for a new lease was still pending when the ALRO arbitration was started. More specifically, in their Request for Arbitration in the ALRO arbitration, the Plaintiffs seek a declaration that:

> …the [CBX and CBY SPA] Payment Conditions [had become] incapable of performance pursuant to [the] parties' true intentions, and consequently, payment of the Remaining Amount can no longer be triggered

The Request for Arbitration was submitted to the ICC just under four weeks after the closing exchange. The Plaintiffs would have known their actual position on the Remaining Amounts by the time of the closing exchange. In any event, all relevant circumstances (*ie,* the Thai court ruling, the NCPO Order and the ministerial regulations) alleged to have vitiated the payment conditions in the CBX and CBY SPAs had occurred in 2017, long before the substantive hearing. Nothing prevented the Plaintiffs from laying their cards on the table at the closing exchange. They could (and should) have signalled then and there that, contrary to the Tribunal's understanding of CC's evidence, the Plaintiffs regarded themselves as "entitled to withhold the Remaining Amount (as and

when the Payment Conditions materialise)" (see the Request for Arbitration at paragraph 24(b)(i)). The Plaintiffs having instead said nothing, it would be unreasonable to expect the Tribunal to infer from the Plaintiffs' references to the ALRO issue prior to the closing exchange that, on the Plaintiffs' case, Schedule 5 had become incapable of performance at the end of 2017.

32 In the course of the parties' Post-Hearing Briefs, the Tribunal was informed of the ALRO arbitration. The Plaintiffs' Phase II Post-Hearing Reply dated 5 November 2018 (the "**Plaintiffs' Post-Hearing Reply**") stated:

> 57. **The [Defendants'] first assertion … mischaracterises [the Plaintiffs'] position**, which has all along been that they remain ready and willing to fulfil their payment obligations under the SPAs (as and when instalments come due), **subject to** the resolution the outstanding issues impinging upon those obligations. In particular: (*a*) in respect of the [CBX] 1st Instalment (which is pending release from the Escrow Account), resolution of [the Plaintiffs'] Set-Off Claim against [the Defendants], and (*b*) in respect of the Remaining Amounts under the SPAs, resolution of [the Plaintiffs'] Counterclaims as well as issues concerning the terms of the land leases obtained for [BBB]'s projects.
>
> 58. On the last point, the Tribunal would recall that, on Day 1 of the Phase II Hearing, [the Plaintiffs] highlighted that [the Defendants] had wrongly informed the Tribunal that the issue concerning the land leases issued by the Agricultural Land Reform Office of Thailand (***ALRO***) for [BBB]'s projects (first highlighted to the Tribunal by way of [the Plaintiffs'] letter of 6 July 2017 "has been definitely resolved on June 23, 2017" (an impression sought to be perpetuated in [the Defendants'] Phase II PHB [*ie,* Post-Hearing Brief] …); in fact, the issue remained live and ALRO's approval of the new lease terms (*which are the subject of applications filed in February 2018, pursuant to ministerial regulations that were only promulgated in December 2017*) is still pending.
>
> 59. As [the Plaintiffs] explained at the Phase II Hearing, and contrary to the aspersions sought to be cast on [the Plaintiffs'] motives in [the Defendants'] Phase II PHB at [19.2], the ALRO issue could not have been made the subject-matter of the current Arbitrations as the facts underlying the issue continued to *evolve*. [The Plaintiffs] thus indicated at the Phase II Hearing

> they may need to commence a fresh arbitration to address those separate issues.
>
> 60. However, in view of a possible approaching time bar in December 2018, [the Plaintiffs] eventually decided to commence that arbitration on 26 September 2018 ... to seek declaratory relief in respect of the Remaining Amounts under the SPAs and/or damages suffered by [the Plaintiffs] arising from the ALRO issue (to be quantified when the underlying facts are finally crystallised).
>
> 61. Pending the resolution of the ALRO issue in the ALRO Arbitration, [the Plaintiffs] have responded to [the Defendants'] 9 October 2018 payment notices to re-affirm that they stand ready and willing to perform their payment obligations thereunder, once the pending issues impinging upon those obligations are resolved: see letters dated 5 November 2018 from [the Plaintiffs] to [the Defendants] at **Exhibits R-179 and R-180**. This is **consistent** with the undertakings given by [CC] at the Phase II Hearing; see the following portions of the transcripts on [CC's] re-examination (which were disingenuously omitted in [the Defendants'] Phase II PHB at [12]-[13]):
>
> [Quotation of CC's re-examination cited in [27] above]
>
> 62. For completeness, the arguments in [the Defendants'] Phase II PHB at [18] in support of [the Defendants'] allegation that the ALRO Arbitration is "*frivolous, factually, procedurally and contractually*" are **misconceived** – among other things, (*a*) [the Plaintiffs] are not arguing that the matters giving rise to the ALRO Arbitration "*cancel*" any damages that the Tribunal may award [the Defendants] in these Arbitrations; (*b*) as highlighted at [58] above, it is incorrect for [the Defendants] to suggest that the ALRO issues have been resolved (such that "*[the Plaintiffs] did not suffer any damage*"); (*c*) the claims pursued in the ALRO Arbitration are not time-barred; and (*d*) the ALRO Arbitration does not (contrary to the mischaracterisation in [the Defendants'] Phase II PHB at [18.4]) concern any claim for "breach of [the Defendants] representations under…the SPAs". [**The Plaintiffs] will elaborate on these matters in the appropriate forum (*i.e.*, the ALRO Arbitration)**.
>
> [emphasis in original in bold, italics and underline]

33 Paragraphs 57 to 59 of the Plaintiffs' Post-Hearing Reply repeat what Plaintiffs' counsel had stated on the first day of the substantive hearing, namely, that the ALRO issue had not yet been resolved pending the outcome of the Defendants' new lease application. Paragraphs 60 and 61 referred to the

commencement of the ALRO arbitration. They mentioned that "declaratory relief in respect of the Remaining Amounts ... and/or damages" were being sought in the ALRO arbitration. But the paragraphs did not provide particulars of the declaration sought, the nature of the damages claimed, or the grounds relied upon for those reliefs. Paragraph 61 instead merely stated that what has been done was "consistent with the undertakings given by [CC] at the Phase II hearing". This would have reinforced the Tribunal's understanding that, whatever the subject matter of the ALRO arbitration, the latter was in line with CC's re-examination evidence and the closing exchange. Although it could have, the Plaintiffs' Post-Hearing Reply did not flag that, in actuality, as far as the Plaintiffs were concerned and regardless of the outcome of the new lease application (including the terms and conditions of any new lease), the obligation to pay pursuant to Schedule 5 had become impossible and the Plaintiffs were entitled to withhold payment. I note, in passing, that paragraph 62 cryptically stated that the matters being canvassed in the ALRO arbitration were not intended to "'cancel' any damages that the Tribunal may award" in the CBX and CBY arbitrations. It is possible that such comment would have created an impression in the Tribunal's mind that, whatever the scope of ALRO arbitration, the latter would not operate as a set-off or counterclaim to whatever the Tribunal might award in the CBX and CBY arbitrations.

34 This does not mean that the allegations in the ALRO arbitration had to be argued in the CBX and CBY arbitrations. Had the Plaintiffs at least signalled their true position on the Remaining Amounts to the Tribunal and stated that such was specifically being considered in the ALRO arbitration, the Tribunal in consultation with the parties could have determined how far (if at all) it could (and should) order payment of the Remaining Amounts as per Schedule 5 and to what extent (if at all) such question should be left to the tribunal in the ALRO arbitration. But not having been informed of the true nature of the Plaintiffs'

case, the Tribunal would not have realised that there was more to the Plaintiffs' case on the payment of the Remaining Amounts than their pleaded set-offs and counterclaims and what the Tribunal had been told by CC in evidence and by the Plaintiffs' counsel in submission.

35 From the foregoing survey of events, I do not think that the Tribunal can be faulted for making the Remaining Amounts Orders. There is a mis-match between what the Tribunal was told about the ALRO issue and what the Plaintiffs have claimed in the ALRO arbitration. On the basis of the Plaintiffs' evidence and submissions, the Tribunal would have thought that the ALRO issue and the ALRO arbitration concerned the outcome of the pending new lease application and the consequences of any terms and conditions thereunder. There was nothing to suggest to the Tribunal that, despite CC's re-examination evidence, by the time of the closing exchange and the Post-Hearing Briefs, the Plaintiffs actually had (and still have) no intention of paying the Remaining Amounts in any circumstance. By the Remaining Amounts Orders, the Tribunal was merely acting on its understanding of CC's re-examination evidence as intimated to counsel (and left uncontradicted by the Plaintiffs) during the closing exchange. The Tribunal repeated its understanding in paragraph 312 of its Phase II Partial Awards (quoted in [16] above). The Plaintiffs had ample opportunity before then to disabuse the Tribunal of this understanding (for instance, at the closing exchange or in the Plaintiffs' Post-Hearing Reply), but did not do so.

36 In *AKN and another v ALC and others and other appeals* [2016] 1 SLR 966 ("***AKN v ALC***"), the Court of Appeal stated (at [59]):

> Whether as a function of substantive or procedural law, there is strong support for the view that barring special circumstances, the "extended" doctrine of *res judicata* operates to preclude the re-opening of matters that (a) are covered by an

> arbitration agreement, (b) are arbitrable, and (c) could and should have been raised by one of the parties in an earlier set of proceedings that had already been concluded...

Whether what was not raised by Plaintiffs' counsel in the CBX and CBY arbitrations gives rise to a *res judicata* in the ALRO arbitration is outside the scope of this judgment. The tribunal in the ALRO arbitration will no doubt have to grapple with that question. What is of concern here is the effect of the Plaintiffs' failure to inform the Tribunal of their actual case in the ALRO arbitration. The corollary of the Court of Appeal's dictum in *AKN v ALC* is that, where a question (in this case, the payment of the Remaining Amounts as per Schedule 5) is squarely in issue in an arbitration, then absent special circumstances a party must raise all its arguments in connection with such question in that arbitration. A party cannot keep arguments up its sleeve for use in other proceedings depending on the outcome of the instant arbitration. The rationale for such principle is a salutary one. A person should not normally be vexed more than once by adversarial proceedings (whether arbitration or litigation) on the same subject matter. Here, the Plaintiffs could have (but did not) say anything to the Tribunal about the real nature of their case on the payment of the Remaining Amounts under the SPAs. If as a result they are estopped from raising their case in the ALRO arbitration (for example, if the tribunal in the ALRO arbitration finds that the matter is *res judicata*), I do not think that such prejudice can be attributed to the Tribunal. The Plaintiffs would only have themselves to blame.

37 The Plaintiffs complain that, in the English and other proceedings, allegations of *res judicata* and bad faith have been advanced by the Defendants based on the Remaining Amounts Orders. The validity of those allegations must be for the English court and other relevant forums to determine. For the purposes of the present setting aside application, it suffices that points which

are analogous to those made above on the ALRO issue apply to the alleged prejudice that the Plaintiffs are facing in the English or other proceedings. If the Plaintiffs suffer prejudice, it will have been as a result of their omission to spell out their case on the Remaining Amounts to the Tribunal. The Defendants go so far as to submit that by their silence the Plaintiffs waived any right to set aside the Remaining Amounts Orders. However, given the conclusions that I have reached on prejudice, it is unnecessary for me to rule on waiver.

(3) Whether there has been a denial of natural justice

38 As mentioned at [35] above, the Tribunal afforded the Plaintiffs with numerous opportunities to state the true nature of their case on the payment of the Remaining Amounts. The difficulty is that the Plaintiffs did not do so. I therefore disagree that there has been a denial of natural justice.

A.4 Conclusion on the Remaining Amounts Orders

39 For those reasons, the challenge to the Remaining Amounts Orders fails.

B. The challenge to the Compound Interest Orders

B.1 Additional Background

40 SPA Article 12.9 provided as follows:

> **Interest**
>
> If the Seller or the Purchaser defaults in the payment when due of any sum payable under this Agreement, its liability shall be increased to include interest on such sum from the date when such payment is due until the date of actual payment (after as well as before judgment) at a rate per annum of 15 per cent. Such interest shall accrue from day to day and shall be compounded monthly.

41 In the Phase II Partial Awards, the Tribunal explained why it was making the Compound Interest Orders thus:

> 276. The Arbitral Tribunal has already decided the issue as to the applicable interest to the payments under the two SPAs, by ruling as follows in the first Partial Award in this arbitration:
>
> "*Respondents do not deny that this rate applies in principle and agree that the rate of 15% is acceptable under Thai law as the maximum allowed rate for loans. Further, the Parties' Thai law experts agree that the interest can only be compounded after the first year of arrears, and can only be compounded on a yearly basis and not monthly.*
>
> *Accordingly, the Tribunal finds that the 15% per annum rate is applicable to the First Instalment under the [CBY] Agreement. It also decides that such interest must be compounded as from 25 September 2016, on a yearly basis. This means that the 15% interest as calculated by Claimants and its experts, Accuracy, must be updated, since Accuracy used the compounded rate on a monthly basis starting with 25 September 2015, as opposed to 2016. Moreover, this may also result in an overpayment of interest by Respondents. In any event, as a result of the findings above, Claimants are not entitled to the payment of the shortfalls, but are entitled to the payment of the interest.*"
>
> 277. The Tribunal sees no reason to depart from this ruling in these arbitration proceedings and finds that the 15% interest prescribed in Article 12.9 of the [CBY] SPA shall be compounded on an annualised basis to all payments due under the [CBY] Schedule 5 as described at para. 270, from the date of this Award until payment in full, since the payments under Schedule 5 became legally due as of the date of this award and the findings of this Tribunal as to Claimants' entitlement to the same. At the same time, as per paragraph 284 b) of the first Partial Award in this arbitration, Claimants continue to be entitled to 15% p.a. interest on the First Instalment under the [CBY] Agreement due to the late payment by Respondents, as from 25 September 2016. [emphasis in original]

42 In rejecting the Defendants' application for a correction of the Compound Interest Orders, the Correction Decision stated (at [35]):

> … As a starting point, the Tribunal recalls that its decision on the interest applicable to the payment obligations under the [CBX] (and [CBY]) SPA were made on the basis of the Parties' and their experts' representations in the submissions in the

> First and Second Phase of this arbitration. The Tribunal fully considered the issue, and – due to a regrettable oversight by the Tribunal and a lack of clear reference on the issue in the most recent Prayers for Relief of each Party – decided that the compound interest of 15% p.a. was still appropriate.

The Correction Decisions went on to explain that, in their Phase II Statement of Claim, the Defendants had claimed compound interest at 15%. Although by their Phase II Reply the Defendants had changed their stance on compound interest, the Correction Decision noted that the prayer in the Phase II Reply "only referred to a payment of interests 'at a rate of 15%', with the adjective 'compound' being dropped without being replaced by 'simple'". During the exchange of Post-Hearing Briefs, the Defendants provided the Tribunal with a table ("**Annex C**") of the interest owed under seven heads of claim. The table mentioned that the interest calculated therein was "simple". However, as the Correction Decision observed, "the table did not consider the 'very subsidiary claim' for payments under Schedule 5". As a result, having considered the issue of compound interest under Thai law, the Tribunal nevertheless concluded that, as had been found in the Phase I Partial Awards, an interest rate of 15% (as stipulated in SPA Article 12.9), compounded annually, was appropriate. In those circumstances, the Tribunal did not think that a correction of the Compound Interest Orders was possible under Article 35 of the International Chamber of Commerce Rules of Arbitration 2012 as that only allowed for the correction of typos and arithmetical mistakes.

B.2 The Plaintiffs' case

43 According to the Plaintiffs, the parties "agreed" that Thai law did not permit the compounding of interest due under agreements such as the SPAs. The only issue before the Tribunal was therefore whether the prohibition of compound interest vitiated the whole of SPA Article 12.9 (so that the stipulated interest of 15% would also be ineffective) or merely that part of SPA Article

12.9 providing for compound interest. It follows (the Plaintiffs say) that, in awarding compound interest, the Tribunal exceeded its power and jurisdiction.

44 The Plaintiffs further submit that, given the parties' agreement, the Plaintiffs proceeded on the basis that the compounding of interest was no longer an issue in the arbitration and focussed their arguments on the effect of Thai law on the 15% contractual rate. By making the Compound Interest Orders without prior notice and despite the parties' common position, the Tribunal deprived the Plaintiffs of a reasonable opportunity to put forward their case on the compounding of interest under Thai law.

45 In any event, the Plaintiffs argue that the Compound Interest Orders contravene Thai mandatory law relating to public order and good morals. The present situation is a case involving "palpable and indisputable illegality" in the place (Thailand) where the Compound Interest Orders are to be performed. The Plaintiffs conclude from these premises that it would be against Singapore public policy to allow the Compound Interest Orders to stand.

46 The Plaintiffs finally submit that the Tribunal's award of 15% interest is not severable from its orders that interest be compounded. It follows (the Plaintiffs submit) that, if the Compound Interest Orders are set aside, the award of 15% interest must fall as well. Setting aside the Compound Interest Orders should then lead to there being no interest, rather than there being 15% simple interest, on any Remaining Amounts payable to the Defendants.

B.3 Analysis of the Plaintiffs' case

(1) Whether there has been excess of jurisdiction

47 I do not agree that the Tribunal lacked power to award compound interest or exceeded its jurisdiction in so doing. Singapore being the seat of the CBX and CBY arbitrations, Singapore law governed the arbitrations (including the extent of the Tribunal's powers). The Tribunal had the power to award compound interest under section 12 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("**IAA**"). That states:

> **12. Powers of arbitral tribunal**
>
> ....
>
> (5) Without prejudice to the application of Article 28 of the Model Law, an arbitral tribunal, in deciding the dispute that is the subject of the arbitral proceedings —
>
> ....
>
> (b) may award simple or compound interest on the whole or any part of any sum in accordance with section 20(1).

Section 20 of the IAA supplements s 12(5)(b) of the IAA by enabling an arbitral tribunal to "award simple or compound interest from such date, at such rate and with such rest as [it] considers appropriate". Article 28(1) of the UNCITRAL Model Law on International Commercial Arbitration (the "**Model Law**") (to which s 12(5)(b) of the IAA is without prejudice) provides that an arbitral tribunal "shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute". Thai law being the law governing the CBX and CBY SPAs, the Tribunal's task was accordingly to determine the effect of Thai law on SPA Article 12.9 and consider whether and how to exercise its power under the IAA in line with such determination.

48 I am not persuaded that the Compound Interest Orders were in excess of the Tribunal's jurisdiction. The validity of SPA Article 12.9 was plainly a live dispute at the outset of Phase II. The parties had "agreed" on the relevant Thai law only in the sense that, in the course of Phase II, the Defendants' Thai law expert accepted the view of the Plaintiffs' expert. The Defendants supposed that their change of stance would have been manifest to the Tribunal from the prayer in their Phase II Reply and Annex C. Unfortunately, the Plaintiffs' change of mind had not been apparent to the Tribunal. Although not explicitly mentioned in the Correction Decision, it also seems that the Tribunal did not appreciate that the Defendants' expert had accepted the Plaintiffs' expert's view that, under Thai law, stipulations for compound interest in agreements of the nature of the SPAs are invalid. As a result of these misapprehensions, the Tribunal came to a wrong conclusion on Thai law. I do not think that such error can be characterised as the Tribunal acting beyond its jurisdiction.

49 In *Lesotho Highlands Development Authority v Impregilo SpA and others* [2006] 1 AC 221, the applicants applied to set aside an arbitral on the ground that tribunal had exceeded its powers by awarding (among other relief) pre-award interest contrary to the governing Lesotho law. In his judgment (at [24]), Lord Steyn distinguished between two types of situation:

> … [T]he issue was whether the tribunal "exceeded its powers" within the meaning of section 68(2)(b) [of the UK Arbitration Act 1996 (c 23)]. This required the courts below to address the question whether the tribunal purported to exercise a power which it did not have or whether it erroneously exercised a power that it did have. If it is merely a case of erroneous exercise of power vesting in the tribunal no excess of power under section 68(2)(b) is involved. …

In my view, the present facts fall into the second of Lord Steyn's categories. The situation here is one where, due to its mistake as to the parties' positions and the thrust of the Thai law evidence, the Tribunal wrongly exercised its

undoubted power to award compound interest. The risk that a tribunal makes an error of this sort is a routine hazard of arbitration. Parties to an arbitration have nonetheless agreed to be bound by a tribunal's decision, whether right or wrong, even egregiously wrong, in fact or law. The Tribunal's error on Thai law is thus not of itself a ground for setting aside the Compound Interest Orders.

(2) Whether there has been a denial of natural justice

50 Nor do I accept that the Plaintiffs were denied a reasonable opportunity to present their case on compound interest under Thai law. On the contrary, in the course of Phase II, the Plaintiffs submitted substantial expert evidence of their case on compound interest in Thai law and managed to persuade the Defendants' expert of the correctness of their view on the issue. On its part, the Tribunal (as confirmed by the Correction Decision) considered the issue of compound interest, including the Thai law material before it. The problem was not so much a lack of due process, as of the Tribunal misapprehending the parties' stances and the thrust of Thai law evidence presented to it.

(3) Whether there is a contravention of Singapore public policy

51 I also disagree that allowing the Compound Interest Orders to stand would be repugnant to Singapore public policy.

52 The awarding of compound interest could not by itself be against Singapore public policy since ss 12(5) and 20 of the IAA authorise tribunals to award compound interest. The Plaintiffs instead submit that it would be contrary to Singapore public policy to allow the Compound Interest Orders to stand because they contravene Thai mandatory law. It would be against public order and good morals in Thailand (the Plaintiffs stress) to enforce the Compound Interest Orders. Therefore, in the interest of international comity, the Singapore

court (the Plaintiffs suggest) should set aside the Compound Interest Orders, on the basis that Thailand is a state with which Singapore maintains friendly relations and the Compound Interest Orders constitute "palpable and indisputable illegality" under Thai law. The Plaintiffs cite *Soleimany v Soleimany* [1999] QB 785 ("***Soleimany***") and *AJU v AJT* [2011] 4 SLR 739 ("***AJU v AJT***") in support of this submission.

53 In my view, neither authority assists the Plaintiffs.

54 *Soleimany* was a dispute over a contract for the illegal export of carpets from Iran. The dispute went to arbitration before the Beth Din which applied Jewish law to the dispute. The tribunal found that the plaintiff son and the defendant father had knowingly taken part in a joint venture to smuggle carpets from Iran. But, ignoring the criminal implications of such finding, the tribunal awarded to the son the profits that he would have been made from the enterprise. Reversing the judge below, the English Court of Appeal refused to enforce the Beth Din's award on the ground that the contract was illegal in the place of its performance (which was Iran) and it would be contrary to English law, as the law of the place of enforcement, to recognise such an award.

55 I make three comments in relation to *Soleimany*.

56 First, the expression "palpable and indisputable illegality" used by the Plaintiffs in their submissions originates from *Westacre Investments Inc. v. Jugoimport-SPDR Holding Co. Ltd.* [1999] QB 740 ("***Westacre***"), a case involving a consultancy agreement intended to be performed through the bribery of Kuwaiti officials. In *Westacre,* Colman J stated (at 767):

> … If the issue before the arbitrators was whether money was due under a contract which was indisputably illegal at common law, an award in favour of the claimant would not be enforced

> for it would be contrary to public policy that the arbitrator should be entitled to ignore palpable and undisputed illegality. …

Having referred to Colman J's principle, the Court of Appeal in *Soleimany* ([52] *supra*) broadened its ambit as follows (at 803–804):

> … [W]e should state explicitly what may already have been apparent: when considering illegality of the underlying contract, we do not confine ourselves to English law. An English court will not enforce a contract governed by English law, or to be performed in England, which is illegal by English domestic law. Nor will it enforce a contract governed by the law of a foreign and friendly state, or which requires performance in such a country, if performance is illegal by the law of that country.... This rule applies as much to the enforcement of an arbitration award as to the direct enforcement of a contract in legal proceedings.

57 But the "illegality" arising out of the Compound Interest Orders is not the type of "palpable and indisputable illegality" to which *Westacre* and *Soleimany* were referring. The latter cases used the expression "palpable and indisputable illegality" to describe contracts involving conduct of an obvious criminal nature. This may be seen from *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 Lloyd's Rep 222 at 225 (cited in *AJU v AJT* at [57]), where Walker J distinguished *Soleimany* as follows:

> … [Omnium's] reliance on *Soleimany* … was in my view misplaced. In that case, it was apparent from the face of the award that the arbitrator was dealing with an illicit enterprise for smuggling carpets out of Iran. It was quite simply a smuggling contract. The case thus clearly fell into the category of cases where as a matter of public policy no award would be enforced by an English Court, and the whole of the judgment … has to be read in that context. The element of corruption or illicit practice was present [in *Soleimany*] which, on the arbitrator's unchallengeable finding of fact in this case, was not present here.

58 By similar token, SPA Article 12.9 is "illegal" in the sense that it is contrary to Thai public order and good morals and therefore unenforceable as a

contractual obligation. However, there is no suggestion that the parties' agreement to SPA Article 12.9 gave rise to criminal liability or constituted an illicit enterprise. On the contrary, from the history of the CBX and CBY arbitrations, there was considerable debate in Phase I between the parties' Thai law experts on the validity of SPA Article 12.9. It was not until Phase II that the Defendants' expert changed his opinion on compound interest. It must thus be presumed that the parties agreed to SPA Article 12.9 in good faith, originally believing it to be compatible with Thai law. This is a different situation from one where a contract "palpably and indisputably" requires the parties to contravene the criminal law of some country (for example, by engaging in smuggling or bribery) or is intended to be performed (for example through bribery) in a manner that violates such laws. Neither is this a case where the Tribunal ignored "illegality" under Thai law. The Correction Decision shows that the Tribunal was fully aware that Thai law prohibited compound interest in most (but not all) situations. Having considered the issue, the Tribunal took the view (however wrongly) that, exceptionally, Thai law allowed annualised compound interest on monies due under the SPAs.

59 Second, *Soleimany* ([52] *supra*) is an "enforcement" (as opposed to a "setting aside") case. In a setting aside case under the Model Law, the supervising court of the arbitral seat may set aside an award if it contravenes the public policy of the arbitral seat. In contrast, in an enforcement case under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**") and the Model Law, the enforcing state may refuse to enforce an award which contravenes the public policy of the enforcing state. The Plaintiffs' submission requires me to suppose that a Thai court would not enforce the Compound Interest Orders as a matter of Thai public policy, because the latter orders would be contrary to "public order and good morals" under Thai law. Many jurisdictions have a similar concept of

"public order" or *ordre public* as part of their domestic law. It does not follow that, because an award violates the "public order" of a jurisdiction, the award must automatically be contrary to that jurisdiction's "public policy" in the sense that the expression "public policy" is used in the New York Convention or the Model Law.

60 As the Plaintiffs themselves acknowledge, the expression "public policy" in the New York Convention and the Model Law has a narrow scope. On this point, the Plaintiffs referred to *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 (at [59]), which states that:

> …[the concept of public policy] only operate(s) in instances where the upholding of an arbitral award would "shock the conscience"… or is "clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public" … or where it violates the forum's most basic notion of morality and justice…

The ambit of "public order" or *ordre public* under Thai law may be wider than the narrow scope of "public policy" under the New York Convention and the Model Law. Thus, whether an award violates the "public order" of a country and whether it is contrary to "public policy" under the New York Convention and the Model Law are two different questions. It cannot be assumed that, when it comes to enforcement of the Compound Interest Orders, the Thai court will refuse enforcement as a matter of Thai "public policy" under the New York Convention or the Model Law, simply because the compounding of interest is contrary to "public order and good morals" under domestic law. There is, moreover, a countervailing principle of finality whereby parties are held to a tribunal's decision even when it has made an error of law. In deciding whether to enforce an award as a matter of public policy, an enforcing court (whether in Singapore or elsewhere) will have to balance between the demands of "public order and good morals" (as set out in the relevant state's law) and the principle

of finality (see also *Soleimany* at 800D-H, where the court refers to the existence of "a tension between the public interest that the awards of arbitrators should be respected, so that there be an end to lawsuits, and the public interest that illegal contracts should not be enforced"). It is not apparent to me what the outcome of the Thai court carrying out such balancing exercise in relation to the Compound Interest Orders would be.

61 In any event, whether or not the Compound Interest Orders are enforceable as a matter of Thai public policy strikes me as a question best left to the Thai court to determine, if the Defendants should ever seek to enforce the Compound Interest Orders in Thailand. Save in a case of obvious criminal conduct (such as the smuggling in *Soleimany*), the Singapore court should not have to discern what a Thai court would do on an enforcement action and then reason backwards that, because the Thai court is likely to refuse enforcement as a matter of Thai "public policy" (as the expression is used in the New York Convention and the Model Law), the Singapore court should set aside the Compound Interest Orders, in the interest of comity, as contrary to Singapore public policy.

62 Third, the Plaintiffs equate the place of performance with the place of enforcement. The Plaintiffs assert that the Compound Interest Orders are to be "performed" in Thailand, because they will be enforced there. They suggest that it would be wrong, as a matter of Singapore public policy, to allow the Compound Interest Orders to stand if they are contrary to the law of Thailand as the place of performance. While I accept that the Compound Interest Orders may be enforced in Thailand, I do not believe that the orders can only be enforced there. The orders may be enforced in any New York Convention state in which the Plaintiffs happen to have assets. It seems, for instance, that the Defendants have alleged that the Plaintiffs have assets in Hong Kong against

which the Phase I Partial Awards can be enforced (see *Company A and others v Company D and others* [2019] HKCFI 367). If so, there may be more than one place of performance, insofar as "performance" can be equated with "enforcement". For like reasons to those canvassed in relation to enforcement in Thailand, it is not evident that the multiple jurisdictions where the Compound Interest Orders might be "performed" will refuse enforcement on the basis of their public policy, due only to the Compound Interest Orders being regarded as contrary to public order and good morals in Thailand. The Defendants have drawn my attention, for example, to *Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd* [2004] 2 NZLR 614, in which it was held that an award upholding a clause (such as SPA Article 12.9) which is illegal, in the sense of being unconscionable or penal in nature, will not be set aside as contrary to New Zealand "public policy" (as that expression is used in the New York Convention and Model Law).

63 Next, I address the Plaintiff's contentions in respect of *AJU v AJT* ([52] *supra*), which was a setting aside case. In *AJU v AJT*, the plaintiff sought to set aside an interim award on the ground that the tribunal had wrongly held that a "Concluding Agreement" was legal and enforceable. The plaintiff argued that the Concluding Agreement was illegal under its governing Singapore law and Thai law as the law of the place of performance. The plaintiff alleged that this was because the Concluding Agreement involved the perversion of justice in Thailand, since (contrary to what the tribunal found) it required the defendant to take steps to stifle the prosecution of the plaintiff by the Thai authorities. The plaintiff succeeded at first instance, but lost on appeal.

64 The Singapore Court of Appeal stated:

> 62 … [S]ince the law applied by the Tribunal was Singapore law, the question that arises is whether, if a Singapore court

disagrees with the Tribunal's finding that the Concluding Agreement is not illegal under Singapore law, the court's supervisory power extends to correcting the Tribunal's decision on this issue of illegality. In our view, the answer to this question must be in the affirmative as the court cannot abrogate its judicial power to the Tribunal to decide what the public policy of Singapore is and, in turn, whether or not the Concluding Agreement is illegal (illegality and public policy being … mirror concepts in this regard), however eminent the Tribunal's members may be. Accordingly, we agree with the Judge that the court is entitled to decide for itself whether the Concluding Agreement is illegal and to set aside the Interim Award if it is tainted with illegality, just as in *Soleimany*, the English CA refused to enforce the Beth Din's award as it was tainted with illegality.

63 However, this conclusion does not mean that in every case where illegality in the underlying contract is invoked, the court is entitled to reopen the arbitral tribunal's finding that the underlying contract is not illegal. In the present case, it was not disputed that the Tribunal's decision took into account the principle that an agreement to stifle the prosecution of non-compoundable offences would be illegal and contrary to public policy; indeed, the Tribunal made the Interim Award on that basis….

64 In our view, this was not an appropriate case for the Judge to reopen the Tribunal's finding that the Concluding Agreement was valid and enforceable. The Tribunal did not ignore palpable and indisputable illegality (as the Beth Din did in *Soleimany* …). The Concluding Agreement does not, on its face, suggest that the Appellant was required to do anything other than to receive evidence of the withdrawal and/or discontinuance and/or termination of "the Criminal Proceedings" (as defined in cl 1 of the Concluding Agreement) from the Thai prosecution authority or other relevant authority….

65 In our view, the Judge was not entitled to reject the Tribunal's findings and substitute his own findings for them. On the facts of this case, s 19B(1) of the IAA calls for the court to give deference to the factual findings of the Tribunal. The policy of the IAA is to treat IAA awards in the same way as it treats foreign arbitral awards where public policy objections to arbitral awards are concerned, even though, in the case of IAA awards, the seat of the arbitration is Singapore and the governing law of the arbitration is Singapore law. Arbitration under the IAA is international arbitration, and not domestic arbitration. That is why s 19B(1) provides that an IAA award is final and binding on the parties, subject only to narrow grounds for curial intervention. This means that findings of fact made in

an IAA award are binding on the parties and cannot be reopened except where there is fraud, breach of natural justice or some other recognised vitiating factor.

66 In this connection, we would reiterate the point which this court made in *PT Asuransi Jasa* ... at [53]–[57], *viz*, that even if an arbitral tribunal's findings of law and/or fact are wrong, such errors would not per se engage the public policy of Singapore. In particular, we would draw attention to the following passage from [57] of that judgment:

> … [T]he [IAA] … gives primacy to the autonomy of arbitral proceedings and limits court intervention to only the prescribed situations. The legislative policy under the [IAA] is to minimise curial intervention in international arbitrations. Errors of law or fact made in an arbitral decision, *per se,* are final and binding on the parties and may not be appealed against or set aside by a court except in the situations prescribed under s 24 of the [IAA] and Art 34 of the Model Law. While we accept that an arbitral award is final and binding on the parties under s 19B of the [IAA], we are of the view that the [IAA] will be internally inconsistent if the public policy provision in Art 34 of the Model Law is construed to enlarge the scope of curial intervention to set aside errors of law or fact. For consistency, such errors may be set aside only if they are outside the scope of the submission to arbitration. *In the present context, errors of law or fact, per se, do not engage the public policy of Singapore under Art 34(2)(b)(ii) of the Model Law when they cannot be set aside under Art 34(2)(a)(iii) of the Model Law.* [emphasis added]

This passage recognises the reality that where an arbitral tribunal has jurisdiction to decide any issue of fact and/or law, it may decide the issue correctly or incorrectly. Unless its decision or decision-making process is tainted by fraud, breach of natural justice or any other vitiating factor, any errors made by an arbitral tribunal are not per se contrary to public policy.

67 That said, since s 19B(4) of the IAA, read with Art 34(2)(b)(ii) of the Model Law, expressly provides that an arbitral award can be challenged on public policy grounds, it is necessary for us to clarify the application of the general principle laid down in *PT Asuransi Jasa* (at [57]) that "errors of law or fact, *per se*, do not engage the public policy of Singapore". It is a question of law what the public policy of Singapore is. An arbitral award can be set aside if the arbitral tribunal makes an error of law in this regard, as expressly provided by s 19B(4) of the IAA, read with Art 34(2)(b)(ii) of the Model Law. Thus, in the present case, if the Concluding Agreement had been governed by Thai law instead of Singapore law, and if the Tribunal had

> held that the agreement was indeed illegal under Thai law (as the Respondent alleged) but could nonetheless be enforced in Singapore because it was not contrary to Singapore's public policy, this finding – viz., that it was not against the public policy of Singapore to enforce an agreement which was illegal under its governing law – would be a finding of law which, if it were erroneous, could be set aside under Art 34(2)(b)(ii) of the Model Law (read with s 19B(4) of the IAA).
>
> ....
>
> 69 In our view, limiting the application of the public policy objection in Art 34(2)(b)(ii) of the Model Law to findings of law made by an arbitral tribunal – to the exclusion of findings of fact (save for the exceptions outlined at [65] above) – would be consistent with the legislative objective of the IAA that, as far as possible, the international arbitration regime should exist as an autonomous system of private dispute resolution to meet the needs of the international business community. Further, such an approach would also be fair to both the successful party and the losing party in an arbitration. Taking the present case as an example, we have held that the Respondent is bound by the Tribunal's factual finding that the Concluding Agreement did not require the Appellant to do anything illegal under Thai law and was therefore not an illegal contract. If the Tribunal had made the converse finding of fact instead – *ie*, if the Tribunal had found as a fact that the Concluding Agreement did indeed require the Appellant to engage in illegal conduct in Thailand and was therefore an illegal contract – and if the Tribunal had erred in this regard, the Appellant would equally have been bound by this finding as it would have no recourse under the IAA (read together with the Model Law) against such an error of fact.

65 I do not think that *AJU v AJT* takes the Plaintiffs' argument much further.

66 The Court of Appeal (in *AJU v AJT* at [62]) drew a helpful distinction between errors of fact and errors of law in arbitral awards and held that, where it is a question of the latter, the Singapore court would in appropriate circumstances be "entitled to decide for itself whether [an agreement underlying an award] is illegal and to set aside the [award] if it is tainted with illegality". However, there will be times when the distinction between an error of fact and

law may prove elusive. The present situation might be such an occasion. It could conceivably be characterised as one where the Tribunal correctly appreciated what the Thai law on compound interest was, but erred in finding as a fact that, by reason of its attributes, SPA Article 12.9 fell among the exceptions to that law. Alternatively, this case could be classified as one of error of law where, misunderstanding Thai law, the Tribunal wrongly applied it to the facts. I will assume in the Plaintiffs' favour that the error here is of the latter sort. On that footing, would this be an appropriate case to intervene in light of *AJU v AJT*?

67 I do not think so. There are at least four types of situations that can arise. One situation is where a contract is governed by Singapore law and a tribunal wrongly holds that an agreement is not illegal in nature. The Singapore court can intervene in such case because, as the supervisory court, it "cannot abrogate its judicial power to the Tribunal to decide what the public policy of Singapore is" (*AJU v AJT* ([52] *supra*) at [62]). A second situation is where a contract is governed by Singapore law and a tribunal wrongly holds that the contract is illegal and so unenforceable. It would not usually be appropriate for the Singapore court to intervene in such case. The parties should be held to their agreement to abide by the tribunal's award, even if that award is wrong as a matter of law (*AJU v AJT* at [66]). There is a third situation where a contract is governed by foreign law and a tribunal erroneously finds that the contract is illegal under that law. As in the second situation, there should typically be no recourse against the award here (*AJU v AJT* at [69]). Lastly, on the assumption that the Tribunal erred as a matter of Thai law, there is the present situation. That is one where the governing law of a contract is foreign law and a tribunal wrongly concludes that the contract is not illegal under that law. It seems to me that, in this type of case, where there is "palpable and indisputable illegality" on the face of the award, it may be appropriate for the Singapore court to intervene as a matter of Singapore public policy, because not to do so would be to ignore

or condone obvious criminality (*AJU v AJT* at [67]). That the Court of Appeal in *AJU v AJT* was confining its observations on intervention in the fourth type of situation to cases of "palpable and indisputable illegality" may be inferred from its comment (at [64]) that the relevant tribunal had not ignored "palpable and indisputable illegality". If, on the face of an award, obvious criminality is not involved, it should not normally be warranted for a supervisory court to consider evidence or submissions on the question of illegality under foreign law with a view to possibly intervening. That would be tantamount to re-opening and re-hearing the merits of an arbitration. A supervisory court should not readily accede to such an exercise in a setting aside application.

68 I have explained at [57]–[58] above why I do not believe that the present situation is one of "palpable and indisputable illegality". It follows that, even on the assumption that the Tribunal erred as a matter of law, I should not re-visit the legality of the Compound Interest Orders and set them aside as contrary to Singapore public policy. There may be grey areas where a supervisory court will have to make a "judgment call" on whether or not there is "palpable and indisputable illegality" on the face of an award. But the present circumstances are not that type of case.

B.4 Conclusion on the Compound Interest Orders

69 For the foregoing reasons, the challenge to the Compound Interest Orders fails. Had I found in the Plaintiffs' favour in relation to the Compound Interest Orders, I would merely have set aside that part of the Phase II Partial Awards requiring payment of compound interest on the Remaining Amounts on an annualised basis. In my view, the Tribunal's awards of compound interest are severable from the Tribunal's award of interest at 15%. Accordingly, had I set aside the Compound Interest Orders, the result would be that the Plaintiffs

would remain liable to pay 15% simple interest on any overdue Remaining Amounts.

C. The challenge to the Costs Award

70 The challenges to the Remaining Amounts and Compound Interest Orders having failed, there is no basis for a consequential order setting aside the Costs Award. The challenge to the Costs Award and the Plaintiffs' claim for 100% of the costs of Phases I and II of the CBX and CBY arbitrations therefore also fail.

71 If I had set aside the Remaining Amounts and Compound Interest Orders, there would have been a question as to my jurisdiction to set aside the whole of the Costs Awards as a result. Where part of an award has been set aside, other parts may consequentially be set aside where they are "inextricably linked to" or "flow from" the tribunal's findings which have been set aside (see *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd and another matter* [2018] 4 SLR 271 at [72]-[76]). I simply record here my doubt as to whether the Tribunal's conclusions in the Costs Award can be characterised as "inextricably linked to" or "flowing from" one or other or both of the Remaining Payments or the Compound Interest Orders.

72 On the Plaintiffs' claim for 100% of the costs of the CBX and CBY arbitrations, I mentioned to Plaintiffs' counsel that I had doubts as to my power to award the costs of the two arbitrations, even if I upheld the challenges to the Remaining Amounts and Compound Interest Orders. Here I share the views of Kannan Ramesh J in *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd and others* [2019] 3 SLR 12 ("***Lesotho v Swissbourgh***"), at [344]–[346]. In response to my comment, counsel cited *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 (at [102]) where, having set aside

the whole of an award, the Singapore Court of Appeal directed that "[a]ll costs and disbursements incurred in the Arbitration are to be borne by CRW [that is, the claimant in the arbitration]". But the Court of Appeal did not explain the source of its power to award the costs of the arbitration in such manner. My concern is that, under Article 5 of the Model Law, where the Model Law governs an arbitration, "no court shall intervene except where so provided in this Law". There appears to be no provision conferring a power on the court to award the costs of an arbitration in the present situation. It will therefore be necessary at some stage to articulate precisely how the court's jurisdiction to award the costs of an abortive arbitration arises. Had the Plaintiffs prevailed here, only parts of the Phase II Partial Awards would have been set aside. It would then be all the more important to ascertain the source of the court's power (if any) to vary all or part of the allocation of costs in the Costs Award.

73 There is a further issue. Article 34(4) of the Model Law provides:

> The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

74 A possible solution on costs (suggested by the Plaintiffs' counsel) could be to suspend the setting aside proceedings and remit the question of costs to the Tribunal for further determination in light of the court's decisions on the Remaining Amounts and Compound Interest Orders. But I am unsure that Article 34(4) authorises such an approach for the reasons expressed by Ramesh J in *Lesotho v Swissbourgh* (at [345]). The Tribunal may well be *functus officio* on what it has already decided as to the incidence of costs and Article 34(4) of the Model Law, which is limited in ambit, "does not empower the court to remit

any matter after setting aside an award" (see also *AKN v ALC* ([36] *supra*) at [22], from where the quoted words come).

75 As I do not have to deal with such questions here, they can be left for determination on another day.

III. Conclusion

76 The Plaintiffs' setting aside applications are dismissed.

77 Within 14 days of the date of this judgment, the parties are to submit agreed directions for determining the costs (incidence and quantum) of these proceedings. If the parties cannot agree particular directions, they are to submit a joint statement identifying those directions upon which they agree and those upon which they disagree, with succinct explanations for any disagreement.



Anselmo Reyes
International Judge

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