IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2020] SGHC(I) 06

Originating Summons No 9 of 2019

Between

(1) BYL
(2) BYM

… *Plaintiffs*

And

(1) BYN

… *Investor*

JUDGMENT

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

[Arbitration] — [Challenge against arbitrator] — [Bias]

TABLE OF CONTENTS

BYL and another
v
BYN

[2020] SGHC(I) 06

Singapore International Commercial Court — Originating Summons No 9 of 2019
Anselmo Reyes IJ
17 February 2020

3 March 2020 Judgment reserved.

Anselmo Reyes IJ

Introduction

1 BYL (the "**Promoter**") and BYM (the "**Company**") (collectively, the "**Plaintiffs**") applied to set aside a Partial Award (the "**ICC Award**") dated 30 April 2019. The ICC Award was issued by a tribunal (the "**Tribunal**") of three arbitrators in an ICC Arbitration (the "**ICC Arbitration**") wherein BYN (the "**Investor**") was the Claimant, while the Promoter and Company were the 1st and 3rd Respondents respectively. The Tribunal consisted of two co-arbitrators (respectively, Mr. [X] SA ("**SA**") and Mr. [Y] QC) and the chairperson ("**Chairperson**"). The ICC Arbitration started on 11 February 2016. The 2nd Respondent in the Arbitration had been dissolved on 10 September 2015 and so did not play a material part in the ICC Arbitration. The seat of the ICC Arbitration is Singapore. But, as found by the Tribunal, Indian law governs the

arbitration agreement. The ICC Arbitration remains ongoing. SA has since resigned as co-arbitrator in the circumstances described below and has been replaced by Mr. [Z]. An oral hearing took place in the ICC Arbitration from 29 May to 1 June 2018. That was followed by several rounds of written closing submissions. On 22 March 2019 the Tribunal notified the parties that the arbitral proceedings were closed, and the Tribunal proceeded to its award.

2 The Plaintiffs' setting aside application is premised on two grounds. The first ground (the "**put option ground**") arises from the Tribunal's decision to award reliefs under two put options in a shareholders' agreement. According to the Plaintiffs, by the ICC Award the Tribunal ordered alternative reliefs. The Plaintiffs say that the Tribunal thus failed to decide the dispute before it and improperly conferred upon itself the power to change the ICC Award if part of it was later found to be unenforceable by a court. The second ground (the "**bias ground**") arises from the conduct of a Tribunal member. The latter is said to have made belated and only partial disclosures of a co-counsel relationship that he negotiated and entered into with the Investor's legal representatives in the ICC Arbitration while the ICC Award was still being drafted and finalised. The relevant arbitrator's circumstances are said to give rise to a reasonable suspicion of bias (that is, apparent bias) vitiating the ICC Award.

Background

3 The dispute underlying the ICC Arbitration arose out of a Share Subscription and Shareholders Agreement dated 7 August 2008 (the "**SSHA**") among the parties to the ICC Arbitration. The Company was set up by the Promoter as a special purpose vehicle for the construction and operation of a development ("**Development**"). Under the SSHA, the Investor became a 35%

shareholder in the Company, with the Promoter holding the remaining 65%. The Investor was obliged under the SSHA to provide capital for the Development. In consideration for the Investor's investment, the Promoter undertook to construct the Development by a commercial operation date ("**COD**") of 1 January 2012 and thereafter to promote the Development. Construction was delayed, so that the Development only commenced operations on 23 September 2017, after the start of the ICC Arbitration. Part of the Development has yet to come into operation.

4 Clauses 14 and 17 of the SSHA gave the Investor two put options. The clause 14 put option could be exercised upon the Promoter's failure to undertake an IPO of the Company. By the clause 14 put option, the Promoter was obliged to purchase the Investor's shares in the Company at their "Fair Market Value" ("**FMV**") as at a specified date. The clause 17 put option was exercisable upon an "Event of Default" ("**EOD**") as defined in clause 17, including delay to the Development's COD and a material breach of the SSHA. By the clause 17 put option, the Promoter was obliged to purchase the Investor's shares in the Company at a price corresponding to an "Internal Rate of Return" ("**IRR"**) of 25% compounded annually. Clause 28.3 of the SSHA further provided that:

> Each of the rights of the Parties hereto under this [SSHA] are independent, cumulative and without prejudice to all other rights available to them, and the exercise or non-exercise of any such rights shall not prejudice or constitute a waiver of any other right of the Party, whether under this [SSHA] or otherwise.

5 On 1 April 2016 the Investor nominated Mr. [Y] as co-arbitrator. The Investor was represented by the Indian firm [AAA]. On 2 May 2016 the Investor informed the ICC and the Plaintiffs that an international firm of solicitors [BBB] ("**the Firm**") would act as co-counsel for the Investor.

6 The Plaintiffs nominated SA as arbitrator on 7 April 2016. SA practises as an independent counsel and as an arbitrator. He signed a Statement of Acceptance, Availability, Impartiality and Independence on 9 May 2016 when he was designated by the Plaintiffs as arbitrator. There SA disclosed that he was acting as mediator in a dispute between the two partners of [CCC] firm. [CCC] split into two firms, one of which, [DDD], had previously represented the Plaintiffs and had nominated SA in the ICC Arbitration. On 19 May 2016 the Investor confirmed that it had no objection to SA's appointment as arbitrator. The Investor noted that neither it nor its associated companies had engaged SA in the past. The Investor further stated that, due to SA's stature as an advocate, it was aware that SA "has been instructed on a regular basis by [[AAA]] as a counsel and … that he has been (and continues to be) instructed by [[DDD]]". The Investor did not regard those matters as problematic. For their part, the Plaintiffs did not complain that [AAA] had been instructing SA. As for the Firm, it had previously only had two contacts with SA before the ICC Arbitration. In 2003 the Firm engaged SA as an expert for an unrelated arbitration. In 2012 the Firm, including the lead lawyer (Mr. [N] QC) of the Firm's team representing the Investor in the ICC Arbitration, had acted against SA in another unrelated arbitration. Prior to the events set out below, the Firm had never acted as co-counsel with SA.

7 On 31 May 2016 the ICC confirmed the appointments of Mr. [Y] and SA as co-arbitrators. The Chairperson was appointed as presiding arbitrator on 28 July 2016.

8 SA circulated that part of the ICC Award drafted by him to the other members of the Tribunal on 5 March 2019. On 22 March 2019 the Tribunal sent a draft of the ICC Award to the ICC for scrutiny. On 18 April 2019 the ICC

approved the draft ICC Award with comments. On 25 April 2019 the Tribunal informed the parties that it had revised the draft ICC Award on the basis of the ICC's comments and had sent the same to the ICC for final approval. The ICC transmitted the finalised ICC Award to the parties on 3 May 2019.

9 A major area of dispute in the ICC Arbitration was whether the Investor could invoke the clauses 14 and 17 put options at the same time. The Investor maintained throughout the ICC Arbitration that, by clause 28.3 of the SSHA, it was entitled to bring claims under clauses 14 and 17 "in tandem".

10 More specifically, the Investor's Statement of Claim dated 9 February 2017 (the "**SOC**") in the ICC Arbitration asked in [201] that:

> [The Investor] be granted, the highest sum of the prayers sought below:
>
> i. direct specific performance of the [Promoter]'s obligation to pay the price set out in Clause 17.2(a) of the [SSHA], being USD 70.5 million;
>
> ii. in the alternative, direct the [Promoter] to pay to the [Investor] the maximum price permissible under Indian law, being USD 24.86 million, and a further sum of USD 45.6 million as damages / compensation for the [Plaintiffs'] failure to perform their obligations under Clause 17;
>
> iii. in the further alternative, direct the [Promoter] to pay to the [Investor] damages / compensation equivalent to the price

> set out in Clause 17.2(a) for the [Plaintiffs'] breach of their obligations under Clause 17, being USD 70.5 million;
>
> iv. damages equivalent to the FMV Price, which amounts to USD 24.86 million; and
>
> v. in the further alternative, direct the [Promoter] to pay to the [Investor] such other sums as the Tribunal thinks fit.

11 By the time of its Post-Hearing Brief dated 24 September 2018, the Investor had refined the relief being sought as follows:

> … In respect of amounts sought under paragraph 201 of the SOC, the [Investor] wishes to clarify that the priority of relief requested is as follows:
>
> (a) damages in the amount of the Clause 17.2 price calculated in accordance with paragraph 8.4(d) above (the **Relevant Clause 17.2 Price**) as compensation for the [Promoter]'s breach of Clause 17.2;
>
> (b) specific performance of the [Promoter]'s obligation to pay the Relevant Clause 17.2 Price up to the maximum amount permissible under the FEMA [that is, India's Foreign Exchange Management Act 1999] regime, being the FMV Price of USD 25.88 million, and damages for the remainder of the Relevant Clause 17.2 Price as compensation for the [Plaintiffs'] breach of Clause 17.2;
>
> (c) specific performance enforcing the [Promoter]'s obligation to pay the Relevant Clause 17.2 Price;
>
> (d) damages of USD 25.88 million (being the FMV Price) as compensation for the [Promoter]'s breach of Clause 14.2; or
>
> (e) in the alternative, directions to the [Promoter] to pay to the [Investor] such other sums as the Tribunal sees fit.
>
> [emphasis in original]

The Investor repeatedly stressed, as the Tribunal put it in the ICC Award, that "it does not seek double recovery, and it has only sought recovery of the highest amount available".

12 The Plaintiffs' case, on the other hand, was summarised by the Tribunal in the ICC Award as follows:

> … [I]n their Post-hearing Brief, at paras 338-340, the [Plaintiffs] repeat their pleaded submission, contending that to pursue rights under clauses 14 and 17 in tandem is absurd and cannot be accepted – "the [Investor] cannot sell the same shares twice by altering the nature of the reliefs." The [Plaintiffs'] argument is that clause 28.3 does not envisage the simultaneous exercise of inconsistent rights, there is a risk of unjust enrichment, and the [Investor] "cannot be allowed to assert claims under both clauses 14 and 17 of the [SSHA] in the same proceedings."

13 The ICC Award concluded that, so long as there was no double recovery, the Investor was entitled by reason of clause 28.3 to assert claims under both clauses 14 and 17 of the SSHA.

14 During the ICC Arbitration, the Plaintiffs contended that SSHA clause 17.2 was contrary to the Foreign Exchange Management Act 1999 (Act 42 of 1999) (India) ("**FEMA**"), FEMA-related regulations, and Reserve Bank of India ("**RBI**") circulars. They argued that an award pursuant to clause 17 was thus unenforceable under Indian law in the absence of RBI approval and such approval would never be given because clause 17 stipulated for a guaranteed return. The Plaintiffs also suggested that clause 17 operated as a penalty and was unenforceable under Indian law for that reason as well. However, the ICC Award held that FEMA did not render an award under clause 17 unenforceable and rejected the characterization of clause 17 as a penalty.

15 The ICC Award assessed the FMV of the shares in the Company under clause 14 at INR 160.2 crores. The ICC Award noted that, as agreed by the parties, the Investor's original investment in the Development had been INR 800 million (that is, INR 80 crores). Accordingly, based on a 25% IRR, the ICC Award calculated the total due to the Investor under clause 17 to be INR 761

crores as at 31 March 2019. In the dispositive section to the ICC Award, the Tribunal consequently directed:

> (1) [The Promoter] is ordered, by way of specific performance, to pay to [the Investor] within 28 days of this Award, the sum of INR 761 crores pursuant to clause 17.2 of the [SSHA], as at March 31, 2019.
>
> (2) The Tribunal orders, by way of specific performance, [the Promoter] to pay to [the Investor] within 28 days of this Award a further sum pursuant to clause 17.2 of the [SSHA], being 25% IRR to the date of this Award in an amount to be agreed between the parties, or, failing agreement, to be determined by the Tribunal.
>
> (3) Upon payment of the sums in (1) and (2) above, [the Investor] shall deliver to [the Promoter] executed transfers and any other title documents relating to its shares in [the Company].
>
> (4) If for any reason the awards in (1) and/or (2) above are declared unenforceable in whole or in part by any court or tribunal, [the Promoter] shall pay to [the Investor] the sum of INR 160.2 crores pursuant to clause 14.2 of [the SSHA] (or such lesser sum as shall be sufficient to satisfy the awards in (1) and (2) above, after taking account of any amounts paid by [the Promoter] pursuant thereto) upon delivery by [the Investor] to [the Promoter] of executed transfers and any other title documents relating to its shares in [the Company].
>
> (5) [The Investor]'s claim for currency losses is reserved to a future award.
>
> (6) Interest on the sums awarded is reserved to a future award.
>
> (7) [The Plaintiffs] are ordered, for so long as [the Investor] holds its shareholding in [the Company], not to hold any Board Meetings or meetings of [the Company], or passing any resolutions thereat, otherwise than in compliance with clauses 6, 7 and 8 of the [SSHA].
>
> (8) [The Investor]'s claims for breach of the arbitration agreement in relation to the actions of [the Plaintiffs] … are reserved to a future award.
>
> (9) Costs are reserved to a future award.

The Tribunal having reserved some matters for later decision, the ICC Arbitration remains ongoing.

16 On 9 March 2019, while attending the wedding of the son of the chairperson and CEO of [MMM] Ltd, SA was approached to act for [MMM] at a Delhi High Court hearing on 13 March 2019 relating to the enforcement of an UNCITRAL Award (the "**UNCITRAL Award**") in favour of [MMM] and company [NNN] against the Indian government. Instructions from [MMM] followed. The dispute (the "**UNCITRAL Arbitration**") giving rise to the UNCITRAL Award is unconnected with the ICC Arbitration. But the Firm were (and are) widely known to be acting for [MMM]/[NNN] in connection with the obtaining of the UNCITRAL Award and its enforcement. The Firm's team representing [MMM]/[NNN] is led by Ms. [P]. She has not been (and is not) involved in the ICC Arbitration. But Mr. [N] is (and has been) a prominent member of the Firm's team acting in the UNCITRAL Arbitration.

17 In the week of 10 March 2019, SA attended three meetings relating to the Delhi High Court hearing. Ms. [P] was present at one meeting along with an associate of the Firm who has not been involved with the ICC Arbitration. Mr. [N] was not at any of the three meetings. SA was apparently unaware that Ms. [P] was from the Firm until later. On 13 March 2019 SA appeared before the Delhi High Court in the enforcement proceedings. The hearing lasted for some ten minutes and led to an adjournment.

18 Thereafter, [MMM] approached SA about his potential engagement as counsel in the UNCITRAL Arbitration. Negotiations ensued. In early May 2019 SA met with [MMM]'s legal team. Ms. [P], together with an associate from the Firm who was not involved in the ICC Arbitration, attended for the Firm. On 16

May 2019, Mr. [N] and Ms. [P] met SA for about an hour. SA has described the meeting as a "courtesy call". On 27 May 2019 there was another hearing before the Delhi High Court. SA was not instructed for this hearing. In early June 2019 it was agreed in principle that SA would act with the Firm in the UNCITRAL Arbitration. The clerk to SA's London chambers had discussions with [MMM]/[NNN] on the terms of such engagement. On 10 June 2019 Mr. [N] and Ms. [P] again met with SA for about an hour.

19 On 14 June 2019 the Investor filed submissions on the ongoing matters in the ICC Arbitration.

20 On 17 June 2019 SA emailed the parties to the ICC Arbitration as follows:

> I write to disclose, purely for the sake of transparency, that earlier this year I was instructed by an Indian law firm in connection with the enforcement in the Delhi High Court of an interim award in a dispute between the Government of India and [[MMM]/[NNN]]. [The Firm] ([Mr. [N]] and his associates) represented [[MMM]/[NNN]] (private parties) in the arbitration proceedings.
>
> I have now been instructed in the London arbitration proceedings. These matters are of course wholly unrelated to the present arbitration.

21 On the same day the Plaintiffs' solicitors emailed back to SA:

> At the outset, we thank you for your kind disclosure ('Disclosure Email'). In the interests of transparency, and purely out of abundant caution, we would be grateful if you could also kindly provide the following clarifications/ confirmations:
>
> 1. We understand from the Disclosure Email that the Interim Award sought to be enforced before the High Court of Delhi earlier this year (i) emanated from an arbitration between [[MMM]/[NNN]] as the Claimant[s] and the Government of India (or one of its undertakings) as the Respondent; and (ii) the seat/

venue of the said arbitration was/ is in London, UK. We request you to kindly confirm if our understanding is correct.

2. In the enforcement proceedings before the High Court of Delhi referred to in the Disclosure Email, whether you were instructed (by an Indian Law Firm) on behalf of [[MMM]/[NNN]] or the Government of India? As a corollary, whether the Indian Law Firm that had instructed you was [[AAA]]?

3. We request you to kindly clarify the precise date on which you were first instructed, and/ or had first appeared, in the enforcement proceedings before the High Court of Delhi referred to in the Disclosure Email.

4. At the time of commencement of the enforcement proceedings before the High Court of Delhi referred to in the Disclosure Email, whether [the Firm] ([Mr. [N]] and his associates), or any other offices of [the Firm], were representing [[MMM]/[NNN]] in the underlying arbitration proceedings?

5. Whether the "London arbitration proceedings" referred to in the Disclosure Email are the same arbitration proceedings between [[MMM]/[NNN]] and the Government of India (or one of its undertakings), as referred to in Point # 1 above.

6. Assuming that Point # 5 above is answered in the affirmative, whether you have been instructed in the said "London arbitration proceedings" on behalf of [[MMM]/[NNN]]? We also request you to kindly clarify the precise date on which you were first instructed in connection with the said arbitration proceedings.

7. Assuming that Points #4, #5 and #6 above are answered in the affirmative, whether [the Firm] ([Mr. [N]] and his associates) continues to represent [[MMM]/[NNN]] in the "London arbitration proceedings" referred to in the Disclosure Email?

We thank you for your kind indulgence, and look forward to receiving your response.

22 SA replied on 18 June 2019:

My reply is as follows:

1. [T]his is correct.

2. Yes I was instructed on behalf of [[MMM]] and [[NNN]] [by an Indian Law Firm] … [[AAA]] is not engaged in the matter.

> 3. Sometime in mid March. The matter was listed in the Delhi High Court around 13 March, and was adjourned. It is now listed in July.
>
> 4. I believe that [the Firm] is appearing for [[NNN]] – I'm not sure about [[MMM]], and perhaps they did not engage a separate lawyer, since it is a joint arbitration.
>
> 5. Yes
>
> 6. Yes. I have been approached for accepting instruction in the arbitration proceedings, and the matter is still in discussion with the … clerk [to SA's London chambers].
>
> 7. I believe so.

23 On 11 July 2019, SA's engagement as counsel in the UNCITRAL Arbitration was formalised.

24 On 16 July 2019 the Plaintiffs brought a challenge (the "**ICC Challenge**") in respect of SA's ability to act as an independent arbitrator in the ICC Arbitration. On 29 July 2019, the Chairperson and Mr. [Y] declined to comment on the ICC Challenge, confining themselves to stating that they had "no reason to doubt the independence and integrity of [SA] in the conduct of this arbitration".

25 SA provided his comments to the challenge on 31 July 2019. He issued revised comments on 1 August 2019. The concluding section to his revised comments stated:

> NO CONFLICT OF INTEREST THAT COULD GIVE RISE TO APPREHENSIONS OF BIAS
>
> ~~31)~~32) It is my understanding that merely being "co-counsel" is not per se a relationship on account of which a person is disqualified from being an arbitrator. The nature of the engagement must be such as to create in the mind of a reasonable person, an apprehension of the likelihood of bias.
>
> …

~~33)~~34) If the [Plaintiffs] were bona fide of the view that my association with a lawyer appearing in this arbitration as a co-counsel would impair my independence, they would not have appointed me as an arbitrator considering the fact that when they appointed me, I was appearing in a number of cases instructed by the law firm who is acting for them … It is unfortunate that the [Plaintiffs] have now chosen to suggest that the test of bias to be adopted should be that applied by U.S. Courts to "co-counsel".

~~34)~~35) One of the areas of likelihood of bias is when the law firm of one of the parties is a client of the Arbitrator. [[EEE]], who is acting now for the [Plaintiffs], are my clients for I have appeared in the Bombay High Court and in the Supreme Court in a tax case relating to their firm (in London) and I continue to appear for them in the Supreme Court.

~~35)~~36) The IBA guidelines [on Conflict of Interest in International Arbitration] are generally the standard by which issues of conflict of interests are resolved. …

…

~~37)~~38) As far as the Delhi High Court proceedings are concerned, it is fanciful to suggest that on being engaged as a senior counsel to appear in those proceedings by [[MMM]], I would be so influenced by the fact that [Mr. [N]] is a co-counsel … in the [UNCITRAL Arbitration] proceedings, that I would be likely to be influenced in the [ICC Arbitration] [in which [Mr. [N]] appears as the lead counsel], by factors other than the merits of the case.

39) In the circumstances I did not also consider it necessary to make any disclosure, particularly in view of the fact that the nature of my Indian practice was well known to the [Plaintiffs'] lawyers…

…

~~40)~~41) The relationships between Arbitrators and Counsel of one of the Parties is a matter dealt with in item 3.3.6 of the Orange List [of the IBA Guidelines of Conflict of Interest in International Arbitration] …

~~41)~~42) ~~There is no other entry in the Orange list that suggests that the appointment or continuance of an arbitrator who is a co-counsel with the counsel for a party in some other case is a matter that creates a ground for challenge. The reason is obvious for any such rule that opens an arbitrator's appointment to challenge merely on being a co-counsel with one of the parties counsels, without more and without reference to~~

~~the nature and kind of practice in the jurisdiction where the arbitrator practices law, would perhaps be overbroad.~~ Paragraph 3.3.9 of the Orange List deals with relationships between arbitrators and counsel. It requires a disclosure of a relationship of an arbitrator and the lawyer of another party as *co counsel*. The application of this requirement will have to be evaluated in the context of the nature of the practice in India and in the UK. The fact that it requires disclosure does not in all events suggest that in all such cases there is likely hood [*sic*] of impairment of independence or impartiality.

~~42)~~43) I did not consider that my involvement in [the UNCITRAL Arbitration] would create a situation that would bring about a relationship with [Mr. [N]] of the kind as could justifiably give rise to doubts about my continuance as an arbitrator in the present proceedings.

~~43)~~44) There is a large legal team consisting of lawyers from [the Firm] [lead by Ms. [P]], in-house lawyers of [[NNN]], [lawyers working for [MMM]], who are working on the arbitration and they will be working with me in the arbitration. I do not believe that I would have any continuous interaction with [Mr. [N]] apart from exchanging comments on drafts etc. In any event, this relationship is of a purely professional nature and is a one-off engagement. I have had no occasion in the past to work with [Mr. [N]], though I appeared against him in an arbitration in London. I have no other engagement that would require us working together. Similarly, I have had no other engagement from [the Firm] in the past few years – I was engaged by them once sometime in 2004 [to the best of my recollection] as an expert in Indian law.

~~44)~~45) Thus, I formed the view that it did not create a situation in which I should decline to continue further in the arbitration.

~~45)~~46) I do consider it a matter of grave regret that the [Plaintiffs], who appointed me, do not now have any faith in my independence.

~~46)~~47) I have no real desire to continue in these proceedings, and personally feel disinclined to continue as an arbitrator even if a party, without sufficient reason, doubts my independence. The only reason why I have, after considerable reflection, chosen not to resign is that considering that not much remains to be done in the present arbitration, it may create an unfair situation for the [Investor] and inconvenience to my colleagues if a new arbitrator was necessitated on account of my resignation. However, if the ICC has the slightest concern about my continuance, I would willingly resign from this arbitration.

[emphasis in original]

26 On 2 August 2019 the Plaintiffs applied to the Singapore Court to set aside the ICC Award.

27 On 10 August 2019 SA commented further on the ICC Challenge:

> 1) I have gone through the [Investor's] response to the challenge. There are only two comments that I have to offer.
>
> 2) Firstly, I reiterate that I do not accept the allegation that my independence or impartiality would be doubted by a fair minded and informed observer, who is familiar with the mode and manner of practice which was disclosed.
>
> 3) I find in the factual exhibits an email written by [the Investor's] lawyers on 19th May 2016 which noted that I had been instructed on a regular basis by [[AAA]] [[the Investor's] lawyers] and that I have and continued to be regularly briefed by [[DDD]] [[the Plaintiffs'] lawyers of that time].
>
> 4) To recall, I was appointed by the [Plaintiffs], and for which I had been approached by a partner of [[DDD]]. The [Plaintiffs] would thus have been aware that I was regularly instructed by the solicitors of the [Investor] and did not find this objectionable. That being so, I find it incomprehensible as to why [Mr. [N]] and I appearing in the same unrelated case is found objectionable.
>
> 5) Secondly, I have gone through the exchanges between the Arbitrators. We had divided the work amongst ourselves, and my first draft section was sent to my fellow arbitrators as early as 5th March 2019.
>
> 6) I had my first meeting in Mumbai in relation to the Delhi High Court proceedings on the 10th of March 2019. [The Investor's] response says that someone from [the Firm] attended the meeting – it was a big group of lawyers who attended that meeting, and to the best of my recollection the discussions were led by [[MMM]'s lawyer].
>
> (7) Thus I do not accept the suggestion that I owed any duty to inform the parties of my engagement in the High Court proceedings, before the Tribunal sent its award to the ICC on 22nd March 2019.
>
> (8) I reiterate that as an arbitrator, it is not for me to contest this challenge, and the [Investor has] contested it. I would only

> add, in my view I do not see any reason to come to the conclusion that a reasonable apprehension as to my independence or impartiality has arisen. I am honoured that my fellow arbitrators have reposed their continuing faith in my independence. However, as an arbitrator, if the ICC is were [*sic*] to find any merit in the [Plaintiffs'] allegations, I would be happy to resign from the Tribunal.

28 On 26 August 2019 the ICC asked SA whether he wished to resign or have the ICC decide the ICC Challenge. On 28 August 2019 SA replied:

> On receiving your letter of 26th August 2019, I have further reflected over the matter.
>
> I have been disturbed by the tone and tenor of the submissions even after the facts had been clearly set out in my emails.
>
> I had been appointed by the [Plaintiffs], and they have now challenged my continuance making all these allegations which I have found distasteful.
>
> This degree of distrust in an arbitrator is destructive of the institution of arbitration, and that these are being levelled by a firm no less than [[EEE]] is disturbing.
>
> While my colleagues have reposed full faith in my continuance, I am certain that even if this challenge fails, the [Plaintiffs] will continue to challenge my continuance and also the award finally rendered.
>
> For these and other reasons, I have decided to resign from this [Tribunal] with immediate effect.
>
> I know this may cause some delay in the further proceedings, but I feel that I will not be able to continue to discharge my duties as an arbitrator in this atmosphere of distrust.

29 On 5 September 2019 the ICC accepted SA's resignation. It invited the Plaintiffs to nominate a replacement arbitrator within 15 days. The Plaintiffs nominated Mr. [Z] as replacement.

Discussion

The put option ground

30 The Plaintiffs advance two main points. First, they submit that the ICC Award was neither final nor complete in that it entirely failed to resolve the parties' dispute. The Tribunal instead left it to a supervising or enforcing court to determine the amount (if any) due to the Investor from the Promoter for the transfer of shares in the Company. Second, the Plaintiffs contend that, by the ICC Award, the Tribunal purported to confer upon itself the power to alter its decision *ex post facto,* if its order that the Promoter pay the Investor an amount under clause 17 should be set aside or refused enforcement for any reason. The Plaintiffs argue that the Tribunal became *functus* upon rendering the ICC Award. They suggest that consequently the Tribunal cannot decide the amount due to the Investor afresh if the clause 17 relief awarded proves unenforceable. The Tribunal cannot declare that the clause 14 relief mentioned in the ICC Award should become effective in such case.

31 On their first point, the Plaintiffs say that the relevant questions for the Tribunal to determine were (1) whether the Investor could bring claims under clauses 14 and 17 in tandem and (2) if so, under which claim the Investor was entitled to receive payment. According to the Plaintiffs, having decided that the Investor was entitled to bring claims in tandem and in light of the Investor's acceptance that it could not have double recovery, the Tribunal had to decide which put option claim to allow. On finding that that the clause 17 put option had been validly exercised and was not void or unenforceable by Indian law, the Tribunal's duty was finally and completely to allow that claim and that claim alone. If, on the other hand, the Tribunal was of the view (which it was not) that the clause 17 put option was inapposite for any reason, then the Tribunal's duty was to allow the clause 14 relief and no more. The Plaintiffs object that the Tribunal did neither. They say that the Tribunal instead found in favour of both put options and made the ultimate relief to which the Investor was entitled

contingent on the decision of any number of courts or tribunals over an indefinite period as to the enforceability of clause 17.

32 The Plaintiffs observe that the ICC Award can be enforced anywhere in the world, not just in India where the Plaintiffs are based. They thus characterise what the Tribunal did as tantamount to saying:

> [The Investor] is entitled to exercise its put option under Clause 17 provided that all relevant courts and tribunals agree with us but if just one of them does not, then [the Investor] is entitled to exercise its put option under Clause 14 to claim a second sum from the Plaintiffs.

This (the Plaintiffs contend) makes the ICC Award unworkable. More pertinently, it is submitted that, if asked by the Investor to pay the amount due under the ICC Award for the transfer of shares in the Company, the Plaintiffs would have no idea what amount to tender, as the sum would depend upon the ruling of some court or tribunal somewhere as to the enforceability of clause 17.

33 It is further said that, by leaving the final outcome to the determination of another forum, the Tribunal created a circularity. The enforcement of the ICC Award predicates a decision by a supervising or enforcing court that clause 17 is enforceable. Until some such forum has considered the enforceability of clause 17 and so long as there remains the possibility that a forum may declare clause 17 to be unenforceable, the relief granted by the Tribunal under clause 17 remains undetermined. This means that the enforceability of the put option reliefs under clauses 14 and 17 hinges on the view of every potential enforcing or other court or tribunal. Different forums can reach different conclusions on the enforceability of clause 17, with the decision of one forum not necessarily binding another. For example, the undisputed evidence adduced by the Plaintiffs before this court is that a creditor can file multiple applications for the

enforcement of an award before different High Courts of different Indian states. The decision of one Indian High Court would not be binding on another, save possibly for issue estoppel. Moreover, the RBI may of its own motion challenge the legality of clause 17 under FEMA before a relevant Indian forum. Thus, even if steps to enforce the ICC Award are only taken in India, the position will be the same.

34 On their second point, the Plaintiffs posit that, if the Tribunal had only granted relief under clause 17, it would not later be able to re-open its decision if such relief turned out to be unenforceable in the view of a supervising or enforcing court. The Tribunal would be *functus* and the Investor could not recover anything. But here the Tribunal sought to get around its having become *functus* by making the ICC Award contingent on what happens before a supervising or enforcing court. The Plaintiffs go so far as to submit that, if a tribunal can use the device employed here to circumvent a relevant court's refusal of enforcement, that would make a mockery of the principle that, having decided a substantive issue, the tribunal becomes *functus* in relation to that issue. It would mean (the Plaintiffs say) that a tribunal could frame its decisions in the alternative to pre-empt the effects of a court's refusal to enforce any one of the alternative awards. The Plaintiffs stress that it is no part of a tribunal's role to concern itself with what happens after an award has been issued. A tribunal's job (the Plaintiffs contend) is instead merely to decide a dispute. Thereafter, it is for the parties to seek or resist enforcement and for a court to determine whether the award should stand. In this case, the Tribunal exceeded its mandate by having regard to what might happen afterwards.

35 The Plaintiffs conclude from the foregoing arguments that the put option reliefs purportedly awarded by the Tribunal are in excess of jurisdiction and

should be set aside under section 3(1) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (the "**IAA**") read with Article 34(2)(*a*)(iii) of the UNCITRAL Model Law on International Commercial Arbitration (the "**Model Law**"). The Plaintiffs submit in the alternative that the ICC Award should be set aside under Article 34(2)(*b*)(ii) of the Model Law as being repugnant to the public policy of Singapore, the seat of the ICC Arbitration. It is suggested in the further alternative that the put option reliefs should be set aside under section 24(*b*) of the IAA and/or Article 34(2)(*a*)(ii) of the Model Law. This is because it is alleged that there was a denial of natural justice in that the Plaintiffs were not afforded the opportunity to address the Tribunal on the inappropriateness of the contingent nature of the put option reliefs granted.

36 I am not persuaded by the Plaintiffs' points. The Plaintiffs' two points are in essence the same argument expressed in different ways. I shall therefore deal with the two points together.

37 There is nothing incomplete or lacking in finality about the ICC Award insofar as it dealt with clauses 14 and 17. Reading the ICC Award as a whole and in context, the Tribunal made a cumulative award. The Tribunal plainly thought that the Investor was entitled to be paid a base amount of INR 160.2 crores ("**Amount 1**"), equivalent to the FMV for its shares in the Company pursuant to clause 14. The Tribunal so awarded that amount by sub-paragraph (4) of the dispositive of the ICC Award. The Tribunal was clearly also of the opinion that, pursuant to clause 17, on top of Amount 1, the Investor should be paid an additional INR 600.8 crores ("**Amount 2**") (that is, the difference between INR 761 crores and INR 160.2 crores) with the result that at the end of the day the Investor should receive a grand total of INR 761 crores, representing its investment in the Development plus a 25% IRR until 31 March 2019. The

Tribunal consequently awarded the grand total of Amounts 1 and 2 by sub-paragraph (1) of the dispositive section of the ICC Award. The Tribunal additionally noted in sub-paragraph (2) of the dispositive that, pursuant to clause 17, the Investor should be entitled to a further amount ("**Amount 3**") representing an additional 25% IRR for the period from 1 April to 30 April 2019 (the date of the ICC Award). But the Tribunal (as it was entitled to do) postponed the assessment of Amount 3 to a later date.

38 The Tribunal obviously regarded INR 761 crores (that is, the total of Amounts 1 and 2) as the maximum amount that the Promoter is liable to pay to the Investor under clauses 14 and 17, taken in tandem, as at 31 March 2019. This is evident from the bracketed words in sub-paragraph (4) of the dispositive section of the ICC Award, that is, the words "or such lesser sum as shall be sufficient to satisfy the awards in (1) and (2) above, after taking account of any amounts paid by [the Promoter] pursuant thereto" (the "**bracketed words**"). Those words have the effect that in no case can the Investor ever receive more than INR 761 crores out of the ICC Award for the period up to 31 March 2019. The bracketed words were no doubt inserted into sub-paragraph (4) to ensure that there would be no double recovery on the Investor's part. The award in sub-paragraph (1) of the dispositive in practical effect tops up the quantum of the award in sub-paragraph (4), much as in due course an award quantifying Amount 3 will top up the total amount due to the Investor for the transfer of shares in the Company to the Promoter.

39 Since the ICC Award expressly refers to problems in connection with the enforcement of sub-paragraphs (1) and (2) of the dispositive, the Tribunal was cognisant that the Investor could face difficulties in enforcing those sub-paragraphs of the ICC Award. There is nothing unusual about this. Arbitrators

are duty-bound to use their best endeavours to produce an enforceable award. Conscientious arbitrators thus invariably worry about whether their award can be enforced. The proviso to sub-paragraph (4) of the dispositive (that is, the words "If for any reason the awards in (1) and/or (2) above are declared unenforceable in whole or in part by any court or tribunal") (the "**Proviso"**) does no more than highlight, presumably out of an abundance of caution on the Tribunal's part, the fact that:

(a) the award of INR 761 crores (that is, the total of Amounts 1 and 2) under sub-paragraph (1) of the dispositive and the award of Amount 3 to be assessed under sub-paragraph (2) of the dispositive; and

(b) the award of INR 160.2 crores (that is, Amount 1) under sub-paragraph (4) of the dispositive,

are distinct and severable. If the award under sub-paragraphs (1) and (2) of the dispositive are held for any reason to be unenforceable with the result that the award of the total of Amounts 1, 2 and 3 falls away, the award of Amount 1 under sub-paragraph (4) of the dispositive will still remain standing and be enforceable. Contrary to what the Plaintiffs assert, there is nothing strange about this. Arbitrators frequently make awards consisting of a number of component amounts A, B, C, etc. The mere fact that component A is held to be unenforceable for some reason will not mean that components B, C, etc are likewise unenforceable.

40 I do not accept the contention that, until all relevant courts (that is, the totality of courts before which the Investor seeks to enforce the ICC Award) have pronounced as to whether the ICC Award will be enforced, it will not be possible to say how much is due and owing by the Plaintiffs to the Investor.

Nor do I accept that there is anything "circular," "contingent" or "unworkable" about the ICC Award.

41 To the question, for what amount is the Promoter liable under the ICC Award, the answer is apparent: The Promoter is liable to pay INR 761 crores for the Investor's shares in the Company. That is the total amount which the Tribunal has held to be due to the Investor from the Promoter as at 31 March 2019. There remains a sum equivalent to 25% IRR for the period from 1 April 2019 to 30 April 2019 (that is, Amount 3) to be assessed in a later award. If the Plaintiffs' complaint is that the ICC Award is "contingent" because the Tribunal sets out alternative orders for the payment of money and fails to make a determination as to which of the two alternatives is to be paid, then for the reasons that I have set out the ICC Award is palpably not of such a nature.

42 On the other hand, if the Plaintiffs are merely saying that the ICC Award is "contingent" because, if the Plaintiffs refuse to honour the same, the recovery by the Investor of the total amount of INR 761 crores awarded for the period up to 31 March 31 2019, depends on the extent to which courts find sub-paragraph (1) of the dispositive to be enforceable, then the Plaintiffs would only be stating a truism characteristic of every award for the payment of money. Such truism can hardly constitute a criticism of the ICC Award or be said to lead to "circularity". The extent to which a creditor can recover money awarded by a tribunal will self-evidently depend on the degree to which relevant courts hold that the award is enforceable. This must especially be the case where a money award consists of components, such as a component for the payment of principal and a component for the payment of interest. Some courts may refuse to enforce one or more components of an award, resulting in a creditor obtaining less than the total sum awarded or anything at all. A creditor cannot be 100% certain of

obtaining all of its entitlement (such as here the amount of INR 761 crores) until the relevant award is recognised and enforced by relevant courts.

43 There are in fact only minor differences between the ICC Award and a routine award for (say) the payment by a debtor of a principal sum and an interest component. These minor differences are the consequence of two features which the Tribunal had to cater for in the dispositive of the ICC Award. The first feature was the overlap between the amount of INR 160.2 crores awarded under clause 14 and the amount of INR 761 crores awarded under clause 17. If those two amounts had simply been compounded together and the total so obtained awarded, there would be double recovery. The Tribunal therefore dealt with the first feature by including the Proviso and the bracketed words in sub-paragraph (4) of the dispositive. The second feature was that, by the express terms of clauses 14 and 17, full payment by the Promoter of the amount due under one or other clause triggers an obligation on the Investor's part to transfer its shares in the Company to the Promoter. The Tribunal dealt with this feature, as far as the transfer following payment under clause 17 was concerned, by sub-paragraph (3) of the dispositive and, as far as the transfer following payment under clause 14 was concerned, by including the Proviso, the bracketed words, and the final words (that is, the words "upon delivery by [the Investor] to [the Promoter] of executed transfers and any other title documents relating to its shares in [the Company]") in sub-paragraph (4) of the dispositive.

44 The two features just identified and the pragmatic manner by which the Tribunal handled them do not have the result of making the ICC Award something that is unconventional, indeterminate or impermissible. The dispositive of the ICC Award took what might appear at first blush to be a

convoluted form, not because the Tribunal was arrogating to itself the power to alter its decision depending upon post-award events, but purely because of the way in which clauses 14 and 17 were drafted. Contrary to what has been suggested by the Plaintiffs, the ICC Award is not an attempt to subvert the principle that a tribunal is *functus* once it has decided a matter. On the contrary, it would be odd if the ICC Award is to be characterised as going beyond the Tribunal's jurisdiction or against Singapore public policy, just because the Tribunal tailored the dispositive of the ICC Award (as it was bound to do) to the terms of the SSHA.

45 It follows from the foregoing that there is no basis for setting aside the ICC Award under Articles 34(2)(*a*)(iii) or 34(2)(*b*)(ii) of the Model Law. Nor is there a basis for setting aside the ICC Award under IAA section 24(*b*) or Article 34(2)(*a*)(ii) of the Model Law due to an alleged lack of due process. The reality is that the Plaintiffs had ample opportunity to make (and did make) submissions on the matter. As noted above at [9] above, right up to the time of closing submissions, it was hotly disputed by the Plaintiffs whether the Investor could claim clause 14 and clause 17 reliefs in tandem and whether the Tribunal could make a cumulative award on both clauses without triggering double recovery. Referring to SSHA clause 28.3, the Tribunal held that it could make such a cumulative award and did so. The Plaintiffs are essentially complaining here that the Tribunal has done by the ICC Award that which, during the ICC Arbitration, the Plaintiffs contended was "ludicrous", "absurd", and impossible to do. The Plaintiffs' critique in the present setting aside application is a reiteration of its contention during the ICC Arbitration that the Tribunal could not make a cumulative award under clauses 14 and 17 without bringing about double recovery.

46 The put option ground accordingly fails.

The bias ground

47 The ICC Arbitration was conducted pursuant to the 2012 ICC Rules of Arbitration (the "**ICC Rules**"). The ICC Rules stipulate:

> Article 11: General Provisions
>
> 1. Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.
>
> 2. Before appointment or confirmation, a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The prospective arbitrator shall disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them.
>
> 3. An arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature to those referred to in Article 11(2) concerning the arbitrator's impartiality or independence which may arise during the arbitration.
>
> …
>
> 5. By accepting to serve, arbitrators undertake to carry out their responsibilities in accordance with the Rules.

48 The *IBA Guidelines on Conflict of Interest in International Arbitration* (the "***IBA Guidelines***") provide helpful guidance on an arbitrator's duty of disclosure in respect of potential conflicts of interest. General Standards (1), (2) and (3) in the latest edition (adopted on 23 October 2014) of the *IBA Guidelines* provide as follows:

> (1) General Principle

Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.

…

(2) Conflicts of Interest

(a) An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if he or she has any doubt as to his or her ability to be impartial or independent.

(b) The same principle applies if facts or circumstances exist, or have arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard 4.

(c) Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.

(d) Justifiable doubts necessarily exist as to the arbitrator's impartiality or independence in any of the situations described in the Non-Waivable Red List [that is, a list of situations found in Part II of the *IBA Guidelines* in which a person may not act as arbitrator in any circumstances].

…

…

(3) Disclosure by the Arbitrator

(a) If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and the co-arbitrators, if any, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns of them.

> (b) An advance declaration or waiver in relation to possible conflicts of interest arising from facts and circumstances that may arise in the future does not discharge the arbitrator's ongoing duty of disclosure under General Standard 3(a).
>
> (c) It follows from General Standards 1 and 2(a) that an arbitrator who has made a disclosure considers himself or herself to be impartial and independent of the parties, despite the disclosed facts, and, therefore, capable of performing his or her duties as arbitrator. Otherwise, he or she would have declined the nomination or appointment at the outset, or resigned.
>
> (d) Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.
>
> (e) When considering whether facts or circumstances exist that should be disclosed, the arbitrator shall not take into account whether the arbitration is at the beginning or at a later stage.

By way of example and with no intention of being exhaustive, Part II of the *IBA Guidelines* sets out an "Orange List" of situations in which an arbitrator should make disclosure. Paragraph 3.3.9 of the Orange List provides that disclosure should be made where "The arbitrator and another arbitrator, or counsel for one of the parties in the arbitration, currently act or have acted together within the past three years as co-counsel".

49 SA referred to paragraph 3.3.9 of the Orange List in his revised response to the ICC Challenge. His original comments did not refer to paragraph 3.3.9, but proceeded on the erroneous basis that the Orange List contained no express statement that a co-counsel relationship should be disclosed. This mistake appears to have been because SA originally referred to the 2004 edition of the *IBA Guidelines* which lacked a similar provision to paragraph 3.3.9.

50 There was little (if any) difference between the parties on how, as a matter of law, the existence or otherwise of apparent bias is to be determined.

The test for apparent bias in arbitration proceedings is analogous to that applicable in court proceedings, namely, a test of reasonable suspicion. That test involves an assessment of whether there are circumstances which would give rise to a reasonable suspicion or apprehension in a fair-minded reasonable person with knowledge of the relevant facts that the tribunal may be biased and that a fair hearing may not be possible as a result: *UES Holdings Pte Ltd v KH Foges Pte Ltd* [2018] 3 SLR 648 ("***UES***") at [29], *per* Loh J. The test applies to applications to remove an arbitrator for bias under Article 13(3) of the Model Law and applications to set aside an arbitral award for apparent bias under section 24(*b*) IAA and Article 34(2) of the Model Law: *PT Central Investindo v Franciscus Wongso and others and another matter* [2014] 4 SLR 978 at [51] and [142], *per* Ang J.

51 The reasonable suspicion test is applied objectively: *BOI v BOJ* [2018] 2 SLR 1156 ("***BOI***") at [103(b)]. The hypothetical reasonable observer is presumed to be a lay-person who is: (1) informed of the relevant facts and able to consider them in their proper context, (2) not wholly uninformed and uninstructed about the law in general or the issues to be determined in the proceedings, (3) aware of the traditions of integrity and impartiality that persons who exercise adjudicative functions generally have to uphold, and (4) fair-minded in the sense of being neither complacent nor unduly sensitive or suspicious: *BOI* at [99]–[102]. The Plaintiffs submit (and I am prepared to accept) that, since the *IBA Guidelines* have achieved widespread acceptance as setting out current international practice for disclosure among arbitrators, the reasonable observer would be aware of the duty of disclosure as set out in the *IBA Guidelines*. However, the court must be careful, when evaluating whether the reasonable observer would harbour a justifiable suspicion of bias, not to assume knowledge beyond that of a reasonably well-informed member of the

public. For instance, the court should not presume a detailed knowledge of law or arbitration practice or inside knowledge of the attributes of tribunal members: *BOI* at [103(d)]. A reasonable suspicion or apprehension of bias arises when the hypothetical reasonable observer would think, from the relevant circumstances, that bias is possible. The belief should not be fanciful and must be capable of articulation by reference to the available evidence. A standard of possibility (as opposed to probability) is adopted to ensure that from the public perspective the administration of justice is beyond reproach.

52 Following the ICC Award, there has not been a substantive decision in the ICC Arbitration. SA having voluntarily resigned from the ICC Arbitration and having now been replaced by Mr. [Z], there is no question of any substantive decision of the Tribunal post-dating the ICC Award being tainted by apparent bias consequent upon SA's engagement by [MMM]/[NNN]. Thus, the question that I have to focus on here is whether the ICC Award should be set aside for apparent bias by reason of SA's conduct.

53 The Plaintiffs submit that, in keeping with the *IBA Guidelines*, SA should have disclosed as early as 9 March 2019 that he had been approached or engaged to act for [MMM] in a matter in which the Firm were also acting. For the purposes of my analysis, I shall assume in the Plaintiffs' favour that this is correct. In other words, I shall proceed on the basis that, from the time when he was approached or engaged to act for [MMM] on 9 March 2019, SA fell within the term "co-counsel" in paragraph 3.3.9 and should have made (but did not make) disclosure of that circumstance in accordance with General Standard 3(a) and (d) and paragraph 3.3.9 of the *IBA Guidelines*.

54 The Plaintiffs say that, on the available evidence, applying the reasonable suspicion test, I should find that there was apparent bias vitiating the ICC Award. The Plaintiffs contend that, had SA made proper disclosure on 9 March 2019, they would have successfully objected to his continuing as arbitrator on the ground of apparent bias with the result that SA would have had to resign from the Tribunal and not have taken part in the ICC Award. My difficulty with this submission is that I do not see how the nature and extent of SA's associations with the Firm support a conclusion of apparent bias in relation to the ICC Award.

55 First, SA is not a partner within the Firm. Although acting as co-counsel with the Firm, he was acting as an independent barrister and not sharing in the Firm's profits and risks as a firm of solicitors. Thus, the mere fact of SA being engaged or potentially engaged to act as co-counsel with the Firm would not of itself give rise to apparent bias. For there to be cause for concern, there must be something about SA's actual contact with the Firm's representatives that gives rise to a reasonable suspicion of bias.

56 Second, although SA met with representatives of the Firm (such as Ms. [P] and an associate) prior to the transmittal of the ICC Award to the parties by the ICC on 3 May 2019, those representatives of the Firm that SA met before 3 May 2019 had no involvement with the ICC Arbitration. Those representatives of the Firm would therefore not have been in a position to discuss anything about the ICC Arbitration with him. It is hard to see how the Firm's representatives could possibly have influenced SA's views on the merits of the ICC Arbitration one way or the other. Mr. [N], on the other hand, was certainly involved in the ICC Arbitration. But SA did not meet with him in connection with the UNCITRAL Arbitration until 16 May and 10 June 2019. Both meetings

took place well after the ICC Award had been transmitted to the parties. It is thus fanciful to suggest that SA's views on the merits of the ICC Arbitration, as set out in the ICC Award, could have been influenced in some way (whether consciously or unconsciously) by anything that Mr. [N] said or did at the meetings on 16 May and 10 June 2019.

57 At the hearing before me, the Plaintiffs vaguely suggested that SA's views in the ICC Award could conceivably have been indirectly influenced by the Firm's representatives (namely, Ms. [P] and a representative) that he met prior to 3 May 2019. But it was never articulated how this might have been possible. It was also suggested by the Plaintiffs that in mid-March 2019, having already put in a lot of time and work in the ICC Arbitration, SA would not have wanted to resign from the Tribunal until at least after the ICC Award had been published. So (it is said) SA deliberately kept quiet about being approached or engaged to work for [MMM] as co-counsel with the Firm and did not disclose anything until 17 June 2019. In so conducting himself, SA would (the Plaintiffs argue) have acted in bad faith and as a result there would be justifiable doubt over the fairness of his views as set out in the ICC Award. This reasoning seems to me contrived. In any event, assume that SA consciously refrained from making disclosure prior to 17 June 2019 because he did not wish to be knocked out from the ICC Arbitration by a challenge from the Plaintiffs before the issue of the ICC Award. It is not apparent why such calculation on SA's part would give rise to a possibility of his being more disposed towards one party (the Investor) as opposed to the other (the Plaintiffs). On the Plaintiffs' hypothesis, SA's presumed goal would only have been to remain in the ICC Arbitration until the ICC Award was issued. Accomplishing that objective would not have dictated that he favour one side over the other. So long as he remained on the

Tribunal until the ICC Award was issued, SA would be indifferent to the outcome.

58 In the alternative, the Plaintiffs contended that SA's disclosure and that of Mr. [N] in an affidavit filed in these proceedings had been less than full and frank. It was suggested that for this reason I should draw adverse inferences as to SA's good faith and as to the possible existence of undisclosed *ex parte* communications between SA and Mr. [N] before their meetings on 16 May and 10 June 2019.

59 In support of the submission that I could draw adverse inferences from only partial disclosure, the Plaintiffs referred me to the following passage from the judgment of Hamblen LJ in *Halliburton Co v Chubb Bermuda Insurance Ltd and others* [2018] 1 WLR 3361 ("***Halliburton***"):

> 74. If a disclosure that ought to have been made has not been made, that will mean that the arbitrator will not have displayed the "badge of impartiality" which he should have done. As Lord Bingham of Cornhill observed in the *Davidson's* case 2005 1 SC (HL) 7, the fact of non-disclosure "must inevitably colour the thinking of the observer".
>
> 75. Non-disclosure is therefore a factor to be taken into account in considering the issue of apparent bias. An inappropriate response to the suggestion that there should be or should have been disclosure may further colour the thinking of the observer and may fortify or even lead to an overall conclusion of apparent bias—see, for example, *Paice v MJ Harding (trading as MJ Harding Contractors)* [2015] EWHC 661 (TCC), [2015] 2 All ER (Comm) 1118 and *Cofely Ltd v Bingham* [2016] 2 All ER (Comm) 129.
>
> 76. Non-disclosure of a fact or circumstance which should have been disclosed, but does not in fact, on examination, give rise to justifiable doubts as to the arbitrator's impartiality, cannot, however, in and of itself justify an inference of apparent bias. Something more is required—see, for example, the comments of Lord Mance in *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416, para 58.

60 The Plaintiffs then subjected SA's disclosure to the parties regarding his engagement by [MMM] to a detailed critique. For example, SA's email of 17 June 2019 (see [20] above) was queried for not disclosing the specific date on which he was instructed in relation to the Delhi High Court enforcement proceedings, but only revealing that SA had been instructed "earlier this year". Complaint was made that SA did not straightaway provide chapter and verse about his contacts with Mr. [N] and the Firm before 17 June 2019. In similar vein, SA's email of 18 June 2019 (see [22] above) was said to be woefully insufficient because SA coyly referred there to a mere "belief" that the Firm were acting for [NNN] and was "not sure" if the Firm was also acting for [MMM]. SA (the Plaintiffs commented) has not to this day disclosed precisely when he was approached to act as counsel in the UNCITRAL Arbitration. The Plaintiffs observed that, although they had sought disclosure in suitably redacted form of all communications among the Firm, [MMM], [MMM]'s lawyers and SA regarding SA's engagement by [MMM]/[NNN], the Investor and the Firm have not complied. In connection with SA's revised comments of 1 August 2019 to the ICC Challenge (see [25] above), the Plaintiffs speculated that SA had amended his original remarks "because one party alerted him to his error". The Plaintiffs stressed that they had obviously not alerted SA, presumably implying that the alerting party must have been the Investor and the Firm. The Plaintiffs further suggested that SA's resignation letter (see [28] above) exhibited "a degree of animosity and ill-feeling towards both the Plaintiffs and their lawyers" from which bad faith could be inferred.

61 In relation to Mr. [N], my attention was drawn to [62] of his affidavit in these proceedings. That states: "Importantly, I had no *material* contact with [SA] in relation to [the UNCITRAL Arbitration] prior to the issuance of the [ICC Award] on 30 April 2019" [original emphasis omitted, emphasis added in

italics]. The Plaintiffs suggested that Mr. [N] had carefully chosen his words and the use of the word "material" to qualify "contact" must be taken as implying that SA and Mr. [N] had other meetings on undisclosed occasions before 30 April 2019. By similar token, the Plaintiffs said that they were deeply troubled by [45] of Mr. [N]'s affidavit. That reads:

> In the absence of a close or any *material* professional relationship between myself/[the Firm] and [SA], it should not be surprising that I/[the Firm] did **not** have an *active* role in [SA]'s engagements to act on behalf of [NNN] and [MMM] for (i) the March 2019 Delhi High Court Hearing; and (ii) [the UNCITRAL Arbitration].
>
> [original emphasis in bold and underline, emphasis added in italics]

The Plaintiffs complained that no information has been volunteered about any "non-material professional relationship" between Mr. [N] and SA or any "non-active role" played by Mr. [N] or the Firm in SA's engagement from 9 March 2019 onwards.

62 I am unable to accept the Plaintiffs' alternative submission. I am unable to draw the inferences for which they contend. On the contrary, it seems to me that the Plaintiffs are asking me to approach the available evidence in a manner that is unduly sensitive and suspicious. That, according to *BOI*, is what I should not be doing.

63 When Mr. [N] deposes that he has had "no material contact" with SA, he should in my view be taken to mean exactly what he is stating, namely, that he has had no contact with SA relevant to these setting aside proceedings. Prior to 30 April 2019 Mr. [N] would obviously have been appearing as counsel before the Tribunal (including SA). That would have been "contact" with SA, but not a material one for the purposes of determining this setting aside

application. It is therefore understandable that Mr. [N] should depose, in the interests of precision, that he had no *material* contact with SA prior to 30 April 2019.

64 As to the involvement or otherwise of Mr. [N] and the Firm in engaging SA for [MMM], "having a role" in a matter by definition entails being "active" in bringing that matter about. It is difficult to see how one can play a "non-active" or "passive" role in attaining some outcome. That would be an oxymoron. Mr. [N]'s statement as to the Firm and he not having had an "active role" may be pleonastic. But I seriously doubt that the expression means anything more than that neither he nor the Firm played a role in SA's engagement by [MMM]. This is clear from reading other parts of Mr. [N]'s affidavit. See, for example:

> 56 … [The Firm's] lawyers are **not** involved in instruction of Senior Advocates … In particular, I was not and am not involved at all in this work stream, and did not and do not instruct or supervise other lawyers at [the Firm] in relation to the [enforcement of the UNCITRAL Award].
>
> …
>
> 58 … [[MMM]] also led the discussion on the details of the engagement with [[NNN]]. I/[the Firm] were **not** involved in these discussions about the larger instruction.
>
> …
>
> …
>
> 61 [The Firm] (but importantly, **not** myself) had only a peripheral involvement in the engagement **process** (**not** the decision to engage [SA] itself) together with, and on behalf of, [[NNN]] (as [the Firm]'s client). As previously stated, [[MMM]] made the decision to engage [SA], and also led the discussions leading to [SA]'s provisional acceptance of the engagement in May 2019 "*subject to the fees and other terms being agreed*", and [[NNN]]'s in-principle agreement to the engagement.
>
> [emphasis in original]

65 In SA's case, there would be the inevitable dilemma of how much information he should volunteer in respect of his dealings with [MMM]/[NNN] (including his interactions with the Firm as counsel to [MMM]/[NNN]), given that SA's dealings with [MMM]/[NNN] and the UNCITRAL Arbitration proceedings are subject to obligations of confidentiality. Individuals in SA's position may decide to be sparing in their disclosure in the interests of that confidentiality. This is a matter of judgment on the part of the individual concerned. Different persons may reasonably draw the line as to what to disclose and what not to disclose differently. I am unable to say on the facts of this case that SA was unreasonable in the way that he approached the matter. As I have already mentioned, the suggestion that there was some collusion between the Investor or the Firm and SA underlying SA's correction of his original response to the ICC Challenge is only speculation, unsupported by any evidence. Nor am I able to read SA's comments on the ICC Challenge (including those in his resignation letter) as exhibiting animosity (as opposed to regret) towards the Plaintiffs. An arbitrator faced with the choice of resigning or not when one party wishes him or her to go, but the other does not, is in a difficult position. The arbitrator owes duties to both parties and deciding which way one ought to go will not always be straightforward.

66 A court must therefore be wary about drawing inferences of bad faith merely because an arbitrator has been laconic in his or her responses to disclosure requests or has expressed personal regret and hurt in a resignation letter. That does not mean that an arbitrator in SA's position can be economical with the truth and make misleading statements. Helpful guidance on how a court should approach the matter was given by Hamblen LJ in *Halliburton* at [76] (see [59] above). Loh J expressed a like view in *UES*, where he stated at [42] that "a failure to disclose will only give rise to apparent bias if there are other

circumstances which support such a finding". Loh J added at [43] of *UES* that "the nature and extent of a tribunal's associations is a crucial factor in determining whether the failure to disclose the same supports a reasonable suspicion of bias." Here I do not see any "other circumstances" (*UES* at [42]) or "something more" (*Halliburton* at [76]) apart from the posited belated disclosure (see [53] above) to support an inference of apparent bias. For the reasons that I have given, I do not accept that there has been deliberate (or any) insufficient disclosure by SA or Mr. [N]. In particular, I have not found the Plaintiffs' tendentious reading of what SA and Mr. [N] have written as any basis for inferring bad faith on SA's or Mr. [N]'s part.

67 The bias ground accordingly also fails.

Conclusion

68 The Plaintiffs' setting aside application is dismissed.

69 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 on 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

Davinder Singh SC, David Fong and Sivanathan Jheevanesh (Instructed), Kabir Singh and Tan Tian Yi (Cavenagh Law LLP) for the Plaintiffs;
Thio Shen Yi SC, Niklas Wong and Kevin Elbert (TSMP Law Corporation) for the Defendant.