IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC(I) 13

Originating Summons No 4 of 2021

Between

CIP

… *Applicant*

And

CIQ

… *Respondent*

JUDGMENT

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

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CIP
v
CIQ

[2021] SGHC(I) 13

Singapore International Commercial Court — Originating Summons No 4 of 2021
Patricia Bergin IJ
1, 2, 30 September 2021

19 November 2021 Judgment reserved.

Patricia Bergin IJ:

Introduction

1 By an Originating Summons filed in the High Court of Singapore on 19 November 2020, CIP, the applicant, respondent in the arbitration, seeks orders setting aside an arbitral award ("the Award") rendered in a Singapore International Arbitration Centre ("SIAC") arbitration ("the Arbitration") in favour of CIQ, the respondent, claimant in the Arbitration. CIP will be referred to as "the applicant". CIQ will be referred to as "the respondent".

2 On 29 January 2021 the proceedings were transferred into the Singapore International Commercial Court.[1]

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[1] Minute Sheet dated 29 January 2021 in HC/OS 1180/2020.

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3 The proceedings were heard on 1 and 2 September 2021.

Background

4 The applicant and the respondent are companies incorporated in the Republic of the Philippines.[2] They, together with a company related to the respondent, were parties to a Joint Venture Agreement dated 10 May 2013 (as amended on 13 August 2013 and by a Supplemental Agreement on 3 September 2015) ("JVA") relating to a mining project in the Philippines ("the Project").[3] The purpose of the joint-venture ("JV") was to prospect, explore and develop an open-pit mine and processing plant ("the Plant") within the relevant "Zone" defined in the JVA ("the Project Zone").[4]

5 Natural resources in the Philippines are owned by the State. The Philippines Mines and Geosciences Bureau ("MGB") within the Department of Environment and Natural Resources ("DENR") issues exploration permits ("EP") to qualified persons granting them the rights to explore, mine and process those resources.[5]

6 The MGB issued EPs to the respondent and the Project proceeded between 2013 and 2015 when the parties' relationship appears to have become somewhat dysfunctional.

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2 Jesusito G Morallos' First Affidavit dated 19 November 2020 ("Jesusito's 1st Affidavit") at paras 5–6 (Exhibit AR ("AR") vol 1 ("AR-I") at pp 10–11).

3 Jesusito's 1st Affidavit at paras 8(a), 10 (AR-I at pp 12–13).

4 Jesusito's 1st Affidavit at para 10 (AR-I at p 12).

5 Final award in the Arbitration dated 21 August 2020 ("Final Award") at [69] (AR-I at p 116).

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7 Under the JVA, the applicant was given the right to acquire up to a 36% interest in the JV during the defined "Earn-in Period" subject to the fulfilment of certain conditions.[6] It was to provide counterpart funding, drilling services and management services.[7] A Memorandum of Understanding dated 22 November 2013 gave the applicant the right to acquire an additional 6% interest in the JV also subject to the fulfilment of certain conditions ("the 6% MOU").[8]

8 The Recitals to the Supplemental Agreement of 3 September 2015 referred to previous agreements constituting the JVA, certain of the applicant's obligations, drilling services provided by the applicant, and the respondent's waiver, and that of its related company, of the applicant's two year[9] Earn-in Period. Recital F recorded that in view of those matters, the applicant "is considered to have earned its full 36% interest in the joint venture".[10]

9 The parties agreed in the JVA that they would enter into good faith discussions to convert the applicant's 36% (and later an additional 6%) interest in the JV into equity in the respondent.[11]

10 One important aspect of the parties' relationship was that the applicant would use its connections and contacts within the Philippines to facilitate the granting and continuation of the appropriate enabling permits and approvals

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6 Jesusito's 1st Affidavit at p 332 (AR-I at p 339); Final Award at [81] (AR-I at p 119).

7 Jesusito's 1st Affidavit at para 11 (AR-I at p 12).

8 Jesusito's 1st Affidavit at para 12(b) (AR-I at p 13).

9 Supplemental Agreement dated 3 September 2015 ("Supplemental Agreement") (AR-I at p 370).

10 Supplemental Agreement (AR-I at p 371).

11 JVA, cl 8.2 (AR-I at p 342).

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crucial to exploration activities and extraction of mining deposits.[12] The respondent was to be the party to whom the EP was to be issued. However, the applicant took the view that because it had become at least a 36% shareholder or a 42% shareholder in the respondent (having on its case converted its interest in the JV into equity in the respondent) it was entitled to be named as a "co-permittee" in the EPs. In accordance with this view the applicant approached the MGB to be named as a co-permittee on the EP.[13] The respondent did not share the applicant's view about this entitlement and this difference between them was referred to by the parties as the "co-permittee issue".

11 The applicant became concerned that its shareholding had not been regularised[14] and a dispute arose between the parties as to the proper reflection of the applicant's equity interest in the respondent.

12 Another issue that arose during the parties' working relationship was the ownership of rights that the applicant had acquired to the land ("the Surface Rights") within the Project Zone,[15] the subject of the JV operations. It is not in issue that the applicant had acquired some Surface Rights within the Project Zone and the respondent subsequently claimed that these acquisitions were secretive and not consistent with the applicant's obligations to the JV.

13 Another issue between the parties in relation to their respective obligations was the requirement for the applicant to pay certain outstanding amounts into the JV fund ("the JV Fund").

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12 Jesusito's 1st Affidavit at para 14 (AR-I at pp 13–14).

13 Final Award at [100] (AR-I at p 123).

14 See Respondent's Reply Memorial dated 29 March 2019 ("Respondent's Reply Memorial") at para 696 (AR-III at p 121).

15 Jesusito's 1st Affidavit at para 17(d) (AR-I at p 15).

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14 By mid-2015 it was necessary for the EP to be renewed. An application for its renewal was lodged with the MGB on 5 May 2015. However, for various reasons the EP expired on 11 July 2015. The applicant then suspended all drilling operations and the Project stalled whilst the parties fell into dispute in relation to a number of issues.[16] Each commenced litigious process; the applicant in the Philippine courts; and the respondent in arbitral proceedings in Singapore.

15 Although the motivation to settle their differences was in issue, the parties achieved such settlement and entered into a Memorandum of Agreement on 10 June 2016 ("MOA"). As this Agreement is a pivotal aspect of the applicant's challenges to the Award, it is appropriate to refer to it in some detail.

The MOA

16 The Recitals to the MOA referred to the existence of the JVA and in particular to the 6% MOU in which the parties agreed to add an additional 6% to the applicant's 36% interest in the JV upon the fulfilment of certain conditions. The Recitals also referred to the Supplemental Agreement of 3 September 2015 in which the parties acknowledged that the applicant "has fully earned its 36% interest in the JV".[17] Recital D recorded that: "The Parties have been in discussion on a number of issues in connection with the JVA and are seeking to resolve matters amicably and equitably".[18]

17 The MOA recorded that the parties had agreed to take steps in three stages within different time frames for specified purposes.

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16 Final Award at [97], [106]–[107] (AR-I at pp 123–124).

17 Memorandum of Agreement dated 10 June 2016 ("MOA") (AR-I at pp 390–391).

18 MOA, Recital D (AR-I at p 391).

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18 In Stage 1 (in Section 1 of the MOA) the parties agreed to take steps "upon the signing of" the MOA until 30 June 2016 "in order to facilitate timely issuance of the … EP Renewal" and the Declaration of Mining Project Feasibility ("DMPF").[19]

19 In Stage 2 (in Section 2 of the MOA) the parties agreed to take steps "within 45 days", which could be extended by agreement between the parties, "from the signing of" the MOA "to Document the Relationship".[20]

20 In Stage 3 (in Section 3 of the MOA) the parties agreed to take steps "within 3 months from the signing of" the MOA "to Accommodate a Separate Mining and Processing Company Structure".[21]

21 Section 4 of the MOA was entitled "Conditionality" and provided that: "All proposed Stages would ultimately be conditional on satisfaction of all steps unless all parties agree to a variation in writing".[22]

Stage 1 – on signing of the MOA

22 The applicant agreed to do five things by 30 June 2016: (a) to secure the necessary support from Local Government Units ("LGUs") and communities for the renewal of the EP and the DMPF for the relevant part of the Project before 30 June 2016; (b) to provide funding of US$150,000 of the outstanding JVA commitments, subject to agreement as defined; (c) to remit to the JV Fund US$200,000 in order to fund the incremental 6% contribution for expenditure

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19 MOA, s 1 (AR-I at pp 391–392).

20 MOA, s 2 (AR-I at pp 392–393).

21 MOA, s 3 (AR-I at p 393).

22 MOA, s 4 (AR-I at pp 393–394).

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to the date of the MOA; (d) to "stay its Court Proceedings" and application to the MGB on the "co-permittee issue" and confirm such matters in writing with the relevant parties; and (e) to transfer its Surface Rights interests to the respondent at cost plus a modest premium on a timely basis.

23 The respondent agreed to do four things by 30 June 2016: (a) to be committed to reflect that the applicant owned 42% of shares in the respondent, subject to: (i) the most cost effective and expeditious way of transferring and issuing the shares; and (ii) the applicant confirming its commitment to meet the obligations under the 6% MOU (as amended by the MOA); (b) to provide proof of the applicant's ownership of the 42% share in the respondent (with the undertaking/acknowledgement to be signed by the president, a director, the treasurer and the corporate secretary of the respondent); (c) to undertake to issue or transfer the shares, issue the certificate of shares and file with the Securities and Exchange Commission ("SEC") its amended General Information Sheet ("GIS") as soon as practicable; and (d) to "stay its Singapore Arbitration Proceedings" and confirm such matters in writing with any relevant parties.

24 The applicant and the respondent agreed to do four things together by 30 June 2016: (a) to request from and work cooperatively with MGB/DENR to have the EP renewed and DMPF approved in the respondent's name; (b) to confirm that the terms of the JVA, the 6% MOU and the MOA would be fairly reflected in a shareholders' agreement ("the Shareholders' Agreement"); (c) to provide full transparency and accounting for all current and future surface title rights related to the Project (covering all key aspects including infrastructure, mineral resources, access, port, etc) acquired by all parties and all their nominees directly or indirectly; and (d) to cooperatively pursue the issue of all permits in the name of the respondent (the incorporated JV vehicle) including the renewal of the EP and mining permits.

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25 This part of the agreement also recorded that the 1.5 million dry metric tonnes of "first material" to be mined out by the applicant as contained in the 6% MOU was to be reimbursed over time chargeable as part of mining cost.

Stage 2 – within 45 days of signing the MOA

26 The applicant agreed to "subsequently" conduct due diligence on the respondent and all its predecessors, "to ensure" that it was "not exposed to any undue risk (i.e. legally, financially, etc.) as a result from being a shareholder" of the respondent.

27 The respondent agreed that it would cooperate with the applicant and provide all the necessary documents and information to the applicant in respect of the due diligence process.

28 Both the applicant and the respondent agreed that if after the completion of the due diligence process the parties "deem the risk to continuously be a part of [the respondent] unacceptable acting reasonably", they would have discussions in good faith including in respect of forming a new corporation ("Newco Transferee") of which the respondent and the applicant would own 58% and 42% respectively and allow the applicant to swap its 42% ownership of the respondent into 42% ownership of the Newco Transferee.

29 Both the applicant and respondent agreed that within 45 days, which could be extended by agreement between the parties, they would negotiate in good faith and agree on the terms of the Shareholders' Agreement for the respondent reflecting customary terms some of which were identified in this Section of the MOA. These terms included non-dilution on equity holdings; pre-emptive rights on shares; rights of first refusal; composition of the Board of Directors; various matters to be voted on by the Board of Directors; and the

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composition of the Management Committee. It also included an undertaking by the applicant not to use its provision of services against the best interests of the JV.

Stage 3 – within three months of signing of MOA

30 The parties agreed that within three months of the signing of the MOA, they would incorporate "Newco 1" to be a separate processing company responsible for the construction and operation of the Plant and/or a second company, "Newco 2", to be a trading or marketing company responsible for sales of products and purchasing of inputs during the construction and operating phases. They agreed to negotiate and agree in good faith on the shareholders' agreement for Newco 1 and Newco 2 to be on similar terms and conditions as the Shareholders' Agreement for the respondent and that the applicant was to receive a 42% interest in Newco 1 and Newco 2.

31 The parties also agreed to negotiate and agree in good faith on an "Ore Sale and Purchase Agreement" between the respondent and Newco 1 on arm's length terms and conditions. They agreed that Newco 1 and Newco 2 were to be incorporated and that the agreements referred to in Stage 3 were to be executed within three months of the "Stage 1 Agreement". Although the term "Stage 1 Agreement" is not used elsewhere in the MOA, it is probable that the parties intended this expression to refer to the Shareholders' Agreement of the respondent.

Subsequent to the MOA

32 On the same day that the MOA was signed, the applicant and the respondent wrote a joint letter to the MGB. That letter referred to the pending application for the renewal of the EP and advised that the parties had signed the

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MOA, a copy of which was provided with the joint letter to the MGB.[23] The letter informed the MGB that the applicant had "already earned a total of 42% of the JV Project" and that the parties "now seek to … implement the conversion of [the applicant's] 42% interest in the JV Project into 42% equity share of [the respondent] as the corporate vehicle owning the JV Project" and to formulate the terms and conditions of the Shareholders' Agreement that would eventually replace the JVA.[24] That letter also included the following:

> In consideration of these developments, and on [the respondent's] firm/absolute and enduring undertaking to immediately issue to [the applicant] 42% equity/ownership in [the respondent], it is respectfully submitted that the immediate renewal of [the relevant EP] is now in order. Thus, [the applicant] and [the respondent] respectfully pray for the immediate approval/renewal of [the relevant EP] in [the respondent's] name.

33 On 17 June 2016 the relevant EP was renewed for two further years until 17 June 2018.[25]

34 On 23 June 2016, the applicant sent the respondent a spreadsheet entitled "List of Properties Purchased by [the applicant] as of 23 June 2016."[26] The provision of this document was in purported compliance with the obligation in Section 1 of the MOA for "full transparency and accounting for all current and future surface title rights related to the project"[27] that had been acquired by the applicant either directly or indirectly.

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23 Jesusito's 1st Affidavit at para 18, pp 390–391 (AR-I at pp 15, 397–398).

24 Applicant and respondent's letter to MGB dated 10 June 2016 (AR-I at p 390).

25 First renewal of EP at para 4 (AR-I at p 425).

26 Final Award at [126] (AR-I at p 127); Jesusito's 1st Affidavit at para 22, p 381 (AR-I at pp 18, 388).

27 MOA, s 1 (AR-I at p 391).

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35 On 24 June 2016, the applicant and the respondent executed a "Subscription Agreement" which recorded that the respondent had agreed "to issue" to the applicant "out of the existing but unissued portion of its authorized capital stock" 10,500,000 Class A Common shares with an aggregate par value of 10,500,000 Pesos.[28] The Subscription Agreement also recorded that the applicant agreed to pay for those shares and the respondent undertook to secure any required approvals from the appropriate government agencies to enable it to issue the shares to the applicant.[29] Thereafter the respondent registered the applicant's 42% shareholding with the SEC in its amended GIS.[30]

36 From June 2016, the applicant requested documentation from the respondent for the purpose of its due diligence process.[31] The respondent provided a quantity of those documents to the applicant but failed to provide the respondent's "Stock and Transfer Book" (or "STB").[32] The applicant also sought signed copies of various loan agreements which, as at October 2016, had not been provided to it.[33]

37 On 5 October 2016 the respondent suggested a revised "deadline" of 30 October 2016 to complete the due diligence process and execute the Shareholders' Agreement. In this communication the respondent suggested that it understood that a draft Shareholders' Agreement had been provided to the applicant and that it was "under review and discussion".[34]

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28 Jesusito's 1st Affidavit at para 23 (AR-I at p 18).

29 AR-I at p 512.

30 Jesusito's 1st Affidavit at para 23 (AR-I at p 18).

31 Jesusito's 1st Affidavit at para 20 (AR-I at p 16).

32 Jesusito's 1st Affidavit at para 26(c) (AR-I at p 19).

33 Jesusito's 1st Affidavit at para 20 (AR-I at p 16).

34 Jesusito's 1st Affidavit at p 569 (AR-I at p 576).

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38 On 6 October 2016, the applicant wrote to the respondent advising that any extension would be dependent upon when the respondent could provide "all the documents as listed". The applicant also advised the respondent that it had not received a draft Shareholders' Agreement from the respondent and attached an initial draft ("the Draft Shareholders' Agreement") said to be based on the documents that had been made available to the applicant and subject to change depending upon the documents to be provided to it in due course.[35]

39 There was then disputation between the parties and on 3 November 2016, the respondent wrote a detailed letter to the applicant which included the following:[36]

> As a result of [the applicant's] failure or refusal to abide by its reciprocal obligations as discussed above, [the respondent] hereby suspends the implementation of the MOA and its implementing agreements pending full compliance by [the applicant] of its reciprocal obligations and reserves to exercise its right under Article 2041 of the Civil Code to regard the [MOA] and its implementing agreements as rescinded.

40 On 4 November 2016 the respondent filed an amended GIS with the SEC indicating that the applicant's 42% shareholding was subject to rescission.[37]

41 On 1 December 2016 the respondent wrote to the applicant ("the Respondent's Letter of 1 December 2016") advising that the MOA had been rescinded as a result of the applicant's failure or refusal "to abide by its reciprocal obligations thereunder".[38] The respondent advised the applicant of

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35 Jesusito's 1st Affidavit at pp 573–574 (AR-I at pp 579–580).

36 Jesusito's 1st Affidavit at p 609 (AR-I at p 616).

37 Jesusito's 1st Affidavit at para 29 (AR-I at p 20).

38 Respondent's letter to applicant dated 1 December 2016 (AR-I at p 635).

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alleged breaches of material provisions of the JVA and provided 60 days from the receipt of the letter for the applicant to correct those breaches.

42 On 2 December 2016 the applicant filed a civil claim in a Regional Trial Court ("the Regional Court") in the Philippines against the respondent and its directors. In those proceedings the applicant sought amongst other things a declaration that it was a 42% stockholder of the respondent with consequential orders that the respondent and its directors record its stockholding in the STB.[39] After the applicant filed the civil claim, the respondent sent the applicant a letter on the same day titled "Formal Notice of Rescission of [MOA]".[40]

43 On 9 March 2017, the respondent wrote to the applicant advising that as the applicant had failed to correct its breaches of the material provisions of the JVA as advised in the Respondent's Letter of 1 December 2016, "the JVA has been terminated".[41]

44 Although it is apparent that in March 2019 the applicant had some measure of success in the Regional Court in the claim that it filed on 2 December 2016, the Metropolitan Trial Court reversed that order in November 2019 ("the MTC Order").[42] The MTC Order recorded a conclusion that the applicant lost its right to rely on any rights pursuant to Stage 2 of the MOA because it did not comply with the other obligations under Stage 1 of the MOA.[43]

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39 Final Award at [143] (AR-I at pp 131–132).

40 Jesusito's 1st Affidavit at para 30, p 632 (AR-I at pp 20, 639).

41 Respondent's letter to applicant dated 9 March 2017 (AR-II at p 20–23).

42 Final Award at [48], [488] (AR-I at pp 113, 220).

43 Final Award at [624] (AR-I at p 260).

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The arbitration process

45 On 17 May 2017, the respondent issued a Notice of Arbitration seeking declarations that it had validly rescinded the MOA and validly terminated the JVA. It sought damages for breaches of the two agreements.[44] On 16 June 2017, the applicant filed its Response to the Notice of Arbitration.[45] The applicant's position was that it had not breached the MOA or the JVA and it requested the arbitral tribunal ("the Tribunal") to confirm amongst other things that it had not breached those agreements and it was entitled to the 42% interest in the respondent. The detail of the parties' respective claims is dealt with later in this Judgment.

46 The respondent filed its Memorial on 19 June 2018 ("the Respondent's Memorial").[46] The applicant filed its Counter-Memorial on 23 October 2018 ("the Applicant's Counter-Memorial").[47] The respondent filed its Reply Memorial on 29 March 2019.[48] The applicant filed its Rejoinder Memorial on 5 July 2019 ("the Applicant's Rejoinder Memorial").[49] The respondent filed its Rejoinder Memorial on 19 July 2019.[50]

47 By December 2018, the parties had submitted their respective requests for production of documents. It is not in issue that the applicant submitted 93 requests and the respondent submitted 129 requests. It is also not in issue that

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44 Jesusito's 1st Affidavit at paras 40–41, pp 722–736 (AR-I at pp 22–23, AR-II at pp 31–45).

45 Jesusito's 1st Affidavit at p 738 (AR-II at p 47).

46 Jesusito's 1st Affidavit at p 761 (AR-II at p 70).

47 Jesusito's 1st Affidavit at p 954 (AR-II at p 263).

48 Jesusito's 1st Affidavit at p 1274 (AR-II at p 583).

49 Jesusito's 1st Affidavit at p 1632 (AR-III at p 241).

50 Jesusito's 1st Affidavit at p 1819 (AR-III at p 428).

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on 22 December 2018 the Tribunal granted 48 of the respondent's 129 requests but refused all of the applicant's requests.[51]

48 On 16 August 2019, the parties filed their respective "Agreed Pre-Hearing Documents" which included their respective Lists of Issues because they were unable to agree on a joint List of Issues.[52]

49 On 22 August 2019, the respondent applied to amend its Memorial to include a claim for a declaration that it was entitled to "set off the 'cost'" that it was required to pay the applicant against any amount that the applicant may be ordered to pay the respondent in the Arbitration. On 30 August 2019 the Tribunal allowed that amendment.[53]

50 On 26 August 2019 the respondent applied for leave to disclose three additional emails relating to the issue of damages. The applicant did not object and the application was accordingly allowed by the Tribunal.[54]

51 The substantive oral hearing of the Arbitration was held from 16 to 20 September 2019 inclusive.

52 On 30 September 2019, the Tribunal wrote to the parties confirming its request that they submit their Post-Hearing Briefs by 1 November 2019 and their Reply Post-Hearing Briefs by 22 November 2019. In the circumstances of

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51 Jesusito's 1st Affidavit at para 47 (AR-I at p 25).

52 Jesusito's 1st Affidavit at para 44(d), pp 3335, 3340 (AR-I at p 24, AR-V at pp 544, 549).

53 Jesusito's 1st Affidavit at para 48, p 3970 (AR-I at p 26, AR-VI at p 479).

54 Jesusito's 1st Affidavit at para 49, p 3988 (AR-I at p 26, AR-VI at p 497); Eduardo U Escueta's First Affidavit dated 21 December 2020 ("Eduardo's 1st Affidavit") at para 206 (AR-VIII at p 78).

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the parties not being able to file a joint List of Issues, the Tribunal advised as follows:[55]

> To assist the parties, the Tribunal attaches a list of the main issues and questions for determination ["***the Tribunal's List of Issues***"]. The parties are requested to follow the format of the attached list of issues. For the avoidance of doubt, while inviting the parties to organize their post-hearing briefs in accordance with the issues in the attached file, the Tribunal emphasizes that each party remains free to make such submissions as it sees fit. Similarly, the parties are free to include sub-issues in accordance with their suggested issues and questions that were submitted on 16 August 2019.
>
> You will see that the Tribunal kept the issues in relation to the [the respondent's] alleged violations of Philippine law as part of the issues for determination. This is because the [applicant] did not formally amend its request for relief and claims. However, the Tribunal notes that the [applicant] did state at the hearing that it will not pursue the claims in relation to Philippine law.

53 On 23 October 2019 the applicant applied to the Tribunal to introduce into evidence an email dated 25 August 2016 with attachments, referred to in the Arbitration and in these proceedings as the "Surface Rights Email".[56]

54 On 30 October 2019 the Tribunal rejected the applicant's application to introduce the Surface Rights Email into evidence.[57]

55 On 21 November 2019, the respondent sought the applicant's consent and the Tribunal's leave to disclose and rely upon the MTC Order dated 12 November 2019 and for the parties to be allowed to file further written

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55 Jesusito's 1st Affidavit at p 4831 (AR-VII at p 640).

56 Jesusito's 1st Affidavit at para 51, p 4013 (AR-I at p 26, AR-VI at p 522).

57 Jesusito's 1st Affidavit at para 52, p 4034 (AR-I at p 27, AR-VI at p 543).

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submissions to address that new document. On 22 November 2019 the applicant consented to the respondent's request and the Tribunal approved it.[58]

56 In November 2019 the parties submitted their Post-Hearing Briefs and Reply Post-Hearing Briefs.

57 On 16 January 2020 the Tribunal communicated with the parties directing them to provide clarification and further expert reports as to whether in respect of the rescission of a compromise agreement under Philippine law it was necessary to prove that any breach was "substantial", or whether "*any breach*, including even a slight or casual breach" [emphasis in original in underlined italics] would suffice.[59] The Tribunal also requested the applicant to clarify whether it was pressing or pursuing certain arguments and relief in the Arbitration. The parties were directed to provide their responses by 7 February 2020.[60]

58 The parties complied with the Tribunal's directions and on 17 February 2020 the respondent wrote to the Tribunal requesting a further oral hearing either by video link or conference call to make submissions for approximately 1.5 hours. The respondent submitted that the consequences of the applicant's advice to the Tribunal that it was no longer seeking a declaration that it was the "authorised operator" combined with the applicant's abandonment at "the eleventh hour" of its claim that it was entitled to be a co-permittee and its claims that the respondent had violated Philippine law were matters upon which the respondent wished to address the Tribunal orally.[61]

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58 Final Award at [48]–[49] (AR-I at p 113).

59 Jesusito's 1st Affidavit at p 4274 (AR-VII at p 83).

60 Jesusito's 1st Affidavit at pp 4274–4275 (AR-VII at pp 83–84).

61 Jesusito's 1st Affidavit at pp 4285–4287 (AR-VII at pp 94–96).

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59 On 20 February 2020, the applicant wrote to the Tribunal in response to the respondent's request of 17 February 2020 expressing the view that there was "no need for further written submissions or a hearing" but advising that "should the Tribunal consider it necessary to hold an in-person hearing on this issue", the applicant "would have no objection to an additional hearing". The applicant then went on to propose a process for the additional hearing for the Tribunal's consideration.[62]

60 On 24 February 2020, the respondent wrote to the Tribunal in response to the applicant's response of 20 February 2020 pressing for an oral hearing and noting that the applicant "rightly does not suggest that anyone will be prejudiced by the hearing being conducted by way of a video-link or conference call".[63]

61 On 1 March 2020 the Tribunal advised the Parties that "Having considered the views of both sides" it had decided to "convene a teleconference to hear oral submissions" on the matters that had been identified in their recent communications.[64]

62 The further oral hearing was held by teleconference on 1 April 2020.[65]

63 On 21 August 2020, the Tribunal, by majority, consisting of Mr Alan J Thambiayah and Dr Michael Moser ("the Majority") issued an Award finding in favour of the respondent and dismissed the applicant's counterclaims. Mr Custodio O Parlade issued a Concurring and Dissenting Opinion ("the Dissent").

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62 Jesusito's 1st Affidavit at pp 4289–4291 (AR-VII at pp 98–100).

63 Jesusito's 1st Affidavit at pp 4294–4297 (AR-VII at pp 103–106).

64 Jesusito's 1st Affidavit at p 4306 (AR-VII at p 115).

65 Jesusito's 1st Affidavit at para 119(e) (AR-I at p 76).

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The Award

64 The Majority referred to the history of the proceedings, the factual background and the parties' respective requests for relief. That factual background included reference to the parties' disputes about the Surface Rights, the co-permittee issue and the due diligence process. The Majority addressed each of the 23 Issues that it had identified in the Tribunal's List of Issues provided to the parties on 30 September 2019. In respect of each of those Issues, the Majority recorded the issue for determination and then provided what it described as an "Overview" followed by a recitation of the respondent's submissions and the applicant's submissions concluding each section under the heading "Tribunal's decision".

65 Although there are 23 issues with which the Majority dealt, the applicant's grounds in respect of its challenge to the Award focus upon a lesser number of issues with which this court must deal. However, the applicant also relied upon the structure that the Majority adopted for the Award in support of its submissions that the Award should be set aside.

Structure

66 The Majority dealt with the issues in the same order as they appeared in the Tribunal's List of Issues.

67 Issues 1 to 4 relate to alleged breaches of the MOA by the applicant. Issue 5 deals with the respondent's entitlement to regard the MOA as rescinded on account of the applicant's breaches of the MOA.

68 Issues 6 to 16 relate to various aspects of the applicant's conduct during the JV and whether it was in breach of the JVA. Issue 17 deals with the

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respondent's entitlement to terminate the JVA on account of the applicant's breaches of the JVA.

69 Issue 18 deals with the respondent's entitlement to the relief it sought in respect of the applicant's breaches of both the MOA and the JVA.

70 Issues 19 and 20 relate to claims that the respondent had breached the laws of the Philippines that were abandoned by the applicant during the course of the Arbitration.[66]

71 Issue 21 deals with the applicant's claims that the respondent was in breach of the MOA. Issue 22 deals with the applicant's claims that the respondent was in breach of the JVA which was also abandoned by the applicant during the course of the Arbitration.[67]

72 Issue 23 deals with the applicant's claims for relief against the respondent for breaches of the MOA.

Content

73 It is appropriate at this juncture to deal with the Majority's determination in respect of each of the Issues. It will be necessary to return to some of these in more detail when considering the applicant's grounds upon which it relies in seeking to set aside the Award.

74 *Issue 1* was whether the applicant breached the MOA by failing to negotiate in good faith the terms of the Shareholders' Agreement.

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66 Final Award at [606] and [612] (AR-I at pp 254 and 257).

67 Final Award at [631] (AR-I at p 262).

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75 Section 1 of the MOA imposed an obligation on both the applicant and the respondent to "confirm" by 30 June 2016 that the terms of the JVA, as amended, the 6% MOU and the MOA, would be "fairly and accurately reflected in a shareholders agreement" and that both would agree "to respect and honour all terms".[68] Section 2 of the MOA required both the applicant and the respondent to negotiate in good faith and to agree on the terms of the Shareholders' Agreement within 45 days of the signing of the MOA. This deadline could be extended by agreement between the parties.[69]

76 The Majority found:[70]

> 200. Neither the [respondent] nor the [applicant] sent any draft for the shareholders agreement within the prescribed 45 days from the signing of the MOA (i.e. 25 July 2016). Nevertheless, it was eventually the [applicant] who took the initiative by sending the Draft Shareholders' Agreement on 6 October 2016.
>
> 201. The [respondent] has imputed to the [applicant] a 'sinister motive' in sending the Draft Shareholders' Agreement, which according to the [respondent] was meant to 'trap' the [respondent] and increase the [applicant's] control over the JV.
>
> 202. While the [Majority] accepts that some of the provisions of the Draft Shareholders' Agreement may well have been regarded as inconsistent with the parties' agreement, the [Majority] cannot accept the [respondent's] claim that the [applicant] breached Section 2 of the MOA.
>
> 203. First, as stated above, both parties did not negotiate the shareholders' agreement in the timeframe that was dictated by Section 2 of the MOA. Accordingly, the [Majority] considers that it is inappropriate to declare

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68 MOA, s 1 (AR-I at p 391).

69 MOA, s 2 (AR-I at p 392).

70 AR-I at pp 150–152.

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> that any specific party to the MOA breached the duty to negotiate the shareholders' agreement.
>
> …
>
> 206. In conclusion, the [Majority] finds that the [applicant] did not breach the MOA by failing to negotiate in good faith the terms of a shareholders' agreement.

77 *Issue 2* was whether the applicant was in breach of the MOA for failing to remit US$200,000 to the JV Fund.

78 The Majority found that the applicant was in breach of the MOA for failing to remit US$200,000 to the JV Fund. The Majority noted that the ramifications of this breach and whether the respondent was entitled to rescind the MOA were addressed in the section of the Award dealing with Issue 5.[71]

79 *Issue 3* was whether the applicant had breached the MOA by not transferring to the respondent the originals of "any permit issued to [it]".[72]

80 The Majority found that the applicant was not in breach of the MOA as alleged.[73]

81 *Issue 4* was whether the applicant failed to provide the necessary information to the respondent on the Surface Rights that the applicant held and/or whether it failed to engage with the respondent to negotiate the transfer price and sale of the Surface Rights, and if so, whether it was in breach of the MOA.

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71 Final Award at [219]–[226] (AR-I at pp 155–157).

72 Final Award at [228] (AR-I at p 157).

73 Final Award at [239] (AR-I at p 159).

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82 The Majority noted the respondent's argument that the only issue for determination by the Majority was whether the spreadsheet forwarded to the respondent on 23 June 2016 met the applicant's obligations to provide the "full transparency and accounting" under Section 1 of the MOA in respect of the Surface Rights it had acquired. It noted that the respondent argued that it did not satisfy those obligations.[74]

83 The Majority noted the applicant's argument that Section 1 of the MOA did not impose "any unilateral obligation" on it and that the transfer of the Surface Rights from the applicant to the respondent was "by definition to be implemented by both parties and was a reciprocal obligation". It noted the applicant's argument that it was not in breach and that it denied that it had refused or failed to negotiate the sale of the Surface Rights.[75]

84 The Majority observed that the applicant's obligation "to transfer the information on its Surface Rights was not a small matter". It referred to its discussion later in the Award under Issue 8 that the Surface Rights were one of the main issues that were in dispute between the parties and observed that without the transfer of the Surface Rights "there was no way that the Project could continue".[76]

85 The Majority found that the spreadsheet that the applicant forwarded to the respondent on 23 June 2016 was "clearly only partial" information and "as such deficient".[77] It concluded that without the relevant information such as the acquisition costs of the land and other acquisition documents, it was not possible

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74 Final Award at [242]–[245] (AR-I at pp 160–161).

75 Final Award at [246]–[251] (AR-I at pp 161–162).

76 Final Award at [253] (AR-I at p 163).

77 Final Award at [254] (AR-I at p 163).

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for the respondent to determine whether there were any outstanding obligations or liabilities owed or encumbrances on the Surface Rights and that any negotiation in respect of the modest premium on the price of the Surface Rights was impossible without the "necessary information".[78]

86 The Majority found that the applicant was in breach of its obligation by failing to provide the necessary information to the respondent on the Surface Rights and to negotiate the transfer price and sale of the Surface Rights.[79]

87 *Issue 5* was whether the respondent was entitled to regard the MOA as rescinded on account of the applicant's breaches of the MOA.

88 The Majority concluded that the MOA was "clearly a compromise agreement in which the Parties made reciprocal concessions in order to avoid litigation".[80] It assumed that it was necessary to demonstrate a substantial, as opposed to a nominal breach, to justify the rescission of a compromise agreement in accordance with Article 1191 of the Civil Code of the Philippines (Republic Act No 386) ("the Civil Code").[81]

89 The Majority concluded that each of the breaches, the failure to pay US$200,000 to the JV Fund and the failure to provide the information pertaining to the Surface Rights (Issue 2 and Issue 4 respectively) were substantial breaches and that the respondent was entitled to regard the MOA as validly

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78 Final Award at [254]–[255] (AR-I at pp 163).

79 Final Award at [256] (AR-I at p 163).

80 Final Award at [271] (AR-I at p 167).

81 Final Award at [272] (AR-I at p 167); AR-VII at p 300.

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rescinded. The Majority concluded that the respondent validly rescinded the MOA by its letter of 2 December 2016.[82]

90 The Majority also concluded that the ramifications of rescission were that the parties returned to their positions under the JVA with the applicant having 36% and the respondent having 64% contractual interest in the JV. It also concluded that the respondent was entitled to bring claims against the applicant in relation to alleged breaches of the JVA.[83]

91 *Issue 6* was whether in accordance with the JVA the applicant was entitled to be named as co-permittee under the respondent's EP and if not, whether the applicant's request to the MGB to be named as co-permittee was a breach of the JVA.

92 The Majority found that the applicant was not entitled to be so named and its request to the MGB was a breach of the JVA.[84]

93 *Issue 7* was whether the applicant was entitled to be the authorised operator and/or exclusive driller of the JV; and whether in claiming this entitlement the applicant was in breach of the JVA.[85]

94 The Majority found that the applicant was not entitled to be the authorised operator and/or the exclusive driller of the JV but concluded that the applicant's conduct was not in breach of the JVA.[86]

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82 Final Award at [270]–[281] (AR-I at pp 167–170).

83 Final Award at [281] (AR-I at p 170).

84 Final Award at [304], [315] (AR-I at pp 175, 177–178).

85 Final Award at [323] (AR-I at p 180).

86 Final Award at [343] (AR-I at p 184).

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95 *Issue 8* was whether the applicant breached the JVA by acquiring the Surface Rights.

96 The respondent had contended that the applicant had acquired the Surface Rights to frustrate the operation of the JVA, in competition with the JV and to create leverage to grab control of the Project.[87] The applicant had contended that it acquired the Surface Rights in good faith because the respondent had refused to do so and was unable to acquire them because of financial constraints. The applicant had also claimed that the respondent knew for some years that the applicant had acquired the Surface Rights and that the respondent was estopped from bringing its claims in respect of the Surface Rights.[88]

97 The Majority concluded that the Surface Rights were "covered" under the non-competition obligation in cl 4.3 of the JVA; that the applicant had acquired the Surface Rights "behind the [respondent's] back"; resulting in the respondent having to agree to pay a "modest premium" for the Surface Rights; and that the applicant attempted to use the Surface Rights as leverage to pressure the respondent to agree to different concessions. The Majority concluded that the applicant was in breach of cl 4.3 of the JVA by "purchasing the Surface Rights in competition" with the respondent. The Majority rejected the applicant's estoppel claim.[89]

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87 Final Award at [345] (AR-I at p 184).

88 Final Award at [351], [353] (AR-I at p 186).

89 Final Award at [358]–[361] (AR-I at pp 187–188).

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98 *Issue 9* was whether the applicant's demands that the respondent transfer to it an additional 6% of the JV were in breach of the JVA and the parties' agreement.

99 This issue related to a different EP to that the subject of the MOA. The granting of the additional 6% interest in the JV to the applicant was conditional upon that particular EP being issued "within six months of signing" the 6% MOU.[90] This did not happen. The EP was granted three months after the deadline referred to in the 6% MOU.

100 The Majority agreed with the applicant's submission that a "mere request" to receive an additional 6% interest in the JV, "in and of itself", could not be regarded as a breach of the JVA or of the good faith obligation.[91] However, the Majority concluded that the applicant was not willing to fully co-operate with the incorporation of the JV until its "insistence on and constant demands for" an additional 6% were met.[92]

101 The Majority held that the applicant's demands were unjustified and in breach of the JVA. It also held that this conduct breached the applicant's fiduciary and trustee duties to act in good faith.[93]

102 *Issue 10* was whether the applicant remitted its share of the JV's expenditures in accordance with the JVA.

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90 Final Award at [364] (AR-I at p 189).

91 Final Award at [386] (AR-I at p 193).

92 Final Award at [386] (AR-I at pp 193–194).

93 Final Award at [387] (AR-I at p 194).

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103 The applicant was obliged to contribute 36% of cash calls for the JV Fund. The Majority was satisfied that it had failed to contribute its share during the period October 2015 until June 2016 and September 2016 until February 2017.[94] The Majority was also satisfied that the applicant had wrongfully refused or delayed approval of certain applications for expenditure which were necessary for the operation of the JV.[95]

104 The Majority concluded that the applicant had breached the JVA by failing to pay its share of the JV's expenditures to the JV Fund. It was also satisfied that this conduct amounted to a breach of the applicant's duty of co-operation under the JVA.[96]

105 *Issue 11* was whether the applicant entered into good faith discussions in respect of converting its interest in the JV into equity in the respondent in accordance with the JVA.

106 The Majority found that the applicant had refused to enter into good faith discussions "due to its insistence on being a co-permittee and receiving the additional 6% interest in the JV". It also held that this refusal was "without any legitimate reason".[97] It concluded that this refusal was detrimental to the development of the JV because it prevented the incorporation of the JV which was necessary to obtain funds required to begin relevant operations.[98]

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94 Final Award at [405] (AR-I at p 198).

95 Final Award at [409] (AR-I at p 200).

96 Final Award at [410] (AR-I at p 200).

97 Final Award at [426] (AR-I at p 203).

98 Final Award at [427] (AR-I at p 203).

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107 The Majority found that the applicant's refusal to negotiate the conversion of its 36% interest in the JV into equity in the respondent was a breach of the JVA and of the applicant's fiduciary and trustee duties to act in the interest of the JV and to act in good faith.[99]

108 *Issue 12* was whether the applicant sent authorised representatives to the JV's Management Committee meetings, and if not, whether it was in breach of the JVA.

109 The Majority concluded that the applicant had fulfilled its obligation to send its authorised representatives to the Management Committee meetings and that the applicant was not in breach of the JVA as alleged.[100]

110 *Issue 13* was whether the applicant's decision to suspend drilling operations on 11 July 2015 (when the EP expired) and its decision to prevent the resumption of drilling after the renewal of the EP was in breach of the JVA.

111 The Majority found that the applicant was entitled to suspend drilling operations on 11 July 2015.[101] However, it found that the applicant's decision to prevent the resumption of drilling after the renewal of the EP was in breach of the JVA and its fiduciary and trustee duties to act in the interest of the JV and in good faith.[102]

112 *Issue 14* was whether the applicant used its position and dealings to secure numerous benefits for itself at the expense of the JV.

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99 Final Award at [429] (AR-I at p 204).

100 Final Award at [442] (AR-I at p 207).

101 Final Award at [457] (AR-I at p 211).

102 Final Award at [460]–[464] (AR-I at pp 212–213).

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113 The Majority found that the applicant used its dealings with community leaders and the LGUs to secure one-sided resolutions in favour of the applicant and at the expense of the respondent. The Majority held that such conduct went against the duty of cooperation for the development of the JV and was in breach of the JVA and the applicant's fiduciary and trustee duties to act in the interest of the JV and in good faith.[103]

114 *Issue 15* was whether the applicant breached the JVA by commencing criminal proceedings against the respondent's directors in October 2016.

115 Whilst recognising that a misguided legal strategy would not, by itself, be enough to constitute a breach of contract, the Majority concluded that the timing and the overall factual nexus supported the finding that by commencing the proceedings the applicant acted with the ulterior motive of putting pressure on the respondent to consent to the applicant's demands. The Majority found that this could only be regarded as a breach of the JVA.[104]

116 *Issue 16* was whether the applicant breached the JVA by commencing civil proceedings against the respondent in December 2016.

117 The Majority observed that the problem with the applicant's commencement of the civil proceedings was not simply "that it had no basis". Rather, it was that it "contradicted the express jurisdiction clause of the JVA" and was in breach of the applicant's fiduciary and trustee duties to act in the interest of the JV and to act in good faith.[105]

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103 Final Award at [481] (AR-I at pp 217–218).

104 Final Award at [491] (AR-I at p 220).

105 Final Award at [503] (AR-I at p 223).

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118 *Issue 17* was whether the respondent was entitled to terminate the JVA on account of the applicant's breaches of the JVA.

119 The Majority noted that the parties' submissions focused on whether the respondent had to demonstrate a breach of a "material provision" of the JVA, or a substantial and fundamental breach of a "material provision" of the JVA before it was entitled to terminate the JVA.[106]

120 The Majority concluded that the relevant clause of the JVA (cl 11.1.1.1) entitled the "innocent party" to terminate the JVA when there was a breach of a "material provision" and the other party had failed to correct the breach within 60 days of receipt of written notice of the breach.[107] It was not in issue that most of the clauses which were the subject of the applicant's alleged (and ultimately found) breaches were "material provisions".[108] The Majority found that the applicant's breaches were substantial and fundamental.[109]

121 The Majority was satisfied that the respondent validly terminated the JVA by its letter of 9 March 2017.[110]

122 *Issue 18* was whether the respondent was entitled to the relief sought in respect of the applicant's alleged breaches of the JVA and MOA.

123 The relief sought by the respondent included ten declarations; an order for specific performance in respect of, among other matters, the Surface Rights;

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106 Final Award at [509]–[514] (AR-I at pp 224–226).

107 Final Award at [517] (AR-I at p 226).

108 Final Award at [519] (AR-I at p 227).

109 Final Award at [521] (AR-I at p 227).

110 Final Award at [525] (AR-I at p 228).

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an injunction to restrain the applicant from making certain representations including about its status in the JV and/or the Project; and an order for indemnity for losses, damages and expenses.[111]

124 The Majority found that the respondent was entitled to some of its requested declarations with a few minor modifications.[112] It also made orders for specific performance in respect of the Surface Rights. It ordered that the applicant: provide "complete information" in respect of the Surface Rights it had acquired; transfer or cause to be transferred those Surface Rights "at cost" to the respondent; and account to the JV for any profits from the acquisition of the Surface Rights.[113]

125 The Majority granted injunctions restraining the applicant from making certain representations including that the JV still existed; and from using or divulging information received in connection with the JV.[114]

126 The Majority made an indemnity order in respect of damages in amounts totalling US$18,603,776.10. The Tribunal also awarded pre-award interest on damages.[115]

127 *Issue 19* was whether the applicant could bring claims in the Arbitration in relation to the respondent's alleged violations of Philippine law. It was noted that during the course of the Arbitration, the applicant advised that it was not

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111 Final Award at [527]– [530] (AR-I at pp 228–232).

112 Final Award at [544] (AR-I at p 234).

113 Final Award at [550] (AR-I at pp 236–237).

114 Final Award at [562] (AR-I at pp 240).

115 Final Award at [596]–[597] (AR-I at pp 251–252).

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pressing these claims and they were formally rejected "on the merits for want of being pressed".[116]

128 *Issue 20* was whether if the applicant was entitled to bring the claims identified in Issue 19, the respondent was in breach of any of the relevant provisions of Philippine law. As the applicant abandoned its claims in respect of the matters within Issue 19, the Tribunal rejected these claims in respect of this Issue "on the merits for want of being pressed".[117]

129 *Issue 21* was whether the respondent had breached the MOA.

130 The Majority's findings in respect of this issue are pivotal to the applicant's claims in these proceedings and it is appropriate to extract this section in full:[118]

> **A. Overview**
>
> 613. The issue concerns the [applicant's] counterclaim that the [respondent] breached the MOA.
>
> **B. [Applicant's] submissions**
>
> 614. Before the Hearing, the [applicant] submitted that the [respondent] breached the MOA for the following reasons: (i) the [respondent] failed to provide all of the documents necessary for the due diligence and violated the [applicant's] right to inspect corporate books as a shareholder; (ii) the [respondent] failed to negotiate in good faith the draft Shareholder's agreement (see Issue 1 above); (iii) the [respondent] removed the [applicant's] shares in the [respondent] by undoing the Subscription Agreement. In the same vein, the [respondent] reversed the General Information Sheet with the [applicant's] 42% shareholdings on it and removed the [applicant's]

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116 Final Award at [606] (AR-I at p 254).

117 Final Award at [612] (AR-I at p 257).

118 Final Award at [613]–[626] (AR-I at pp 257–261).

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> nominated directors from the [respondent's] board of directors; (iv) the [respondent] transferred the [applicant's] 42% shares to Sage Capital without the [applicant's] consent; and (v) the [respondent] sought to rescind the MOA instead of seeking to incorporate a new company as an available alternative remedy or escape clause as envisaged in Section 2 of the MOA (see Issue 17 above and the [applicant's] suggested list of issues for determination).

615. In its post-hearing briefs, the [applicant] focused only on the [respondent's] alleged breach of Section 2 of the MOA in relation to the [respondent's] duty to provide the [applicant] with all necessary due diligence documents. In this regard, the [applicant] requests that the Tribunal 'order [the respondent] to produce the [STB] and other corporate books and documents for [the applicant's] inspection and examination, pursuant to the due diligence exercise under the MOA.'

616. On 7 February 2020, in response to the Tribunal's question of whether the [applicant] is 'only pressing the argument that the [respondent] breached the MOA by failing to comply with its due diligence obligations', the [applicant] answered as follows: 'No. In addition to [the respondent's] failure to comply with its due diligence obligations, [the respondent] breached the MOA by failing to (i) reflect [the applicant's] ownership of a 42% stake in [the respondent] in the most cost-effective and expeditious way; and (ii) negotiate in good faith the terms of the Shareholder's Agreement'.

617. Finally, in relation to the [respondent's] reliance on [the MTC Order], the [applicant] submits as follows:

> > […] the Order is immaterial to [the applicant's] counterclaim concerning [the respondent's] breach of its due diligence obligations. Such obligations are based on the MOA, which requires [the respondent] to '*cooperate with [the applicant] and provide all the necessary documents and information to [the applicant]*'. [The respondent] breached its due diligence obligations by failing to provide all the necessary documents to [the applicant], notably the [STB]. [The respondent] never denied at the time that [the applicant] had a right to access the STB under the MOA, and instead only contended

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> (implausibly) that it was unable to provide the STB because it was with its external counsel.
>
> [Majority's emphasis in Final Award]

C. [Respondent's] submissions

618. The [respondent] submits that it acted in accordance with the MOA.

619. The [respondent] submits that the [applicant] lost its right to conduct due diligence on or around 30 June 2016 when it committed 'numerous breaches of Section 1 of the MOA.' In this regard, the [respondent] argues that [the MTC Order] supports the [respondent's] argument that the [applicant] lost the right to become a stockholder of [the respondent] because it did not comply with all of its obligations under the MOA.

620. Notwithstanding that the [applicant] lost the right to conduct due diligence as this right was conditional on the [applicant] performing its own obligations under the MOA, the [respondent] submits that it complied with its due diligence obligation under the MOA. According to the [respondent], it provided all documents the [applicant] asked for (including the loan agreements), except for the [STB], which the [respondent] simply requested that the [applicant] defer its request so that the [respondent] could seek legal advice.

621. The [respondent] also avers that the [applicant] never became a stockholder of the [respondent] because the [applicant] did not comply with its obligations under the MOA. …

D. Tribunal's decision

622. The [applicant's] final case on the [respondent's] alleged breaches of the MOA has become thinner as these proceedings have advanced. By the end, the [applicant's] submissions focus on three alleged breaches of the MOA by the [respondent]. As the MOA has been validly rescinded and the [applicant] is not claiming any damages in relation to the [respondent's] alleged breaches, this topic is somewhat moot.

623. As explained above (see Issue 1), the MOA provided that all obligations were to be performed by the Parties in three (3) stages. Each stage had its own deadline, and according to Section 4 of the MOA, '[a]ll proposed Stages

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> would ultimately be conditional on satisfaction of all steps unless all parties agree to a variation in writing'.
>
> 624. The due diligence obligations are set forth in stage 2 per the MOA. The [Majority] shares the conclusion of the [MTC Order] that the [applicant] lost its right to rely on any rights pursuant to stage 2 per the MOA, as it did not comply with the other obligations under stage 1 per the MOA. Therefore, the [Majority] rejects the [applicant's] claim that the [respondent] breached the MOA by failing to comply with its due diligence obligations.
>
> 625. In the same vein, the [Majority] was not persuaded by the [applicant's] submission that the [respondent] breached the MOA by failing to 'reflect [the applicant's] ownership of a 42% stake in [the respondent] in the most cost-effective and expeditious way.' This obligation is stated as part of stage 1 per the MOA but it is inherently connected to the other stages per the MOA, which, for example under stage 2, require the [respondent] to cooperate with the [applicant's] due diligence. The [respondent] clearly did the first step of complying with its obligation by entering into the Subscription Agreement in light of stage 1 per the MOA. However, as the [applicant] had breached its obligations under the MOA, the [respondent] was entitled to rescind the MOA and cancel the Subscription Agreement. In light of the [applicant's] breaches of the MOA, the [Majority] considers that the [respondent] cannot be regarded as the Party that breached the MOA by failing to 'reflect [the applicant's] ownership of a 42% stake in [the respondent]'.
>
> 626. Finally, as explained by the [Majority] under Issue 1 above, both Parties did not comply with the deadline for negotiating the shareholders' agreement pursuant to Section 2 of the MOA. Therefore, the [Majority] finds it inappropriate to hold that the [respondent] breached the duty to negotiate the shareholders' agreement (see also Issue 21 below).

131 The reference to "Issue 21 below" in [626] of the Award was clearly a typographical error which should have referred to Issue 22.

132 *Issue 22* was whether the respondent breached the JVA.

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133 The Majority noted that before the hearing in September 2019, the applicant had submitted that the respondent had breached the JVA by: (a) refusing the applicant's demand to be named as co-permittee; (b) ignoring the applicant's right to be the authorised operator and/or exclusive driller of the JV; (c) refusing the applicant's demand to receive an additional 6% in the JV; and (d) by violating the Philippine Constitution and various provisions of Philippine law.[119]

134 The Majority also noted that in its Post-Hearing Brief, the applicant dropped its request for a declaration that the respondent breached the JVA and did not address Issue 22. The Majority recorded that the applicant had advised the Tribunal that whilst it continued to seek declaratory relief that the respondent had invalidly terminated the JVA and that the applicant had earned a 42% interest in the JV, it confirmed that it was no longer pursuing its argument that the respondent breached the JVA.[120]

135 As these claims were no longer pressed the Majority rejected them "on the merits for want of being pressed".[121]

136 *Issue 23* was whether the applicant was entitled to the relief it sought in relation to the respondent's alleged breaches of the JVA and the MOA.

137 The relief that the applicant originally sought included claims for declarations that: the MOA was valid and subsisting; the applicant owned 42% of the respondent's shareholdings equivalent to the applicant's 42% converted interest in the JV; the applicant did not commit a breach of the MOA; and the

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119 Final Award at [628] (AR-I at p 261).

120 Final Award at [629] (AR-I at p 262).

121 Final Award at [631] (AR-I at p 262).

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respondent breached the MOA.[122] However, as discussed elsewhere, the applicant abandoned numerous claims during the course of the Arbitration. The Tribunal recorded those claims that the applicant continued to press which included the claim in respect of the rehabilitation of a particular pit ("the Relevant Pit") in the Project.[123]

138 The Majority concluded as follows:[124]

> As explained above, the [Majority] has reached the conclusion that the [respondent] was entitled to rescind the MOA and terminate the JVA in light of the [applicant's] breaches. The [Majority] has also concluded that the [applicant] was not entitled to rehabilitate the [Relevant] Pit on behalf of the JV (see para. 408 above). Accordingly, the [Majority] concludes that the [applicant] is not entitled to any of its requested reliefs.

139 The Majority made costs orders that the applicant bear its own costs and that it pay 100% of the respondent's costs of the Arbitration in the amount of S$727,368.74 and its legal and other costs of S$6,729,653.75.[125]

The Dissent

140 It is the Majority's decision that is the binding Award and the subject of the applicant's challenge. Rule 32.7 of the SIAC Rules (6th Edition, 2016) ("SIAC Rules") recognises that there may be differing opinions between arbitrators in a tribunal.[126]

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122 Final Award at [176] (AR-I at p 139).

123 Final Award at [635] (AR-I at p 264).

124 Final Award at [638] (AR-I at p 266).

125 Final Award at [658] (AR-I at p 271).

126 John Choong, Mark Mangan & Nicholas Lingard, *A Guide to the SIAC Arbitration Rules* (Oxford University Press, 2nd Ed, 2018) at para 8.36.

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141 Notwithstanding that it is the Majority's Award that is being scrutinised in the applicant's challenge, reference was made by both parties to the Dissent in their submissions. In the main, the applicant sought to draw support from the observations in the Dissent and the strength of the manner in which those observations were made.

142 Although the dissentient agreed with the Majority on a number of matters, it was clear that a different and rather robust view was taken of not only the evidence and the credibility of the parties but also the applicability of the Civil Code to the particular circumstances that the dissentient found to have prevailed.

143 The applicant embraced the dissentient's disagreement with the Majority conclusion that: (a) it was inappropriate to hold that the respondent breached the duty to negotiate the terms of the Shareholders' Agreement;[127] and (b) the applicant failed to provide the respondent with the necessary information on the Surface Rights.[128] It also embraced the dissentient's observation that "Neither party discussed the issue as to the appropriate law or legal principle to apply if both parties breached the compromise".[129]

144 The dissentient did not analyse the matters, to which reference is made below, in which the applicant submitted that the Majority would not "award" the respondent with an entitlement of rescission when it was also in breach of the MOA.

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127 Concurring and dissenting opinion dated 18 August 2020 ("Dissent") at [37] (AR-I at p 294).

128 Dissent at [98] (AR-I at p 320).

129 Dissent at [121] (AR-I at p 327).

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145 In any event all of the matters that form part of the applicant's submissions by way of challenge to the Award are dealt with later in this judgment.

The setting aside process

146 The proceedings were heard on 1 and 2 September 2021 remotely from Sydney, Australia with Senior Counsel for the applicant in Pakistan and Senior Counsel for the respondent in Singapore.

147 The applicant relied upon the affidavit evidence of Jesusito G Morallos in affidavits dated 19 November 2020 and 27 January 2021.[130] The respondent relied upon the affidavit evidence of Eduardo U Escueta in affidavits dated 21 December 2020, 9 February 2021 and 4 March 2021.[131] At the hearing on 1 September 2021 the parties' evidence contained in the Agreed Bundle of Cause Papers consisting of 7,787 pages was marked Exhibit AR Volumes I to XI without objection.

148 The applicant relied upon the Applicant's Written Submissions dated 13 August 2021 ("Applicant's Written Submissions") consisting of 147 pages. The respondent relied upon the Respondent's Reply Written Submissions dated 27 August 2021 consisting of 108 pages.

149 At the hearing on 1 September 2021 the applicant's Senior Counsel, Mr Toby Landau QC made oral submissions followed by the respondent's Senior Counsel, Mr Davinder Singh SC's oral submissions. On 2 September 2021 Mr Landau QC and Mr Singh SC made further oral submissions. The parties were

130 AR-I at p 84; AR-XI at p 449.

131 AR-VIII at p 116; AR-XI at pp 482, 569.

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granted leave to file a further written submission in the form of a Note in relation to a matter raised during argument. The final submissions by each party were filed by 30 September 2021.

Applicant's grounds

150 The applicant contends that the Award should be set aside, pursuant to s 24 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") and Arts 34(2)(*a*)(ii) and 34(2)(*a*)(iii) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"), on the following four grounds:

151 *Ground 1*: In deciding that the respondent was entitled to rescind the MOA even though both the applicant and the respondent had failed or refused to abide by the MOA, the Award contains a decision that was: (a) beyond the scope of the parties' submission to the Arbitration; and (b) made without giving the applicant a full opportunity to present its case and respond.

152 *Ground 2*: In deciding that the respondent cannot be regarded as the party that breached the MOA in light of the applicant's breaches, the Award contains a decision that was: (a) beyond the scope of the parties' submission to the Arbitration; and (b) that was made without giving the applicant a full opportunity to present its case and respond.

153 *Ground 3*: The consistently uneven application of procedural rules between the parties, particularly the Tribunal's failure to allow the applicant to adduce the Surface Rights Email in evidence, constituted breaches of the rules of natural justice.

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154 *Ground 4*: By ordering the applicant to specifically perform an obligation not found in the contractual documents (*viz*, to transfer the Surface Rights to the respondent at cost) the Award contains a decision on matters beyond the scope of the parties' submission to the Arbitration.

Applicable legal principles

155 Section 24 of the IAA and Art 34(2) of the Model Law, which has the force of law in Singapore by virtue of s 3 of the IAA, prescribe the grounds upon which an arbitral award may be set aside. Article 34(2)(*a*)(iii) provides that an award may be set aside if it "deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration".

156 Article 34(2)(*a*)(ii) provides that an award may be set aside if the applicant was "unable to present his case". Section 24(*b*) of the IAA provides that an award may be set aside if "a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced." The four requirements, or pre-requisites, to be satisfied in such an application are: (a) the identification of the rule of natural justice that was alleged to have been breached; (b) the manner in which it was breached; (c) how the breach was connected to the making of the award; and (d) how the breach prejudiced the applicant's rights: *John Holland Pty Ltd (formerly known as John Holland Construction & Engineering Pty Ltd) v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443 at [18]; *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [29]; *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 at [86].

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157 In assessing alleged breaches of natural justice and their consequences the "real inquiry" is whether "the arbitrator was denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference" to the arbitrator's deliberations. The issue is "whether the material *could reasonably* have made a difference to the arbitrator; rather than whether it *would necessarily* have done so" [emphasis in original in italics]. Where there is no prospect that the material would have made any difference, it could not be said that the complainant has suffered actual or real prejudice by not having an opportunity to present the material to the arbitrator: *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 at [54]; *Lao Holdings NV v Government of the Lao People's Democratic Republic and another matter* [2021] 5 SLR 228 at [323].

158 An arbitral tribunal's jurisdiction is demarcated by what the parties agree to submit to the tribunal for determination: *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 at [32]. In determining what was within the scope of the parties' submission to arbitration, the court will have regard to five sources, being the pleadings, the agreed list of issues, opening statements, the evidence that was adduced in the arbitration and closing submissions: *CDM and another v CDP* [2021] 2 SLR 235 ("*CDM*") at [18].

159 A "practical view" must be taken in identifying the substance of the dispute that was referred to arbitration: *Prometheus Marine Pte Ltd v King, Ann Rita and another appeal* [2018] 1 SLR 1 at [58]. An assessment of whether an arbitral award should be set aside for deciding any issue not referred to the arbitral tribunal for determination by the parties is a two-stage inquiry. The first stage is to identify matters that were within the scope of submission to the tribunal. The second stage is determining whether the award involved matters

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outside that scope or involving a "new difference" outside that scope: *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [40] and [44]. Guidance pertinent to the issues in this case is found in the following passages of the Court of Appeal's judgment in *Soh Beng Tee* at [65]:

> (d) The delicate balance between ensuring the integrity of the arbitral process and ensuring that the rules of natural justice are complied with in the arbitral process is preserved by strictly adhering to only the narrow scope and basis for challenging an arbitral award that has been expressly acknowledged under the Act and the IAA. In so far as the right to be heard is concerned, the failure of an arbitrator to refer every point for decision to the parties for submissions is not invariably a valid ground for challenge. Only in instances such as where the impugned decision reveals a dramatic departure from the submissions, or involves an arbitrator receiving extraneous evidence, or adopts a view wholly at odds with the established evidence adduced by the parties, or arrives at a conclusion unequivocally rejected by the parties as being trivial or irrelevant, might it be appropriate for a court to intervene. … the overriding burden on the applicant is to show that a reasonable litigant in his shoes could not have foreseen the possibility of reasoning of the type revealed in the award. …
>
> (e) It is almost invariably the case that parties propose diametrically opposite solutions to resolve a dispute. They may expect the arbitrator to select one of these alternative positions. The arbitrator, however, is not bound to adopt an either/or approach. He is perfectly entitled to embrace a middle path (even without apprising the parties of his provisional thinking or analysis) so long as it is based on evidence that is before him.

160 The principle of minimal curial intervention should be balanced against the parties' right to define the jurisdiction of the arbitral tribunal: *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd and another matter* [2018] 4 SLR 271 at [56].

161 An issue that is raised in a party's pleadings "remains in play throughout the arbitration" unless it is "expressly withdrawn" and "no matter how weakly the party may actually advance it": *CDM* at [20(b)], citing *JVL Agro Industries*

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Ltd v Agritrade International Pte Ltd [2016] 4 SLR 768 at [150]. However, the question of whether the issue remains in play will be assessed by the court having regard to the five sources referred to above and all the circumstances of what occurred between the parties during the arbitration including whether the issue was ever advanced or dealt with, even weakly, by either party. In instances where a party raises an issue in its pleadings and/or opening submissions but subsequently "lets it lie" and neither party addresses it further, it will be necessary for the court to assess whether in all the circumstances of the particular case it has been withdrawn or abandoned: *Sugar Australia Pty Limited v Mackay Sugar Ltd* [2012] QSC 38; *OAO Northern Shipping Co v Remolcadores de Marin SL* (*The Remmar*) [2007] EWHC 1821 (Comm); *William Hare UAE LLC v Aircraft Support Industries Pty Ltd* [2014] NSWSC 1403.

162 As there is no right of appeal from an international arbitral award the court must resist engaging with what is substantially an appeal on the legal merits of an arbitral award, but presented as a challenge to process failures during an arbitration: *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 at [38]–[39].

163 An arbitral tribunal has a wide discretion in making case management decisions and a court will not revisit such decisions in a setting aside application unless such decisions breach the rules of natural justice, including depriving a party of a reasonable opportunity to be heard: *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 ("*Triulzi Cesare*") at [131]–[132].

164 Article 18 of the Model Law provides that the parties shall be treated "with equality" and given a full opportunity of presenting their cases. The term "with equality" is to be "interpreted reasonably in regulating the procedural

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aspects of the arbitration". It does not require that the parties are to be treated identically. A tribunal (and a court on an application to set aside an arbitral award) is not concerned with whether or not equal time or equal numbers of pleadings or submissions are made by each party: *Triulzi Cesare* at [112].

Assessment of scope

165 It is appropriate to review the five sources to which reference has been made in these principles to determine the scope of the issues submitted to the Tribunal for decision relevant to the aspects of the Award that the applicant claims are beyond the scope of what was submitted to the Tribunal. Those aspects are: (a) a finding that the respondent was entitled to rescind the MOA even though both the applicant and the respondent had failed or refused to abide by the terms of the MOA (Ground 1); (b) a finding that the respondent could not be regarded as the party that breached the MOA in light of the applicant's breaches (Ground 2); and (c) an order to transfer the Surface Rights to the respondent (Ground 4).

166 The claims in respect of Ground 3 do not relate to the scope of matters that were submitted to the Tribunal for determination. Rather they relate to alleged procedural unfairness to the applicant by what was described as a breach of natural justice in rejecting its tender of the Surface Rights Email and in treating the parties unevenly.

167 The purpose of assessing the sources identified in the above-mentioned principles is to ascertain the limits and scope of the issues and matters that were put before the Tribunal for determination and whether the findings and decisions referred to in Grounds 1, 2 and 4 were outside that scope.

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Pleadings

168 In respect of the matter identified in Ground 1: Each of the Parties claimed in their Pleadings that the other was in breach of the MOA for which each sought consequential relief.

169 The applicant relied upon Art 1191 of the Civil Code which provides relevantly as follows:[132]

> The power to rescind obligations is implied in reciprocal ones, in case one of the obligors should not comply with what is incumbent upon him.
>
> The injured party may choose between the fulfillment and the rescission of the obligation, with the payment of damages in either case. He may also seek rescission, even after he has chosen fulfillment, if the latter should become impossible.
>
> The court shall decree the rescission claimed, unless there be just cause authorizing the fixing of a period.
>
> …

170 The respondent relied upon Art 2041 of the Civil Code which provides relevantly as follows:[133]

> If one of the parties fails or refuses to abide by the compromise, the other party may either enforce the compromise or regard it as rescinded and insist upon his original demand.

171 In its Memorial dated 19 June 2018 the respondent relied upon Art 2041 of the Civil Code to contend that a breach of the MOA by either party would give the other party the right to regard it as rescinded.[134]

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132 AR-VII at p 472.

133 AR-VII at p 604.

134 Respondent's Memorial dated 19 June 2018 ("Respondent's Memorial") at para 462 (AR-II at p 222).

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172 In its Counter-Memorial dated 23 October 2018, the applicant claimed that it had not breached the MOA and that the respondent was in breach not only of the MOA but also Philippine law. However, this latter claim was to be later abandoned. The applicant claimed that the respondent's "actions and circumstances caused issues between the Parties" and therefore it was "only proper that its actions should not be rewarded by the rescission" of the MOA. It also claimed as follows:[135]

> Contrary to its allegations, it is actually [the respondent] and not [the applicant] which is in breach of its obligation under the 2016 MOA. The actions and circumstances of [the respondent] shows that it intends to frustrate the rights of [the applicant] in relation to the [relevant] Project and therefore, should not be rewarded by the rescission of the 2016 MOA.

173 In its Rejoinder Memorial dated 5 July 2019 the applicant disagreed with the respondent's contention that the MOA was a compromise agreement and therefore it could not be rescinded under Art 2041 of the Civil Code. It contended as follows:[136]

> Rather, its rescission would require the congruence of the elements of rescission under Article 1191 of the Civil Code, and a judicial decree for its validity. To be sure, [the respondent] had absolutely no basis to rescind the 2016 MOA since it had not fulfilled its own obligations under the contract as well. In fact, its continued refusal to furnish [the applicant] its [STB] frustrated the fulfillment of obligations under the contract and makes [the respondent] liable for a breach of contract.

174 In respect of the matters identified in Ground 2: Each party made claims in respect of the construction of Section 4 of the MOA.

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135 Applicant's Counter-Memorial dated 23 October 2018 ("Applicant's Counter-Memorial") at para 865 (AR-II at p 492).

136 Applicant's Rejoinder Memorial dated 5 July 2019 ("Applicant's Rejoinder Memorial") at para 597 (AR-III at p 413).

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175 The respondent claimed in its Memorial that the MOA was a compromise agreement and that it was entitled to rescind it by reason of the applicant's breach. It claimed that by reason of Section 4 of the MOA, a breach by one of the parties of its obligations under the MOA would relieve the other party of the requirement to perform its obligations. It claimed that the applicant's entitlement to its shareholding was dependent upon its compliance with its obligations under the MOA.[137]

176 In the Applicant's Rejoinder Memorial, it disagreed with the respondent's construction and submitted that Section 4 "means that the completion of the stages shall be conditional on the completion of the obligations of both Parties".[138]

177 In respect of the matters identified in Ground 4: In its Notice of Arbitration dated 17 May 2017 the respondent sought an order that the applicant transfer the Surface Rights to it at cost. The respondent sought this order by way of specific performance of the applicant's obligations under the JVA or alternatively pursuant to its duties as a fiduciary or its duties as trustee.[139]

178 In its Memorial, the respondent claimed that having regard to the applicant's material breaches of the JVA by acquiring the Surface Rights in competition with the JV, the applicant should transfer the Surface Rights to it "at cost".[140]

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137 Respondent's Memorial at paras 461–462 (AR-II at p 222).

138 Applicant's Rejoinder Memorial at para 554 (AR-III at p 405).

139 Notice of Arbitration dated 17 May 2017 ("NOA") at para 46(b)(ii) (AR-II at p 43).

140 Respondent's Memorial at para 518(a)(ii) (AR-II at p 240).

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179 In its Reply Memorial dated 29 March 2019 the respondent reiterated its entitlement to the order for specific performance as sought in its Memorial.[141]

Lists of Issues

180 The parties were unable to agree on a joint List of Issues and consequently each filed a separate list of issues with the Tribunal on 16 August 2019.

Applicant's List of Issues

181 The applicant's List of Issues ("the Applicant's List of Issues") contained three headings. The first posed the question "What is the nature/purpose of the [MOA] or its relationship with the JVA?". The second heading was: "If the [MOA] is rescinded, whether or not the JVA may also be terminated". The third heading was: "Whether the Parties are entitled to the reliefs sought".[142]

182 The applicant posed alternative questions in relation to the nature of the MOA: (a) whether it was for the purpose of conversion of the applicant's interest in the JV into equity in the respondent; or (b) whether it was a compromise agreement.[143]

183 The applicant contended that if the purpose of the MOA was for conversion of its interest in the JV into equity in the respondent, there was also an issue as to whether the MOA superseded or continued the JVA. The applicant proposed that the Tribunal should determine whether the conditions in the MOA

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141 Respondent's Reply Memorial at para 707 (AR-III at p 124).

142 AR-V at pp 549–553.

143 AR-V at pp 550–551.

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were "conditions subsequent" or "conditions precedent" with further sub-issues dependent upon those findings. These issues were identified in paras I(A)(1) and I(A)(2) of the Applicant's List of Issues.[144]

184 Under the same heading, the question was posed in para I(A)(3) as to "Whether there was a breach of the [MOA] and by which party". The first issue was whether the respondent had breached the MOA in respect of: (a) the due diligence process; (b) the negotiation of the Shareholders' Agreement; (c) the applicant's claimed 42% shareholding in the respondent; and (d) the purported rescission instead of the alternative incorporation of a new company.[145]

185 The second issue which was identified in paragraph I(A)(3)(b) was "Whether [the applicant] may be deemed to have breached the [MOA] under the circumstances" in respect of: (a) the applicant's obligation to pay US$200,000 to the JV Fund; (b) the transfer of the originals of the mining permits to the respondent; (c) the provision of information relating to the Surface Rights; and (d) the negotiation of the Shareholders' Agreement.

186 The next two paragraphs in the Applicant's List of Issues stated the following:[146]

> 4. Considering the finding in I(A)(3)(b), and in the context of the characterization of the [MOA] in I(A)(1) and I(A)(2), above:
>
> a. whether or not there was breach material enough to rescind the [MOA] despite [the applicant's] already huge investments in the Project;
>
> b. otherwise, if [the respondent] breached the [MOA], whether it should be rewarded by the [MOA's]

144 AR-V at p 550.

145 AR-V at pp 550–551.

146 AR-V at p 551.

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> rescission or be compelled to comply with the terms of the [MOA].
>
> 5. If there was a breach of the [MOA], what is the proper remedy –
>
> a. If the [MOA] superseded the JVA, whether the remedy for the breach is rescission of the [MOA] or enforcement of the terms of the [MOA] or incorporation of a New Company;
>
> b. If the [MOA] is a continuation of the JVA, whether the remedy is for the Parties to revert to their legal relationship under the JVA as it was.
>
> [emphasis in original in underline]

187 The alternative issue under the first heading in the Applicant's List of Issues was whether the MOA was a compromise agreement and included the following:[147]

> 1. If the purpose of the [MOA] is to serve as a Compromise, whether there was a breach of the [MOA] –
>
> a. Whether [the respondent] breached the [MOA] [*Refer to breaches in I(A)(3)(a)*]
>
> b. Whether [the applicant] breached the [MOA] [*Refer to breaches in I(A)(3)(b)*]
>
> 2. If [the applicant] may be deemed to have breached the [MOA], whether such breach is material enough to rescind the [MOA] and forfeit [the applicant's] investments
>
> 3. On the other hand, if [the respondent] may be deemed to have breached the [MOA], whether it should be rewarded by

147 AR-V at p 551.

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> the [MOA's] rescission or be compelled to comply with the terms of the [MOA]
>
> [emphasis in original in italics]

188 The final issue under the first heading related to whether, if the applicant had breached the MOA, such breach would be sufficient to, amongst other things, enable the respondent to remove the applicant's 42% shareholding in the respondent.

189 Under the second heading "If the [MOA] is rescinded, whether or not the JVA may also be terminated" the issue was: "If [the respondent] breached the JVA, whether it should be rewarded by the JVA's termination".[148]

Respondent's List of Issues

190 The respondent's list of issues ("Respondent's List of Issues") had two main headings. The first was "Issues Arising from [the respondent's] Claims" [emphasis in original omitted]. The second was "Issues arising from [the applicant's] Counterclaims" [emphasis in original omitted].[149] Under the first heading there were three issues; the first was whether the applicant had breached the JVA; the second was whether the applicant had breached the MOA. Each of those issues dealt specifically with the applicant's alleged breaches at the conclusion of which the question was posed as to whether the respondent was entitled to terminate the JVA and regard the MOA as rescinded "on account of" the applicant's alleged breaches of each agreement. Under the third heading, "Reliefs", the question was posed as to whether the respondent was entitled to the relief it sought in relation to the applicant's alleged breaches.[150]

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148 AR-V at pp 552–553.

149 AR-V at pp 544–547.

150 AR-V at pp 545–546.

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191 The second section of the Respondent's List of Issues focused on the applicant's allegations against the respondent relating to breaches of obligations under Philippine law; whether the respondent was entitled to terminate the JVA on account of the applicant's breaches and, if not, whether the applicant was entitled to the relief it sought; and whether the respondent was entitled to regard the MOA as rescinded on account of the applicant's breaches and, if not, whether the applicant was entitled to the relief it sought.[151]

Tribunal's List of Issues

192 The Tribunal's List of Issues noted that the parties had failed to agree on a "Joint List of Issues for Determination" and that they had each filed their own list on 16 August 2019. The Tribunal also recorded that: "Based on the Parties' respective lists of issues and the Parties' submissions" it considered that the "main issues" that arose for determination were those within the Tribunal's List of Issues it provided to the parties on 30 September 2019.[152]

193 The Tribunal's List of Issues was divided into five headings: "A. In respect of the [MOA]"; "B. In respect of the JVA"; "C. [The respondent's] requests for relief"; "D. [The applicant's] counterclaims"; and "E. [The applicant's] requests for relief".[153]

194 The issues that were identified in the Tribunal's List of Issues have been referred to in detail earlier in the Judgment recounting the Majority's determination of each of these Issues in the Award. The Tribunal's List of Issues relevantly included Issue 18: "Whether [the respondent] is entitled to the relief

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151 AR-V at p 546.

152 AR-VII at p 642.

153 AR-VII at pp 642–644.

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it seeks in relation to [the applicant's] alleged breaches of the JVA and the MOA"; Issue 21: "Whether [the respondent] breached the [MOA]"; and Issue 22: "Whether [the respondent] breached the JVA".

195 Under Issue 21 the Tribunal recorded that the questions that arose for determination included: (a) whether the respondent cooperated with the applicant and provided the applicant all the necessary documents and information it had requested to conduct a due diligence investigation; (b) whether the respondent failed to provide the applicant with the signed copies of the loan agreements and if so whether that was a breach of the MOA; (c) whether the respondent breached the MOA by refusing to provide the STB requested by the applicant; and (d) whether the applicant ever became a stockholder of the respondent and if so when?[154]

Opening submissions

196 In respect of Ground 1: The applicant's Written Opening Submissions in the Arbitration dated 30 August 2019 ("the Applicant's Written Opening Submissions") included Section E entitled "Assuming the [MOA] was breached" with two sub-sections: "i. By [the applicant], such breach is not substantial breach to permit rescission of the [MOA]"; and "ii. By [the respondent], it should not be rewarded for such breach".[155] Section F was in the following terms:[156]

F.

Remedies for the breach of the [MOA]

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154 AR-VII at p 644.

155 AR-V at pp 627–628.

156 AR-V at pp 628–629.

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i If the [MOA] superseded the JVA

106. As [the applicant's] position in this arbitration is that the [MOA] replaced or superseded the JVA, if there is any substantial breach of the [MOA], the same must be dealt with separately from the JVA. Thus, the remedies available to a party for a breach of the [MOA] are as follows:

1. Rescission

107. The non-breaching party can choose to rescind the [MOA]. Article 1191 of the Philippine Civil Code provides that the power to rescind obligations is implied in reciprocal obligations 'in case one of the obligors should not comply with what is incumbent upon him.' The Philippine Supreme Court has ruled that the effect of rescission is the mutual restitution of the parties, such that the parties are 'brought back to their original position prior to the inception of the contract'.

2. Enforcement

108. The non-breaching party can also choose to enforce the terms of the [MOA]. Article 1191 of the Philippine Civil Code provides that the non-breaching party 'may choose between the fulfilment and the rescission of the obligation.' Thus, the non-breaching party can ask the Tribunal to order the party in breach by way of specific performance, to do its obligations under the [MOA].

3. Creation of a New Company

109. A third option, in relation to the enforcement of the terms of the [MOA], is the creation of a new company, pursuant to Section 3 of the [MOA]. By the creation of a new company and the execution of a new contract governing the new relationship of the parties by virtue of the new company, the parties can address the issues that have arisen in the [MOA] and resolve them. The new company can continue the ownership and operations of the parties over the [relevant] Project, without the risks prevailing in the [MOA].

ii If the [MOA] is a continuation of the JVA

110. Should the Tribunal find that the [MOA] is a continuation of the JVA, such that the [MOA] is an agreement that implements the JVA, or arose out of the latter, the remedies of the parties shall be the same as discussed above. The

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> rescission contemplated here, however, shall cause the parties to revert to being governed solely by the JVA.
>
> 111. However, should there be a finding that both [the applicant] and [the respondent] breached its obligations under the [MOA] and the JVA, neither party should be allowed to benefit from the other. Article 1192 of the Philippine Civil Code provides the consequences if both parties breached their obligations. It provides that the liability of the first party who breached its obligations shall be equally tempered, and if it cannot be determined which party first violated the contract, the contract shall be extinguished, and each shall bear his own damages.
>
> 112. [The applicant] submits that if the Tribunal finds that both [the applicant] and [the respondent] were in substantial breach of the [MOA], the Tribunal must order that the Parties should return what they have received from the other, and nothing more.
>
> [emphasis in original in bold and bold italics]

197 In respect of Ground 4: the respondent's Opening Statement dated 30 August 2019 ("Respondent's Opening Statement") included a claim for relief to "protect and preserve its rights" in relation to the Project and to compensate it for the damage allegedly caused by the applicant which included an order for specific performance for the transfer of the Surface Rights.[157]

198 In respect of Ground 2: the parties did not pursue the construction of Section 4 of the MOA beyond the claims they had made in their respective memorials.

The evidence

199 The applicant and the respondent called evidence to establish that the other party was in breach and it was not in breach of the MOA and the JVA.

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157 Respondent's Opening Statement dated 30 August 2019 at para 184 (AR-V at pp 603–604).

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200 The applicant's evidence was also relied upon to demonstrate the financial and other commitments that it had made to the JV in support of its submission that even if the Tribunal found that it was in breach of the MOA and JVA, such breaches should not be regarded as substantial and the applicant should not lose its vast investment in the JV.[158] It relied upon the respondent's conduct to submit that it was the respondent that was in breach of the MOA and the JVA and in those circumstances the respondent should not be "rewarded" by permitting it to rescind the MOA and terminate the JVA.

201 One aspect of the evidence that is relevant to Ground 3, and to which reference is made later, was that during cross examination of one of the applicant's witnesses on 19 September 2019 on the issue of whether the applicant had provided sufficient information on the Surface Rights to the respondent, the witness mentioned that he had communicated with a director of the respondent on the issue and specifically recalled the existence of a map showing the location of the Surface Rights.[159]

Post-hearing briefs

202 The applicant's Post Hearing Brief dated 1 November 2019 ("Applicant's Post-Hearing Brief") included a section dealing with the contention that the applicant did not commit a substantial and fundamental breach of the MOA. In dealing with the contention that the applicant did not breach the MOA by failing to negotiate in good faith the terms of the Shareholders' Agreement, the applicant made the following submission:[160]

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158 Applicant's Written Opening Submissions dated 30 August 2019 at para 64 (AR-V at p 621).

159 Jesusito's 1st Affidavit at para 50 (AR-I at p 26).

160 Applicant's Post-Hearing Brief dated 1 November 2019 ("Applicant's Post-Hearing Brief") at para 14 (AR-VI at pp 625–626).

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> 45 days from the signing of the MOA (on June 10, 2016) was July 25, 2016. It is not in dispute that neither party pursued the negotiations of the shareholders agreement during that period. That is, if [the applicant] was in breach of this provision of the MOA, [the respondent] equally was and should not therefore be allowed to rescind the MOA on that basis.

203 In respect of Ground 4: The respondent's Closing Submissions dated 1 November 2019 included a claim for an order for specific performance that the applicant transfer the Surface Rights to it "at cost".[161]

Ground 1

204 The applicant claims that in so far as the Award contained a finding that the respondent was entitled to rescind the MOA even though both the applicant and the respondent had failed or refused to abide by the terms of the MOA, the Award contained a decision: (a) that was beyond the scope of the parties' submissions to Arbitration; and (b) that was made without giving the applicant a full opportunity to present its case and respond.

205 The applicant relied in particular on [203], [206] and [626] of the Award in support of its claims. In [203] and [626] of the Award the Tribunal found respectively that "both Parties did not negotiate the shareholders' agreement in the timeframe that was dictated by Section 2 of the MOA"; and "both Parties did not comply with the deadline for negotiating the shareholders' agreement pursuant to Section 2 of the MOA".

206 In [203], the Majority concluded that "Accordingly, the Tribunal considers that it is inappropriate to declare that any specific party to the MOA breached the duty to negotiate the shareholders' agreement".

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161 Respondent's Closing Submissions dated 1 November 2019 at p 65 (Annex A) (AR-VI at p 612).

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207 In [206], the Majority found that the applicant "did not breach the MOA by failing to negotiate in good faith the terms of a shareholders' agreement".

208 In [626], the Majority concluded that: "Therefore, the [Majority] finds it inappropriate to hold that" the respondent "breached the duty to negotiate the shareholders' agreement".

209 The Majority's findings in this regard are that neither the applicant nor the respondent was in breach of the MOA. However, the applicant submitted that the findings that "both Parties did not negotiate the shareholders' agreement in the timeframe" or did not "comply with the deadline" in the MOA is a finding that both parties failed or refused to abide by the terms of the MOA. This is the language of Art 2041 of the Civil Code.[162]

210 It is in this respect that the applicant contends that the Majority made a decision beyond the scope of that which was submitted to it by the parties for determination in the Arbitration.

Applicant's submissions

211 The applicant contended that the only issues that had been submitted to the Tribunal for determination in relation to any breach of the MOA was a "disjunctive" or "either/or" case as to whether it was the applicant or the respondent who had failed or refused to abide by or was in breach of the MOA.[163] It contended that the issue of whether the MOA could be rescinded in

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162 Applicant's Written Submissions dated 13 August 2021 ("AWS") at para 86.

163 AWS at para 85(d).

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circumstances where both parties had failed or refused to abide by or were in breach of the MOA was never submitted to the Tribunal for determination.[164]

212 The applicant submitted that the respondent's reliance on Art 2041 of the Civil Code meant that it was arguing that a valid rescission had occurred because the applicant, and "only" the applicant, had been in breach of the MOA.[165] The applicant also submitted that at no point did the respondent acknowledge the possibility that it had breached any of its own obligations under the MOA "much less make arguments concerning the legal implications of its breach(es) vis-à-vis" the applicant.[166]

213 The applicant emphasised its reliance on Art 1191 before the Tribunal in which there is reference to the singular, "*the* injured party" [emphasis added], and its argument to the Tribunal that the respondent was not entitled to rescind the MOA because, amongst other things, "if any Party breached the [MOA]", it was the respondent and "only" the respondent.[167] The applicant also submitted that Arts 1191 and 2041 were both premised on the scenario where only one contracting party had not complied with obligations under a contract affording the innocent counterparty the right to elect between rescission and enforcement of the contract. The Applicant's Written Submissions in this court also includes the following:[168]

> (c) … The situation where both parties have failed to fulfil their obligations under a contract is addressed under a separate provision, namely, Article 1192 of the Civil Code, which provides that: (i) '*the liability of the first infractor shall be*

164 AWS at para 84.

165 AWS at para 85(a).

166 AWS at para 85(a).

167 AWS at para 85(b).

168 AWS at para 85(c).

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> *equitably tempered by the courts*'; and (ii) '[i]*f it cannot be determined which of the parties first violated the contract, the same shall be deemed extinguished, and each shall bear his own damages*'. Neither Party placed any emphasis on Article 1192.
>
> …
>
> (e) … At no point did [the parties] contemplate the conjunctive approach where [the respondent] would be entitled to rescind the [MOA] notwithstanding that both [the respondent] and [the applicant] had failed or refused to abide by the [MOA].
>
> (f) While the lists of issues prepared by the Parties and the Tribunal included the issue of whether [the respondent] was entitled to regard the [MOA] as rescinded, this was solely on the stated basis of '[***The applicant's***] ***breaches*** of the [MOA]'. The Tribunal was not free to decide this issue on any ground that it could find regardless of the issues expressly submitted to it by the Parties. Nor could the Tribunal have properly decided the matter, not having sought and received detailed submissions from the Parties on Article 1192 of the Civil Code and its implications under Philippine law.
>
> …
>
> (h) However, the Majority drastically departed from the disjunctive, 'either/or' approach when it found that [the respondent] was entitled to rescind the [MOA], notwithstanding that both [the respondent] and [the applicant] had failed or refused to abide by the [MOA].
>
> [emphasis in original in italics, underline and bold italics]

214 The applicant contended that "neither Party came anywhere close to taking the position that [the respondent] would be entitled to rescind the [MOA] notwithstanding that both Parties had failed or refused to abide by the [MOA]" [emphasis in original].[169] It submitted that the Majority's findings "in this respect" was a "new difference" constituting a "dramatic departure" from what was presented to the Tribunal and made by it without giving notice to the parties.[170]

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169 AWS at para 84.

170 AWS at para 84.

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215 In its oral submissions the applicant contended that deciding that the respondent was entitled to rescind the MOA, even though both the applicant and the respondent had failed or refused to abide by it, was not something that was within the scope of the Tribunal's jurisdiction. It was submitted that this was not the way the case was put by either party.[171]

216 The applicant contended that if the Tribunal had given notice to the parties that it intended to make a finding that the respondent was entitled to rescind the MOA where there had been a failure by both parties to abide by the MOA, the proceedings would have panned out quite differently and the Tribunal could reasonably have arrived at a different result.[172]

217 The applicant submitted that had it been given such notice it would have presented detailed submissions and expert opinion on the relevant statutory provisions and legal authorities on this issue under Philippine law, the effect of which it claimed would have almost certainly changed the outcome of the Arbitration.[173] It submitted that in the circumstances, the relevant Article was 1192, which modified the general rule in Art 1170 that those guilty of, among other things, contravening the tenor of their obligations are liable for damages. The applicant argued that the issue of whether the applicant or the respondent was the first infractor would have been of central importance and upon which the applicant would have presented detailed submissions and expert opinion.[174]

218 During oral submissions the applicant submitted that what was being put to the Tribunal was a claim for rescission premised exclusively on Art 2041

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171 Transcript, 1 September 2021, p 36:14–19.

172 AWS at paras 147–148.

173 AWS at para 148.

174 AWS at para 149.

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with one innocent party and one defaulting party. It was submitted that if the Tribunal was to reach the conclusion that both parties were in breach, the proper course for it was to "then open that up again to the parties".[175] It was submitted that otherwise the applicant was simply taken by surprise on something which was not argued.[176]

219 The applicant submitted that if the Majority had proceeded under the appropriate article in the Civil Code, Art 1192, and found that the respondent was the first infractor, it would not have been entitled to rescind the MOA and its liability to pay damages to the applicant would have been equitably tempered.[177]

220 The applicant further submitted that if the Majority had found that it was the first infractor it would only mean that the respondent would be entitled to damages, albeit equitably tempered and the respondent would still not have been entitled to rescind the MOA.[178] It also submitted that even if the Majority could not determine which of the parties was the first infractor, the MOA would be deemed extinguished with neither party liable to the other in damages with the respondent still not entitled to rescind the MOA.[179]

221 The applicant submitted that neither party "placed any reliance" on the regime under Art 1192 before the Tribunal "because no party in this case at any point was contemplating breaches on both sides at the same time of a failure to

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175 Transcript, 1 September 2021, p 40:30–31.

176 Transcript, 1 September 2021, p 41:2–3.

177 AWS at para 150.

178 AWS at para 151.

179 AWS at para 152.

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abide by both parties in the context of each of the three stages of the MOA".[180] Senior Counsel for the applicant submitted that there was "no emphasis in any of the submissions" on any articles of the Civil Code other than Arts 2041 and 1191 and that there had been "no case that's actually been framed on the basis of failure by both sides".[181] Senior Counsel indicated that he would have to "double-check" whether Art 1192 was "actually cited" anywhere before the Tribunal.[182] The applicant made the following further oral submissions:[183]

> The complaint is that had we known that the Tribunal would take this approach and depart from the 'either or' approach in terms of abiding by the MOA, then we would have cited, relied upon a whole different area of law and we set that out in our written submissions, which we say could reasonably have arrived at a different result because that will then take us into the category of there being no innocent party and if there's no innocent party, then the question of rescission turns upon Article 1192. And the question then would be: Who was the first infractor and in any event, it would not be a question of rescission, it would be a question of damages either equitably [tempered] or everything falling away.

Respondent's submissions

222 The respondent highlighted the arguments that the applicant had raised before the Tribunal in the Applicant's Counter-Memorial. It emphasised in particular Section II.B.4 in which the applicant claimed that the respondent's "actions and circumstances caused issues between the parties. Thus, it is only proper that its actions should not be rewarded by the rescission of the" [emphasis in original omitted] MOA.[184] The respondent referred to the

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180 Transcript, 1 September 2021, p 39:7–11.

181 Transcript, 1 September 2021, p 45:23–26.

182 Transcript, 1 September 2021, p 45:29–30.

183 Transcript, 1 September 2021, pp 65:22–66:2.

184 Respondent's Written Submissions dated 27 August 2021 ("RWS") at para 75.

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applicant's primary argument that it had not breached the MOA and its secondary argument that it had substantially complied with the MOA.[185] It then referred to the applicant's "alternative" argument that the respondent was not entitled to rescind because it had breached the MOA.[186] It submitted as follows:[187]

> It was an alternative because, if [the applicant] had succeeded on either of the above arguments, the question whether [the respondent] was barred from seeking rescission on account of its own breach would not have arisen. In other words, the premise of [the applicant's] third argument was that even though [the applicant] had breached the MOA, [the respondent] was not entitled to rescind because it too had breached the MOA. That is the same thing as saying there can be no rescission where both parties have breached it.

223 The respondent submitted that it was "curious" and did not make sense for the applicant to describe its case as disjunctive because in considering whether the respondent was entitled to rescind, or to use the applicant's language, whether the respondent should be "rewarded" with an entitlement to rescind, the Tribunal would be required to consider whether the applicant was in breach of the MOA and, if so, whether the respondent was entitled to rescind the MOA, if it was also in breach of the MOA.[188]

224 The respondent pointed out in oral submissions that Art 1192 was referred to before the Tribunal in para 111 of the Applicant's Written Opening Submissions.[189] It was submitted that in those circumstances it is difficult to reconcile the approach that the applicant had adopted in this court. The

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185 RWS at para 77.

186 RWS at para 77; Transcript, 1 September 2021, pp 91:23–92:19.

187 Transcript, 1 September 2021, pp 92:11–19.

188 Transcript, 1 September 2021, p 92:20–31.

189 Transcript, 1 September 2021, p 89:8–17.

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respondent submitted that the inclusion of para 111 in the Applicant's Written Opening Submissions before the Tribunal evidences the applicant's clear belief that the Memorials gave it a proper basis to make that argument on a matter that it regarded as an issue in the Arbitration.[190]

225 The respondent also submitted that having raised this in its Written Opening Submissions the applicant "dropped the point altogether" for reasons best known to the applicant and effectively gave up on the two consequences of Art 1192: the first being that if it cannot be determined which party first violated the contract, the contract was to be extinguished; and the second being that each party would have to pay its own damages. The respondent submitted that the applicant did not wish to take the risk of the Tribunal finding that it could not be decided who first breached the contract with the consequence that the applicant would have to bear its own damages.[191]

226 The respondent submitted that where a party takes a point and does not see it through, for example, by dropping it, it cannot use the process to set aside the Award as an opportunity to run the point afresh: *BLC and others v BLB and another* [2014] 4 SLR 79 at [84]. It was submitted that the applicant is impermissibly seeking to put forward the case it had originally included in its case before the Tribunal and which it decided not to pursue.[192]

227 The respondent submitted that in any event this is not a relevant consideration because the Majority did not find that both parties were in breach of the MOA.[193]

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190 Transcript, 1 September 2021, pp 89:28–90:1.

191 Transcript, 1 September 2021, p 90:1–20.

192 Transcript, 1 September 2021, pp 83:28–84:11.

193 Transcript, 1 September 2021, p 84:20–24.

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228 The respondent was critical of the applicant raising the content of [626] of the Award as part of its claims in respect of Ground 1.[194] It was submitted that this paragraph was not identified at any stage until the hearing of this matter in this court and it is impermissible for the applicant to pursue this claim. Although the basis of the respondent's complaint is understood as a breach of O 69A r 2(4A) of the Rules of Court (2014 Rev Ed) it is unnecessary to discuss this matter further having regard to the conclusions reached in respect of this Ground.

Conclusion

229 This is not a determination of whether the Majority was correct in reaching its conclusions. It is a determination of whether the issue of whether the respondent would be entitled to rescind the MOA if both parties had failed to comply with or were in breach of the MOA was submitted to the Tribunal for determination in the Arbitration.

230 The nub of the applicant's submissions is that it was simply not contemplated by the applicant, or indeed by the parties, that the Tribunal might find a breach by both parties and proceed to find that the respondent was entitled to rescind the MOA.

231 The parties limited themselves to the particular articles of the Civil Code, Arts 1191 and 2041, to frame and pursue their cases before the Tribunal. Although the applicant clearly relied upon Art 1192 in its Written Opening Submissions, it abandoned such reliance by making no further mention of it during the course of the Arbitration.

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194 Transcript, 2 September 2021, pp 32:26–33:2.

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232 The fact that the articles in the Civil Code upon which each of the parties relied referred to one party breaching and the counterparty being in a position to act upon the breach does not mean that the Tribunal was shut out from considering all the circumstances surrounding each party's conduct and consequences of that conduct.

233 Paragraph I(A)(4)(b) of the Applicant's List of Issues is significant. It proposed that the Tribunal would have to determine whether if the respondent was in breach of the MOA it "should be rewarded by the [MOA's] rescission".[195] The same language was deployed in Section II.B.1.4 of the Applicant's Counter-Memorial in which it contended that having regard to the respondent's conduct it should not be "rewarded" by the rescission of the MOA.[196]

234 At the conclusion of the hearing on 20 September 2019, The Tribunal advised the parties that its List of Issues to be sent to them the following week would contain the "main issues" that would need to be dealt with based on: (a) the Tribunal's "examination of the two lists" that the parties had prepared put together in "a more sensible pattern"; and (b) what the Tribunal saw as having "come out of" the hearing.[197] Two issues in the Tribunal's List of Issues were relevant to the issue identified in para I(A)(4)(b) of the Applicant's List of Issues. They were Issue 21, whether the respondent breached the MOA, and Issue 5, whether the respondent was entitled to regard the MOA as rescinded.

235 In para I(A)(4)(b) of its List of Issues, the applicant identified the issue of whether, if the Tribunal were to find that the respondent breached the MOA,

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195 AR-V at p 551.

196 AR-II at p 492.

197 Transcript of Arbitration, 20 September 2019, pp 153:20–154:10 (AR-VII at pp 646–647).

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it should allow the respondent to be "rewarded" with rescission. Clearly, any consideration of whether rescission would be "rewarded" would be in the context of the applicant having committed a breach of the MOA and thus the Tribunal would be considering a circumstance of both parties being in breach of the MOA. Albeit that the applicant did not accept that para I(A)(4)(b) could be interpreted as contemplating a finding that both parties were in breach of the MOA,[198] it clearly presents as the only reasonable reading of that paragraph. Indeed, it is consistent with the applicant's submission in para 14 of its Post-Hearing Brief which referred specifically to the respondent being "equally" in breach of the provision of the MOA and thus not being entitled to rescind it on that basis.[199]

236 The question of the respondent's entitlement to rescission could only arise if the applicant was found to be in breach of the MOA. The applicant was asking the Tribunal not to reward the respondent with the remedy of rescission for the applicant's breach because it claimed that the respondent was also in breach. Had the Tribunal acceded to such a submission it would have found that both parties were in breach and would have had to decide whether in the circumstances of the respondent's breach it should be precluded from the remedy of rescission.

237 This was not a disjunctive case. It was clearly a claim that both parties were "equally" in breach and the remedy should not be permitted.

238 Although the applicant had deployed Art 1192 in its Written Opening Submissions, it is obvious that it did not pursue it any further. It certainly did

198 Transcript, 2 September 2021, pp 2:15–18, 20:29–21:14.

199 Applicant's Post-Hearing Brief at para 14 (AR-VI at p 625–626).

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not ask the Tribunal to apply it if in accordance with its submissions, the Tribunal found that the respondent was in breach of the MOA. Rather it rested its case and submissions on an outcome that, if the Tribunal found that the applicant was in breach of the MOA and the respondent was also in breach, it would not allow the respondent to rescind the MOA. It ran the risk of the Tribunal accepting its submission that the respondent was in breach but deciding that notwithstanding such breach the remedy of rescission was still available. As it happened the Majority found that the respondent was not relevantly in breach of the MOA.

239 The applicant was able to put and argue its case fully as to why the respondent should not be entitled to rescission. As discussed above, it identified various aspects of the respondent's conduct that it relied upon to suggest that it was in breach of the MOA and should not be rewarded with the remedy of rescission.

240 After due consideration of all those submissions the Majority determined that the applicant was in breach of the MOA by failing to remit US$200,000 to the JV Fund (Issue 2) and by failing to provide the necessary information to the respondent on the Surface Rights (Issue 4). The Majority determined that the applicant was not in breach of the MOA for failing to negotiate the terms of the Shareholders' Agreement (Issue 1) and thus this was not considered as a basis for rescission of the MOA. The Majority determined that it was inappropriate to hold that the respondent was in breach of the MOA by *inter alia* failing to negotiate the Shareholders' Agreement (Issue 21). In those circumstances it did not find that both parties were in breach of the MOA.

241 The parties' submissions before the Tribunal utilised the language of "breach" of the MOA rather than whether there was a "failure or refusal to abide

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by the" MOA. The Tribunal found that the applicant was not in breach of the MOA by what the applicant has described as a "failure or refusal" to negotiate the Shareholders' Agreement. Thus, the question of rescission in respect of that conduct was not necessary for determination.

242 The Tribunal did not stray into issues that were not submitted to it for determination. Nor did it deny the applicant the opportunity to make submissions on the Issue.

243 Ground 1 of the applicant's challenge to the Award fails.

Ground 2

244 The applicant claimed that in so far as the Award contained a finding that the respondent cannot be regarded as the party that breached the MOA, the Award contains a decision: (a) that was beyond the scope of the parties' submission to the Arbitration; and (b) that was made without giving the applicant a full opportunity to present its case and respond.

245 In [625] of the Award the Majority found that: "In light of the [applicant's] breaches of the MOA, the Tribunal considers that the [respondent] cannot be regarded as the Party that breached the MOA by failing to 'reflect [the applicant's] ownership of a 42% stake in [the respondent]'".[200]

Parties' contentions

246 The applicant contended that in making this finding in [625] of the Award the Majority applied "some kind of automatic deeming principle" that

[200] AR-I at pp 261.

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had not been argued by either party.[201] It referred to this as a "bizarre result" and that the "sequencing" of the Majority's findings led it to reason that if one party had breached within each of the three sections or stages of the MOA, any question of whether the other side had breached the MOA was "moot".[202] It was submitted that this was an approach that was not argued by either party and was inconsistent with the way in which the parties argued their cases.[203]

247 The applicant submitted that the sequencing of the issues in the Award impeded the Majority from reaching a fair conclusion when it should have considered the respondent's alleged breaches of the MOA to decide whether it was entitled to rescind the MOA on the basis of the applicant's breaches. The applicant submitted that the Majority's approach that once it had decided that one party had breached the MOA, it was "inappropriate" to ask whether the other party had breached the MOA, was extremely curious.[204]

248 The respondent submitted that the applicant had distorted the Majority's findings and that its submissions amount to an argument on the merits.[205] It submitted that far from any application of a deeming principle, the Majority carefully analysed the parties' submissions and ultimately agreed with the respondent's interpretation of Section 4 of the MOA. It submitted that the Majority concluded in line with the respondent's submissions on the interpretation of Section 4 of the MOA that if one party to the MOA failed to comply with steps in any section or stage of the MOA, then the other party

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201 Transcript, 1 September 2021, p 66:22–30.

202 Transcript, 1 September 2021, p 67:13–20.

203 Transcript, 1 September 2021, p 67:13–20.

204 Transcript, 1 September 2021, p 74:26–31.

205 Transcript, 1 September 2021, pp 104:28–105:2.

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would be relieved of its obligation to comply with the prescribed steps within that section or stage.[206] It submitted that reaching that conclusion is consistent with the finding that in all the circumstances the respondent "cannot" be regarded as the party in breach.[207]

249 The respondent also addressed the applicant's submissions on sequencing. It submitted that after the Tribunal provided the parties with its List of Issues on 30 September 2019, there was a clear structure that was accepted by the parties that the Tribunal was "going to look at all the issues in the round" and then structure the Award in the manner that it had made plain to the parties.[208] The respondent emphasised that the applicant's Post-Hearing Brief followed the same structure as that in the Tribunal's List of Issues.[209]

250 The respondent submitted that the Majority made a decision on the points argued before it and not beyond the scope of that which was submitted to it for determination.[210]

Conclusion

251 It is convenient to deal first with the applicant's argument in relation to the structure of the Award. The applicant contended that the conclusions reached by the Majority were effectively dictated by the structure that it chose for the Award. Emphasis was placed on the fact that it was not until the latter part of the reasoning in the Award in Issue 21 that the Tribunal gave any

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206 Transcript, 1 September 2021, pp 113:21–114:3.

207 Final Award at [625] (AR-I at p 261); Transcript, 1 September 2021, p 113:18–20.

208 Transcript, 1 September 2021, p 100:16–18.

209 Transcript, 1 September 2021, p 100:24–26.

210 See, *eg*, Transcript, 1 September 2021, p 108:26–109:2.

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consideration to whether the respondent had been in breach of the MOA. It submitted that it failed to consider this matter appropriately because it had already decided that the respondent was entitled to rescind the MOA.

252 A reasonable reading of the Award as a whole demonstrates that the Majority did not cocoon itself in each separate Issue or fail to give proper and global consideration to all the matters before it for determination. Rather it is clear that it had regard to its findings in various sections of the Award and in some instances cross-referenced those findings. It is appropriate to identify some examples. In dealing with Issue 2 the Majority, at [226] of the Award, referred to the matters that were to be addressed under Issue 5.[211] In dealing with Issue 4, the Majority, at [256] of the Award, referred to the matters that were to be addressed under Issue 5.[212]

253 In dealing with Issue 6 the Majority, at [313] and [314] of the Award, cross-referenced Issue 18 and Issue 14 respectively.[213] At the conclusion of its determination in respect of Issue 8, the Majority, at [362] of the Award, referred to its discussion in Issue 18.[214] In dealing with Issue 11 the Majority, at [426] of the Award, referred to its explanations in Issues 6 and 9 and also referred at [430] to the matters that it had addressed in Issue 17.[215]

254 In dealing with Issue 21 the Majority, at [614] of the Award, cross-referenced not only Issue 17 but also the Applicant's List of Issues.[216] It also

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211 AR-I at p 157.

212 AR-I at p 163.

213 AR-I at p 177.

214 AR-I at p 188.

215 AR-I at pp 203–204.

216 AR-I at pp 257–258.

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cross-referenced Issue 1 at [623] of the Award[217] and in [626] of the Award it also referred to Issue 22, albeit that this was erroneously referred to as Issue 21.[218] In dealing with Issue 23, the Majority, at [638] of the Award, cross-referenced its conclusions in its determination of Issue 10.[219]

255 As can be seen from the extract of the paragraphs of the Award dealing with Issue 21, the Majority, in [623] of the Award, specifically cross-referenced Issue 1. In [624] of the Award the Majority recorded its agreement with the MTC Order that because the applicant did not comply with its obligations under Stage 1 of the MOA, it was not entitled to rely on any rights that it had in Stage 2 of the MOA. In [625] the Majority recorded its rejection of the applicant's claim that the respondent had breached the MOA by failing to reflect the applicant's ownership of the 42% stake in the respondent concluding that because the applicant had breached its obligations under the MOA and by implication from the language used by the Majority the respondent had not breached its obligations under the MOA, the respondent was entitled to cancel the Subscription Agreement that had been executed.

256 The Majority's conclusion recorded in [625] that: "In light of the" applicant's "breaches of the MOA, the Tribunal considers that the" respondent "cannot be regarded as the Party that breached the MOA by failing to 'reflect …'" the applicant's "ownership of a 42% stake in" the respondent, follows immediately upon the reasoning referred to above and must be understood in that context. This was not, as the applicant would have it a "bizarre" and curious outcome. Nor was it the application of a "deeming principle". It is a statement

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217 AR-I at p 260.

218 AR-I at p 261.

219 AR-I at p 266.

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of a conclusion reached in circumstances where the Majority found that the applicant was in breach of its obligations under the MOA, the respondent was not in breach, and the respondent could not ("cannot")[220] be regarded as the party in breach for failing to reflect the applicant's ownership of the 42% stake in the respondent.

257 This is not a review of the merits of whether that is the correct analysis by the Majority. It was certainly a matter that the parties had argued and was well within the scope of the matters submitted to the Tribunal for determination in the Arbitration.

258 Ground 2 of the applicant's challenge to the Award fails.

Ground 3

259 The applicant contends that the Award should be set aside by reason of breaches of the rules of natural justice constituted by: (a) the Tribunal's failure to allow the applicant to adduce the Surface Rights Email in evidence; and (b) the Tribunal's consistently uneven application of procedural rules between the parties.

Surface Rights Email

260 There were two aspects to the parties' agreement in the MOA relating to Surface Rights. The first was that they agreed to "full transparency and accounting for all current and future surface title rights related to the project" that had been "acquired by all parties and all their nominees, whether directly or indirectly".[221] The second was that they agreed that all Surface Right interests

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220 Final Award at [625] (AR-I at p 261).

221 MOA, s 1 (AR-I at pp 391–392).

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not already held by the respondent were to be transferred to it on a timely basis at "cost plus a modest premium".[222]

261 The first step of full transparency and an accounting was to be done "upon the signing" of the MOA and was to continue "until 30 June 2016 in order to facilitate timely issuance" of the EP renewal and DMPF.[223] As discussed earlier, the applicant forwarded a spreadsheet to the respondent on 23 June 2016. This was of course before 30 June 2016 but after the EP had been renewed.

Context of ruling on tender of Surface Rights Email

262 The parties' submissions in relation to Ground 3 relating to the Surface Rights Email should be assessed in the context of what occurred at the time of the applicant's attempt to have it admitted into evidence.

263 The Surface Rights Email included communications between the parties under the heading "Surface Rights Phase-1, Year-1".[224] A map of the Project area was attached to the email which included various lots numbered and coloured and some were in green to signify those lots that had been "acquired" by the applicant "as of July 13, 2016".[225]

264 As referred to earlier, during his cross-examination on 19 September 2019 one of the applicant's witnesses referred to a map and discussions with the respondent's director in relation to the Surface Rights. It does not appear to be

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222 MOA, s 1 (AR-I at p 392).

223 MOA, s 1 (AR-I at p 391).

224 Surface Rights Email (AR-VI at p 509).

225 AR-VI at p 513.

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in issue that the map to which that witness referred was the map attached to the Surface Rights Email. It is certainly not in issue that the applicant had possession of the Surface Rights Email before and during the oral hearings in the Arbitration. However, the applicant did not seek to deploy the Surface Rights Email during the oral hearings which concluded on 20 September 2019.

265 On 23 October 2019, the applicant wrote by email to the Tribunal requesting leave to place the Surface Rights Email "on record".[226] The applicant referred to the attachments as "a map indicating the locations of the surface rights acquired by [the applicant] and [the respondent] and of the surface rights targeted for acquisition by the joint venture going forward, as well as a list of the latter".[227]

266 The applicant made submissions to the Tribunal that the Surface Rights Email was relevant to matters for determination in the Tribunal's List of Issues. It referred to the evidence given in the Arbitration by the witness referred to above and claimed that the respondent "seemed to have all the information about it". The applicant's counsel apologised for the timing of the request and advised the Tribunal that they only became aware of the email "recently" after some cross-examination at the hearing.[228]

267 On 25 October 2019, the respondent objected to the tender of the Surface Rights Email and submitted that the applicant had given no proper reason or explanation for failing to deploy the document earlier; and had not suggested

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226 AR-VI at p 522.

227 AR-VI at p 522.

228 AR-VI at p 522.

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that it did not have the document in its possession prior to the oral hearing.[229] It claimed that it would be prejudiced and that the admission of the document would undermine its rights to a fair hearing.[230]

268 On 28 October 2019, the applicant advised the Tribunal that counsel for the applicant had only gained knowledge of the map attached to the email shortly prior to the cross-examination of the applicant's witness. It also referred to the other documents that it claimed "showed" that the parties were proceeding co-operatively with Surface Rights acquisitions after the MOA and emphasised that the respondent "did not seek more information on the surface rights spreadsheet" from the applicant and did not inform the applicant that it was allegedly in breach of the MOA in relation to the Surface Rights. It submitted that the Surface Rights Email was "highly relevant" to one of the grounds that had been relied upon by the respondent to rescind the MOA.[231]

269 On 30 October 2019 the Tribunal notified the parties of its decision in respect of the application in terms that included the following:[232]

> The Tribunal notes para 68 of Procedural Order No 1 which states as follows: '*As a general principle, documents and legal authorities relied upon by the Parties must be filed with the written submissions in accordance with the Procedural Timetable and no new documents or legal authorities may be presented by either Party at the hearing unless expressly permitted by the Tribunal.*'
>
> As no new evidence is allowed at the hearing unless expressly permitted by the Tribunal, it is clear that the Parties cannot

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229 Respondent counsel's email to the Tribunal dated 25 October 2019 at paras 7, 10 (AR-VI at pp 525–526).

230 Respondent counsel's email to the Tribunal dated 25 October 2019 at para 16 (AR-VI at p 526).

231 AR-VI at p 540.

232 AR-VI at p 543.

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> submit new evidence after the hearing without the Tribunal's permission. Moreover, at the hearing, the Tribunal made it clear that it does not '*want any new evidence in, no new documents, no new witness statements or expert reports or anything like that*'.
>
> After reviewing the Parties' submissions, the Tribunal is of the opinion that the [applicant] did not show sufficient reasons that would justify its failure to disclose the new document before the hearing. Indeed, the [applicant] explicitly acknowledged that it had control and possession of the new document before the hearing. Moreover, the Tribunal believes that the prejudice that might be caused to the [respondent's] right to present its case, by accepting the new document, cannot be cured at this advanced stage of the proceedings.
>
> Therefore, the Tribunal decides to reject the [applicant's] application. Costs are reserved.
>
> [emphasis in original in italics]

Parties' contentions

270 The applicant submitted that the Majority's finding that the applicant failed to provide the necessary information about the Surface Rights to the respondent was a "key plank" to its ruling that the applicant committed a substantial and fundamental breach enabling the respondent to rescind the MOA.[233]

271 The applicant highlighted the fact that the tender of the Surface Rights Email occurred months before: (a) the arbitral proceedings were closed; (b) the Tribunal sought clarification on various issues from the parties; (c) the respondent sought a further oral hearing; and (d) the Tribunal allowed a further oral hearing which took place six months later in April 2020.[234]

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233 AWS at para 212(d).

234 AWS at para 225.

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272 It submitted that the Surface Rights Email was evidence that: (a) the respondent had in its possession the "necessary information" by way of the Surface Rights Email; and (b) demolished any suggestion that 30 June 2016 was a hard deadline and demonstrated that the parties had extended the deadline.[235]

273 The applicant also highlighted the fact that its witness had referred to the map (which was attached to the Surface Rights Email) in his oral evidence and had been cross-examined about the respondent's complaint that the applicant had failed to comply with its Surface Rights obligations. The applicant emphasised the Tribunal's finding that prejudice "might be caused" as opposed to "would be caused" to the respondent by the admission of the document. It submitted that it is difficult to appreciate why the admission of the Surface Rights Email would cause incurable prejudice since the only identified prejudice was the respondent's purported need to cross-examine the applicant's witnesses which it claimed "could have been done at a further short hearing".[236]

274 The applicant referred to Rule 32.1 of the SIAC Rules requiring the Tribunal to declare the proceedings closed after promptly consulting with the parties and being satisfied that they had no further relevant and material evidence with respect to the matters to be decided in the Award. The applicant noted that the Tribunal only declared the proceedings closed on 7 May 2020 and complained that when it tendered the Surface Rights Email in October 2019 the Tribunal had not consulted with the parties in accordance with Rule 32.1. It also complained that the tender was prior to the parties submitting their post-hearing briefs and that there was "no reason why" the parties could not have been

235 AWS at paras 212–218.

236 AWS at paras 224–225.

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allowed to make submissions arising out of the Surface Rights Email in those briefs.[237]

275 The applicant submitted that in all the circumstances the Tribunal's refusal to admit the Surface Rights Email into evidence denied it the opportunity to present its case and/or breached the rules of natural justice by preventing it from adducing material evidence to prove its defence.[238] The applicant submitted that the Surface Rights Email was relevant to its defence that it could not be considered in breach of the MOA when it was the first to initiate negotiations on the transfer of Surface Rights at cost, plus a modest premium, by sending the spreadsheet to the respondent on 23 June 2016. That defence alleged that the respondent took no initiative to negotiate the transfer and failed to explain why the spreadsheet was insufficient. It submitted that if the respondent was truly intent on engaging in good faith discussions, it should have at least requested the applicant to furnish information that the respondent considered was missing from that which it had provided and it did not do so. The applicant submitted that the material in the Surface Rights Email was relevant to these issues.[239]

276 The applicant emphasised that it well understands that it cannot appeal the Tribunal's ruling but submitted that this does not mean that it is precluded from making the present application where the effect of the ruling or decision was to deprive it of the opportunity to fully present its case.[240] It submitted that the Surface Rights Email is a "critical document" that "directly addressed, and

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237 AWS at para 225.

238 AWS at paras 224–225.

239 AWS at para 37.

240 AWS at paras 229–232.

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in fact contradicted" the Majority's "reasoning on a key issue".[241] It also submitted that the breach of natural justice was "even more egregious" because the Tribunal "did not appear to have considered or ruled on the relevance" of the document.[242]

277 The respondent submitted that notwithstanding the Tribunal's indication at the conclusion of the oral hearings that it did not wish to receive any further documents or new evidence, it gave the applicant a full opportunity to be heard on its application to tender the Surface Rights Email.[243] It submitted that the Tribunal's rejection of the tender was an exercise of its case management powers in which it had very wide discretion.[244]

278 The respondent submitted that the Majority's reasoning in the Award was that the information that the applicant had provided to the respondent in the spreadsheet dated 23 June 2016 did not include the acquisition cost of the land that the applicant had purchased nor any of the various instruments of title, such as deeds of sale and other acquisition documents. It emphasised that the Majority found that those documents were necessary to determine amongst other things whether there were any outstanding obligations or liabilities in respect of, or encumbrances on the Surface Rights. The respondent also emphasised the Majority's conclusion that it was impossible for the respondent to negotiate the transfer and price without that necessary information.[245]

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241 AWS at para 235.

242 AWS at para 239(e).

243 RWS at paras 207–209.

244 RWS at para 212.

245 RWS at para 252.

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279 The respondent submitted that the map that was attached to the Surface Rights Email does not contain any of the information to which the Majority referred that the applicant should have supplied to the respondent. It does not refer to the acquisition cost of the land nor did it attach or include the various documents to which the Majority had referred as being necessary for the negotiation to proceed.[246]

280 The respondent also submitted that the breach that the Majority found in respect of the Surface Rights, was a breach of the obligation in Section 1 of the MOA which required the relevant step to be taken by 30 June 2016. It submitted that the fact that further communications occurred at a later time, the Surface Rights Email being dated 25 August 2016, does not bear relevantly upon the Majority's findings in respect of the breach that it found occurred in the period up to 30 June 2016. The respondent also pointed out that the applicant did not argue in the Arbitration that it had provided the respondent with the categories of information that the Majority found should have been provided, whether by 30 June 2016 or at all.[247]

281 The respondent submitted that in those circumstances the Surface Rights Email would not have changed the Tribunal's conclusions.[248]

Conclusion

282 The parties did not address this ground in their oral submissions. Both parties expressly relied upon their written submissions in this regard.

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246 RWS at para 256.

247 RWS at paras 260–265.

248 RWS at para 255.

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283 In those circumstances it is necessary to deal initially with the applicant's claim within its written submissions that the Tribunal had closed its mind in respect of its application to tender the Surface Rights Email. This is a very serious allegation. It formed no part of the affidavit evidence in support of the grounds upon which the applicant relied and was not identified in any of the grounds upon which the applicant sought to have the Award set aside. It appeared for the first time in a sub-paragraph of the Applicant's Written Submissions.[249] It should not have been made and will not be considered.

284 Notwithstanding the Tribunal's statement at the conclusion of the oral hearings in respect of the receipt of any further evidence or documents, it is clear that it gave the applicant a full opportunity to make an application to tender the Surface Rights Email and ample opportunity to make submissions in support of that tender.

285 The Tribunal concluded that it was not satisfied that the applicant had provided a proper explanation or reasons to justify what it described as "its failure to disclose" the Surface Rights Email "before the hearing". The Tribunal emphasised that the applicant had explicitly acknowledged that it had control and possession of the Surface Rights Email before the hearing. It also concluded that the prejudice that might be caused to the respondent could not be cured at the advanced stage of the proceedings.

286 Although the applicant submitted that any prejudice to the respondent could be cured by either allowing the respondent to produce new documents in response to the Surface Rights Email (provided that the applicant had the opportunity to address them in at least one of its post-hearing briefs) or allowing

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249 AWS at para 230(a).

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the parties to deal with the document in their post-hearing briefs,[250] it is not possible to know whether further investigation needed to be made in respect of the provenance of the information that was ultimately included in the documents that were annexed to the Surface Rights Email.

287 The Majority's relevant finding in respect of the applicant's breach of the MOA was that the information that it provided to the respondent in respect of Surface Rights was "clearly only partial" information and "as such deficient". As discussed earlier, the Majority concluded that without the "necessary information" such as the acquisition costs of the land and other acquisition documents, it was not possible for the respondent to determine whether there were any outstanding obligations or liabilities owed or encumbrances on the Surface Rights and that any negotiation in respect of the modest premium on the price of the Surface Rights was impossible.

288 It is appropriate to analyse whether the documents within the Surface Rights Email could reasonably have made a difference to the Majority's deliberations. The map attached to the Surface Rights Email, albeit colour-coded and brought up to date to 13 July 2016 of the lots that had been acquired by the parties, did not include any specific information about the date of acquisition, the cost of acquisition and/or whether there were any encumbrances on the titles. There were no documents within the Surface Rights Email identifying the cost of acquisition or the value of the lot either at acquisition or at the time of the Majority's deliberations. There were no documents identifying whether there were any separate loans that had been obtained in respect of the acquisition of the lots in the form of any unregistered mortgage or encumbrance over the lots. There were no documents from which it would be possible to know

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250 Applicant's email to Tribunal dated 23 October 2019 (AR-VI at p 522).

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whether any third party had priority interests in the lots that had been acquired. None of what the Majority referred to as the "necessary information" was to be found in the Surface Rights Email.

289 In all the circumstances, even if the Majority had taken the view that the deadline had been extended to the date of the Surface Rights Email, the content of the Surface Rights Email could not reasonably have made any difference to the Majority's conclusions in respect of the deficiencies in the information that was provided.

290 The applicant's Ground 3 in support of its application to set aside the Award in so far as it relates to the Tribunal's refusal to admit the Surface Rights Email into evidence fails.

Application of procedural rules

291 The other aspect of the applicant's Ground 3 to set aside the Award is its claim that the Tribunal unevenly applied the procedural rules throughout the Arbitral proceedings and failed to treat both parties with equality in terms of allowing them to put forward their respective cases.

292 The applicant argued that the Tribunal unevenly applied the procedural rules in the respondent's favour in four respects: (a) the Tribunal allowed the respondent to amend its Memorial more than one year and two months after its initial submission and after the applicant had filed all of its memorials;[251] (b) the Tribunal allowed the respondent to introduce three new exhibits into evidence less than three weeks before the oral hearing commenced;[252] (3) the Tribunal

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251 AWS at para 245.

252 AWS at para 253.

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granted the respondent's request for an additional oral hearing about 150 days after the main oral hearing for the parties to address the Tribunal on various issues;[253] and (4) the Tribunal allowed 48 of the respondent's 129 requests for production of documents and did not allow any of the applicant's 93 requests for the production of documents.[254]

Amendment of Respondent's Memorial

293 On 22 August 2019 the respondent sought leave to amend its Memorial dated 19 June 2018 to seek a declaration that it was entitled to set off a relevant cost that it was required to pay to the applicant against any amount that the Tribunal may order the applicant to pay the respondent. The respondent claimed that such an amendment was made necessary by recent developments which caused it to have concerns that the applicant was in serious financial difficulty and/or was effectively insolvent.[255]

294 On 28 August 2019 the applicant objected to the proposed amendment rejecting the respondent's claims and advising that it was a fully operational company.[256]

295 On 30 August 2019 the respondent made further submissions in disagreement with the applicant's claims.[257]

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253 AWS at para 257.

254 AWS at para 260.

255 Eduardo's 1st Affidavit at para 188 (AR-VIII at p 73); RWS at para 275(a).

256 Eduardo's 1st Affidavit at para 192 (AR-VIII at p 74).

257 Eduardo's 1st Affidavit at para 197 (AR-VIII at p 75).

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296 On 30 August 2019 the Tribunal noted that it had considered the parties' submissions and had decided to grant the respondent's application to amend its Memorial.[258]

297 The applicant claimed that this decision was "particularly prejudicial" because: (a) the parties' positions on all of the issues raised by the Tribunal had "already been crystallised and the evidence submitted"; (b) the parties had already agreed on and submitted crucial documents on 16 August 2019; and (c) the parties were due to file their written opening statements on 30 August 2019. It was submitted that as 30 August 2019 was the day of the Tribunal's ruling to allow the amendment, the applicant had no chance to properly address the additional relief sought by the respondent.[259]

298 The applicant also claimed that the Tribunal's decision to allow the respondent's amendment application "stands in stark contrast" to the Tribunal's decision to reject the applicant's tender of the Surface Rights Email. It submitted that this demonstrates that the Tribunal had failed to treat both parties with equality in terms of allowing them to put forward their respective cases.[260]

299 The respondent submitted that the applicant did not deny that it had a full opportunity to be heard and to make submissions on the respondent's amendment application. It also submitted that the applicant had not identified any evidence, document, authority or argument that it wished to but did not have the opportunity to present in response to the amendment application; nor had it identified anything which the applicant claimed it would have done differently

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258 Eduardo's 1st Affidavit at para 198 (AR-VIII at p 75).

259 AWS at para 246.

260 AWS at para 247.

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if given more time.[261] It also pointed out that the applicant did not submit during the Arbitration that the respondent's amendment would prejudice it and/or that it did not have the opportunity to properly address the new claim.[262]

300 The respondent also submitted that as the applicant did not at any point during the Arbitration claim that the amendment would cause it prejudice, it is precluded from making that allegation before this court. It raised the substantive argument, a denial that it was insolvent, but did not raise arguments on procedural unfairness and/or prejudice before the Tribunal.[263]

301 In respect of the applicant's submission that the Tribunal's ruling on the respondent's amendment application was in "stark contrast" to its own application, the respondent submitted that this is not "a game of numbers" where the Tribunal has to keep score and ensure that the final result "is a draw". The respondent submitted that at no stage did the applicant claim that the respondent should have applied to make its amendment at an earlier stage or that its amendment would prejudice it. It submitted that the applicant's tender of the Surface Rights Email was completely different particularly because the applicant had failed to explain its delay and the Tribunal found that the prejudice that might be caused could not be cured at that late stage of the proceedings.[264]

Conclusion

302 The applicant's claim is that the Tribunal made procedural rulings that were uneven and failed to treat the parties with equality. The analysis must focus

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261 RWS at paras 276–279.

262 RWS at para 281.

263 RWS at paras 285–289.

264 RWS at paras 295–296.

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on whether there are proper grounds to conclude that the Tribunal applied its rulings unevenly between the parties, amounting to a failure to treat the parties equally.

303 The Tribunal provided each party with the opportunity to put its arguments as to whether the amendment should be permitted. Both parties took up those opportunities and neither before nor after the amendment was allowed did the applicant raise with the Tribunal that it had been prejudiced by the amendment or disadvantaged in arguing its case before the Tribunal.

304 There is no evidence to support the contention that the Tribunal behaved as the applicant contended in respect of this amendment application by the respondent. This application was made two months before the applicant made its application to tender the Surface Rights Email. At no stage did the applicant suggest to the Tribunal that by reason of either allowing the amendment or rejecting the Surface Rights Email it apprehended that the Tribunal was not treating it equally.

305 The processes exposed in the analysis of the context of the ruling in relation to the Surface Rights Email and in respect of the application to amend demonstrate that on each occasion the Tribunal took into account the parties' submissions and made rulings well within the confines of those submissions in a manner that evidences a fair treatment of each party and no proper evidential basis to suggest a lack of treating the parties equally.

306 This aspect of the applicant's claim within Ground 3 to set aside the Award fails.

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Three new exhibits

307 On 26 August 2019, the respondent applied to the Tribunal to make disclosure of three new emails which it submitted were relevant to the issue of damages. That application was granted.

308 The applicant's inclusion of this aspect of the Tribunal's procedural rulings in support of its ground that the Award should be set aside is to say the least rather novel because the applicant did not oppose the respondent's application.

309 Notwithstanding that it raised no objections to the disclosure of the emails so long as they were used exclusively as evidence in support of the issue of damages, the applicant submitted that the Tribunal admitted the evidence despite the applicant "having no proper opportunity to address" them.[265] It made the additional point that once again this stood in stark contrast to the Tribunal's refusal to allow the tender of the Surface Rights Email.[266]

310 The applicant submitted that its own "permissive stance" towards the respondent's application was not appreciated or applied by the Tribunal. Rather it submitted that the Tribunal did not apply the procedural rules even-handedly when it rejected the tender of the Surface Rights Email.[267]

311 Unsurprisingly the respondent submitted that it was significant that the applicant even attempted to use the fact that it had consented to the admission of these exhibits to argue that the Tribunal should agree to the tender of the

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265 AWS at para 253(c).

266 AWS at para 253(d).

267 AWS at para 255.

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Surface Rights Email.[268] It made the point that at no time during the Arbitration did the applicant suggest that the introduction of these three emails would prejudice it and/or that it would not have a proper opportunity to address those documents.[269]

Conclusion

312 It is difficult to understand how this ruling based in part no doubt on the lack of opposition to it by the applicant could demonstrate that the Tribunal misconducted itself such that the Award should be set aside.

313 The applicant's suggestion that the Tribunal should have applied the applicant's permissive stance in dealing with the respondent's application is equally difficult to understand. It would appear that the applicant is suggesting that the Tribunal should either have rejected the respondent's application to disclose the three emails; or when it came to the tender of the Surface Rights Email it should have remembered that it had allowed the three emails to be disclosed and therefore allowed the tender of the Surface Rights Email to ensure that there was an equality of treatment between the parties.

314 It is clear that the Tribunal applied itself appropriately to each of the applications, taking into account the relevant matters that were before it at the time of those applications. There is no evidence of inappropriate or uneven treatment of the parties.

315 This aspect of the applicant's claim within Ground 3 to set aside the Award fails.

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268 RWS at para 307.

269 RWS at para 303.

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A further oral hearing

316 As discussed earlier, it was in early 2020 that the Tribunal sought clarification from the parties in respect of the nature of a breach of a compromise agreement; and confirmation from the applicant of the aspects of its case it was no longer pressing. The respondent sought the opportunity to address the Tribunal orally and this was opposed by the applicant. The Tribunal allowed the oral hearing to take place by teleconference on 1 April 2020 at which time both parties addressed the Tribunal.

317 The applicant submitted that this was "yet another instance in a pattern of the Tribunal allowing great indulgence" to the respondent "while refusing to extend" to the applicant "the same right to present its case fully".[270] It submitted that it was yet another instance in which the Tribunal had failed to treat the parties with equality.[271]

318 The respondent submitted that the applicant did not deny that it had the opportunity to and did participate in the additional oral hearing. It also pointed out that the applicant did not claim during the oral hearing that it had tried to make a point or argument but was not allowed to do so.[272]

319 The respondent submitted that it would appear that the applicant is claiming prejudice because it had to take part in an oral hearing and address a number of issues in a hearing that it claimed should not have taken place.[273] It submitted that there is no basis in the applicant's submissions that it was

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270 AWS at para 257(e).

271 AWS at para 257(h).

272 RWS at para 315.

273 RWS at para 317.

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deprived of the opportunity to make arguments that would have a real as opposed to a fanciful chance of making a difference to the outcome of the Award. It submitted that the applicant has failed to show that it was deprived of any opportunity that would amount to a breach of natural justice.[274]

Conclusion

320 Although the applicant submitted that the Tribunal should not accede to the respondent's application for an oral hearing, its communication to the Tribunal, included the statement that "should the Tribunal consider it necessary to hold an in-person hearing" the applicant "would have no objection to an additional hearing". [275] As it turned out, the Tribunal decided to hold a hearing by teleconference.

321 The applicant's claim presents as quite wrongheaded. Both parties were given a full opportunity to make submissions as to whether an oral hearing should take place. Those submissions were considered and a ruling was made in favour of the oral hearing taking place. Both parties were given full opportunity to make every submission they wished to make at the oral hearing.

322 The applicant is unable to point to any lack of even-handedness by the Tribunal in its dealings with the parties in respect of this matter.

323 This aspect of the applicant's claim within Ground 3 to set aside the Award fails.

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274 RWS at paras 318–319.

275 AR-VII at p 98.

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Requests for production of documents

324 The applicant claimed that there was a "stark disparity" between the Tribunal's decisions on the parties' requests for the production of documents because 48 of the respondent's 129 requests was allowed but none of the applicant's 93 requests were allowed.[276]

325 The applicant accepted that it is not "a numbers game of which party has had more of its document production requests allowed by the Tribunal". However, it relied on what it referred to as the "cumulative effect of the consistent application of the procedural rules" in the respondent's favour; denying the applicant's "crucial piece of evidence" in the Surface Rights Email; while giving the respondent "a free hand" in the arbitral proceedings.[277]

326 The applicant complained in particular in relation to the refusal to allow it to obtain documents that it submitted were relevant to the "overarching issue of good faith" between the parties. It claimed that the documents were relevant to its claim, ultimately abandoned, that the respondent's corporate tactics included waging a propaganda war against the applicant.[278] It claimed that had the documents been produced and depending upon their contents, it may not have abandoned its claim in this regard.[279]

327 The applicant submitted that rather than viewing the refusal of its application for production of documents in isolation, when viewed with the

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276 AWS at para 260.

277 AWS at paras 265(a)–265(b).

278 AWS at para 261.

279 AWS at para 265(e).

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other claims it makes, "these instances" demonstrate that there had been a consistent uneven application of procedural rules between the parties.[280]

328 The applicant submitted that although it did not seek to suspend the Arbitral proceedings in real-time, it would have been difficult, if not impossible, for it to have foreseen the cumulative effect of the Tribunal's uneven application of procedural rules in real-time as the arbitration was unfolding.[281]

329 The respondent submitted that there can be no dispute that the parties were treated with equality in respect of the applications for the production of documents. Each had an equal opportunity to be heard and present submissions and respond to the other side's submissions. The respondent submitted that the applicant's argument is essentially an argument not for equality of procedure but for equality of outcome. It submitted that the applicant's real case is that if one party has been substantially more successful than the other, inequality is demonstrated.[282]

330 The respondent also submitted that the applicant's argument that the Tribunal did not apply procedural rules even-handedly because it rejected the applicant's tender of the Surface Rights Email was once again essentially a complaint that there should be an equality of outcome.[283]

331 The respondent also submitted that the applicant has not pointed to any finding in the Award that it claims would have been different if it had raised and

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280 AWS at para 266(a).

281 AWS at para 266(c).

282 RWS at paras 327–328.

283 RWS at paras 330–331.

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succeeded in the argument that the respondent was considering starting a public relations campaign against the applicant.[284]

Conclusion

332 The applicant's claim is fundamentally reliant upon each of its other claims being successful so that it can claim there was a "cumulative effect" or a trend of uneven treatment of the parties. Each of its other claims has failed. In this particular claim, albeit that the applicant agreed that it is not a "numbers game", its submissions focused on that very matter.

333 There is no proper evidentiary basis to establish that the rulings that the Tribunal made in respect of parties' applications for production of documents amounted to an uneven treatment of the parties. It is true that the respondent was clearly more successful than the applicant in its applications for the production of documents. However, that fact cannot be equated to a finding that equality of treatment was lacking.

334 The applicant has failed to establish that the Tribunal has misconducted itself and breached rules of natural justice by reason of its rulings in respect of the parties' respective requests for production of documents.

335 This aspect of the applicant's claim within Ground 3 to set aside the Award fails.

Ground 4

336 The applicant contended that the Award should be set aside because in ordering the applicant to transfer the Surface Rights held by it to the respondent

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284 RWS at para 343.

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"at cost" within 30 days of the Award (the "Surface Rights Order") the Majority issued an Award containing a decision on matters beyond the scope of the submission to Arbitration.

337 Neither party addressed this ground in oral submissions and expressly relied only upon their written submissions.

Context of the Surface Rights Order

338 During the Arbitration, the applicant had argued that the JVA did not prohibit it from acquiring Surface Rights and that such acquisition was not in competition with the JV.[285] It also submitted to the Tribunal that it should not grant the Surface Rights Order because it was not based on any JVA provision.[286] However, it did not argue before the Tribunal that this went to the Tribunal's jurisdiction.[287]

339 The respondent's position before the Tribunal was that cl 7.1 read with cl 8.2 of the JVA provided that the Surface Rights would be held by the respondent in its capacity as the joint venture company.[288] Clause 7.1 included reference to costs incurred in respect of "the feasibility studies related to [the respondent's] Tenements".[289] Clause 8.2 required the parties to conduct "good faith discussions" in respect of converting the applicant's interest in the JVA into equity in the respondent after the applicant completed its "earn-in".[290]

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285 Applicant's Counter-Memorial at para 943 (AR-II at pp 514–515); RWS at para 355.

286 Applicant's Counter-Memorial at paras 940–942 (AR-II at pp 512–514).

287 RWS at para 356.

288 Final Award at [346] (AR-I at p 184).

289 AR-I at p 341.

290 AR-I at p 342.

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340 The respondent claimed that the applicant had breached cl 4.3 ("Non-Competition") and cl 8.1 ("Cooperation")[291] and/or its fiduciary and trustee duties in acquiring the Surface Rights in competition with the JV.[292] Clause 4.3 of the JVA provided that the applicant agreed that "throughout the term of this JVA, it shall not, and it shall cause its Associates not to, compete with [the respondent] by operating, applying for or acquiring, either directly or indirectly, any new mining claim, license, lease, grant concession, permit, patent or any mineral property that will compete with [the respondent] within fifteen (15) kilometers of the [respondent] Tenements."[293] Clause 8.1 of the JVA recorded an undertaking by each party to "co-operate at all times" with each other and any "Governmental Authority and/or Third Party" to ensure the successful operation of the JVA and the development of the JV.[294]

341 It also claimed that the Surface Rights Order was relief sought arising out of the breaches and flowed from the fact that the parties intended and agreed that the respondent would hold both the permits and the Surface Rights.[295]

342 The Majority found that the Surface Rights were covered under the JVA and that the applicant had breached the JVA by purchasing the Surface Rights in competition with the respondent. It then proceeded to make the Surface Rights Order as flowing directly from the respondent's rights under the JVA to hold those Surface Rights.

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291 AR-I at p 342.

292 RWS at para 354.

293 AR-I at p 340.

294 AR-I at p 342.

295 RWS at para 386.

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Parties' contentions

343 The applicant submitted that although the Majority held that the requests for specific performance in this regard flowed directly from the respondent's rights under the JVA to hold the Surface Rights, it did not identify any part of the JVA which gave the respondent the right to hold the Surface Rights nor any obligation on the applicant to transfer them to the respondent.[296]

344 It submitted that the Tribunal could not direct the applicant to perform an obligation under the MOA which had been rescinded and in any event the obligation under the MOA was to transfer the Surface Rights at cost with a modest premium rather than "at cost".[297]

345 The applicant submitted that the only findings relevant to this ground in the Award are that: (a) the applicant was obliged under the MOA to provide the respondent with full transparency and accounting for all current and future surface title rights related to the Project, identified as the "transfer of information" obligation; and (b) the applicant was prohibited from competing with the respondent in relation to the acquisition of mineral property which includes Surface Rights.[298]

346 The applicant submitted that neither of these two obligations gave the respondent a right or imposed on the applicant an obligation to transfer the Surface Rights as opposed to the information to the respondent. It also submitted that this obligation could not have arisen from the MOA because the Tribunal had found that it was validly rescinded and that was why the Tribunal then went

296 AWS at para 274.

297 AWS at paras 276–277.

298 AWS at para 274.

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on to consider whether there was a breach of the JVA. It submitted that the Tribunal could not direct the applicant to perform an obligation in the MOA while simultaneously finding that it had been rescinded.[299]

347 The respondent submitted that the applicant withdrew its jurisdictional objections and expressly consented to the Tribunal's jurisdiction to hear all of the claims submitted to it after knowing that the respondent was seeking the Surface Rights Order and making submissions against it. The respondent also submitted that having taken that position, the applicant should not be permitted to "change tack" and now claim that the Tribunal had no jurisdiction to grant the Order.[300] It submitted that the applicant waived its right to object and/or is estopped from raising its jurisdictional objections.[301]

348 The respondent also submitted that the applicant did not at any point in the Arbitration make the argument that it now makes in this application that the Tribunal had no jurisdiction to grant the Surface Rights Order because it related to an obligation outside the JVA.[302]

349 The respondent also argued that if the applicant's contentions are to be entertained such arguments do not go to jurisdiction but, in reality, relate to the merits of the decision.[303]

350 The respondent submitted that the applicant's contention that the Majority could not grant the Surface Rights Order because it relates to an

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299 AWS at pars 274–276.

300 RWS at paras 351–352.

301 RWS at para 364.

302 RWS at para 358.

303 RWS at para 371.

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obligation not found in the JVA turns in part on the question of the interpretation of the applicant's obligations under the JVA.[304] In this regard the respondent emphasised cl 12.9 of the JVA which provided that "Any dispute arising from or in connection with any provisions" of the JVA or any breach thereof may be submitted to arbitration.[305] It submitted that this provision is broad enough to encompass the question of whether the Surface Rights Order should have been granted and whether the JVA supported the granting of the order.[306]

351 The respondent submitted that the applicant recognises that its arguments are in reality merits arguments and that this is why it continued to make them against the granting of the Surface Rights Order after expressly consenting to the Tribunal's jurisdiction.[307] The respondent submitted that in any event, the applicant has not shown why the Majority was wrong to grant the Surface Rights Order. The respondent submitted that the applicant has confused the concept of contractual obligations with the separate concept of relief granted in respect of breaches of those obligations.[308]

352 Finally, the respondent submitted that the Tribunal was empowered to grant any relief that was available under the applicable law for the applicant's breaches of the JVA.[309]

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304 RWS at para 374.

305 RWS at para 375.

306 RWS at paras 375–381.

307 RWS at para 382.

308 RWS at para 390.

309 RWS at para 391.

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Conclusion

353 The applicant's contention that the Majority did not identify any part of the JVA which gave the respondent the right to hold the Surface Rights cannot be accepted. The Majority referred to cl 4.3 of the JVA and concluded that the expression "mineral property" covered the Surface Rights.[310] It also concluded that cl 4.3 "covered" the Surface Rights.[311] It referred to cl 8.1 as requiring the parties to cooperate in relation to the acquisition of the Surface Rights.[312] It emphasised the "importance" of the Surface Rights concluding that without them the exploration and development works covered by the JVA could not take place and the Project could not be undertaken because such works required the consent of the holders of the Surface Rights.[313] The Majority concluded that the respondent had "rights under the JVA to hold the Surface Rights".[314]

354 There can be no doubt that the Surface Rights Order was a matter that was submitted to the Tribunal for determination. It was an order that was sought by the respondent from the outset of the Arbitration and was the subject of evidence and submissions. It was also an order that was debated by the applicant during the Arbitration and one that the applicant contended that the Tribunal would not make in the circumstances.

355 The Majority concluded that the applicant had breached not only cll 4.3 and 8.1 of the JVA but also its fiduciary and trustee duties to act in the

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310 Final Award at [356] (AR-I at p 187).

311 Final Award at [358] (AR-I at p 187).

312 Final Award at [358] (AR-I at p 187).

313 Final Award at [357] (AR-I at p 187)

314 Final Award at [550] (AR-I at p 236).

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interests of the JV and to act in good faith.[315] It then crafted the remedy that it concluded flowed from those breaches which included the Surface Rights Order.[316]

356 The fact that the Majority ordered that the Surface Rights be transferred "at cost" rather than "at cost plus a modest premium" is not evidence of a "new difference" or of a decision beyond the scope of what was submitted to it for determination. Rather it is clear that the Majority regarded the Surface Right Order as appropriate in light of the nature of the applicant's breaches including of its fiduciary and trustee duties to the JV.

357 This is not a determination of whether that decision was correct. It is a determination of whether, as propounded in Ground 4, it was "a decision on matters beyond the scope of the Parties' submission to the Arbitration".

358 The Majority considered the parties' submissions and decided that the Surface Rights Order was an appropriate remedy in all the circumstances of the evidence and submissions.

359 The Majority did not stray beyond matters that were submitted to it for determination.

360 Ground 4 of the applicant's challenge to the Award fails.

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315 Final Award at [360] (AR-I at p 188).

316 Final Award at [550] (AR-I at p 236).

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Orders

361 SIC/OS 4/2021 is dismissed. Should the parties not be able to reach agreement on costs, they should file submissions with the court by 21 December 2021 and costs orders will be made after reviewing those submissions.

Patricia Bergin
International Judge

Toby Landau QC and Liang Hanwen Calvin (Duxton Hill Chambers (Singapore Group Practice)) (instructed), Yu Kexin (Yu Law) (instructed), Tnee Zixian Keith (Zheng Zixian), Chin Wan Yew Rachel, Leong Lijie and Teo Jin Yun Germaine (Tan Kok Quan Partnership) for the applicant;
Davinder Singh s/o Amar Singh SC, Jaikanth Shankar, Fong Cheng Yee David and Gerald Paul Seah Yong Sing (Davinder Singh Chambers LLC) for the respondent.

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