IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2025] SGHC 61

Originating Application No 1185 of 2024 and Summons No 316 of 2025

Between

DLS

… *Claimant*

And

DLT

… *Defendant*

GROUNDS OF DECISION

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

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DLS
v
DLT and another matter

[2025] SGHC 61

General Division of the High Court — Originating Application No 1185 of 2024 and Summons No 316 of 2025
Andre Maniam J
14 February, 27 March 2025

10 April 2025

Andre Maniam J:

Introduction

1 This case involved the distinction between an "award" that is susceptible of being set aside, and an "order or direction" for interim measures that is not susceptible of being set aside.

2 It also involved an application to enlarge the bases for the setting-aside application, by adding a further basis of apparent bias that was not raised in the initial supporting affidavits.

Background

The parties

3 The claimant and the defendant were, respectively, main contractor and

sub-contractor for a project in country "X" (the "Project").[1] The terms of the engagement were governed by an agreement between the claimant and the defendant, which I will refer to as the "Agreement".

4 The parties' names and identifying details have been anonymised pursuant to an order to preserve arbitration confidentiality. I shall refer to the claimant as the "Contractor", the defendant as the "Sub-Contractor", and the ultimate client as the "Client".

The arbitration

5 In April 2023, the Sub-Contractor commenced arbitration against the Contractor ("the arbitration"), claiming losses arising from delays in completion of the Project.[2] The arbitration was seated in Singapore, and was governed by the International Chamber of Commerce ("ICC") Rules of Arbitration in force on 1 January 2021 (the "ICC Rules").[3] A three-member arbitral tribunal (the "Tribunal") was constituted on 13 July 2023.[4]

The Interim Measures Application

6 In November 2023, the Sub-Contractor brought an application seeking purported "urgent interim measures" (the "Interim Measures Application").[5] This application resulted in various decisions contained in the Tribunal's "First

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1 1st affidavit of the Contractor's representative filed on 13 November 2024 ("Contractor's 1st Affidavit") at paras 10–11.

2 Contractor's 1st Affidavit at para 5.

3 Contractor's 1st Affidavit at para 5.

4 Contractor's 1st Affidavit at p 29 (First Partial Award at para 12).

5 Contractor's 1st Affidavit at pp 324–367.

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Partial Award" dated 19 June 2024,[6] to which some corrections were made on 9 October 2024.[7]

The Setting-Aside Application

7 In November 2024, by way of this originating application ("OA 1185"), the Contractor applied to set aside two of the decisions in the First Partial Award, namely:[8]

(a) the "Monthly Payment" decision in [96(i)] of the First Partial Award, in which the Tribunal ordered the Contractor to pay the Sub-Contractor a monthly sum of US$172,135.54, until the final completion of the Project. The Monthly Payment sum was intended to cover the Sub-Contractor's operational costs per month. The payment was conditional upon the Sub-Contractor's provision of a corporate guarantee or other form of security agreeable to the Contractor, "to secure [the Monthly Payment] sum in the event that repayment [was] subsequently ordered".

(b) the "Lump Sum Payment" decision in [96(vi)] of the First Partial Award, in which the Tribunal ordered the following:

> Upon paragraph 188(f) of [the Interim Measures Application], the sum of USD 117,339.48 or its equivalent is owing and due to the [Sub-Contractor] and unless the [Client] releases that sum so that it is received by the [Sub-Contractor] on or before 14th June 2024 the [Contractor] shall pay that sum to the [Sub-Contractor] on or before 28th June 2024.

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6 Contractor's 1st Affidavit at pp 26–54.

7 Contractor's 1st Affidavit at pp 57–66.

8 Contractor's 1st Affidavit at para 19.

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8 The setting-aside application was supported by two affidavits:

(a) an affidavit filed by the Contractor's representative ("the Contractor's 1st Affidavit") raising (i) breach of natural justice (specifically, breach of the "Fair Hearing Rule") and (ii) exceeding the scope of submission to arbitration, as the grounds for setting-aside;[9] and

(b) a lawyer's affidavit exhibiting an expert opinion on the law of country X, and related documents.

The application for permission to introduce apparent bias as a new basis for setting-aside

9 In January 2025, the Contractor filed an application to the ICC Court of Arbitration (the "ICC Court") challenging the impartiality and independence of one of the arbitrators in the Tribunal ("the subject arbitrator"). I will refer to this application as the "Challenge".

10 On 5 February 2025, the Contractor filed Summons 316 of 2025 ("SUM 316") seeking permission "to introduce facts and evidence in support of a new basis to partially set aside the First Partial Award, being that of apparent bias on the part of one of the arbitrators".

11 SUM 316 was fixed for hearing together with the setting-aside application (OA 1185), on 14 February 2025.

The Court's decision of 14 February 2025

12 On 14 February 2025, I decided as follows:

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[9] Contractor's 1st Affidavit at paras 24 and 57.

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(a) the application to set aside the Monthly Payment decision was dismissed;

(b) the application to set aside the Lump Sum Payment decision was not granted on what was then before the court;

(c) the Sub-Contractor was awarded costs of $25,000 plus reasonable disbursements to be fixed if not agreed; and

(d) SUM 316 and the remainder of OA 1185 (relating to the Lump Sum Payment decision) were adjourned for further hearing on a date after the ICC Court had decided on the Contractor's Challenge.

The ICC Court's decision on the Contractor's Challenge

13 On 27 February 2025, the ICC Court decided that the Contractor's Challenge was admissible, but rejected it on the merits.[10] This was conveyed to the parties by letter on 28 February 2025.[11] The Contractor's counsel updated the court of this development on 5 March 2025.[12]

14 Although the Challenge had been rejected on the merits by the ICC Court, the Contractor asked that SUM 316 only be fixed for further hearing after the ICC Court had communicated its reasons for its decision (as the ICC Court had indicated it would do).[13] The Sub-Contractor, however, did not agree to hold

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10 Contractor's counsel's letter to court dated 5 March 2025 ("Contractor's 5 March Letter") at para 3.

11 Contractor's 5 March Letter at para 3.

12 See, generally, Contractor's 5 March Letter.

13 Contractor's 5 March Letter at para 5.

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in abeyance the further hearing of SUM 316.[14] SUM 316 was fixed for further hearing on 27 March 2025.

15 On 14 March 2025, the ICC Court issued the reasons for its decision on the Challenge ("ICC Court's Reasons").[15] These reasons were addressed in the parties' submissions for SUM 316,[16] and were considered by me in arriving at my decision on 27 March 2025.

The Contractor's appeal

16 On 5 March 2025 (the same day that the Contractor updated the court about the failed Challenge), the Contractor filed an appeal against my decision of 14 February 2025, save for the adjournment of SUM 316 and the remainder of OA 1185 relating to the Lump Sum Payment decision (see [12(a)]–[12(c)] above).

17 These are my grounds of decision in respect of my decision of 14 February 2025, as well as my decision of 27 March 2025.

Preliminary Issue

18 A threshold question was whether the decisions in the First Partial Award that the Contractor sought to set aside were:

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14 Sub-Contractor's counsel's letter to court dated 10 March 2025 at paras 3–6.

15 Contractor's Written Submissions for SUM 316 dated 21 March 2025 ("Contractor's SUM 316 Submissions") at pp 27–33.

16 See, generally, Contractor's SUM 316 Submissions at paras 20–33, and Sub-Contractor's Written Submissions for SUM 316 dated 21 March 2025 ("Sub-Contractor's SUM 316 Submissions") at paras 37–63.

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(a) "awards" as defined under s 2 of the International Arbitration Act 1994 (2020 Rev Ed) (the "IAA"), which were susceptible of being set aside under s 24 of the IAA, or Article 34(1) of the UNCITRAL Model Law on International Commercial Arbitration read with s 3 of the IAA (the "Model Law"); or

(b) "orders or directions" under s 12 of the IAA, which were not susceptible of being set aside, as they were not "awards" as defined under s 2 of the IAA.

Was the Monthly Payment decision a s 2 IAA "award", or a s 12 IAA "order or direction"?

19 Section 12 of the IAA empowers an arbitral tribunal to make orders or give directions for various matters, including interim measures. Section 2 of the IAA defines an "award" as "a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award *but excludes any order or direction made under section 12*". [emphasis added]

20 As such, s 24 of the IAA and Art 34(2) of the Model Law on the setting-aside of "awards" have no application to "orders or directions" under s 12 of the IAA, for those are not "awards" as defined in s 2 of the IAA.

21 The distinction between a s 2 IAA "award" and a s 12 IAA "order or direction" was explained by the Court of Appeal in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 ("*Persero*") at [50]:

> It is evident that provisional awards do not definitively or finally dispose of either a preliminary issue or a claim in an arbitration. Examples of provisional awards include those: (a) maintaining the status quo; (b) preserving assets; (c) preserving evidence or providing for inspection of property; (d) preventing aggravation of the parties' dispute; (e) ordering the provision of security for

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> underlying claims; (f) ordering the provision of security for costs; and (g) ordering compliance with a confidentiality obligation (see Gary B Born, *International Arbitration: Law and Practice* (Wolters Kluwer, 2012) at p 210). An order for the interim payment of damages prior to the final assessment of damages taking place, as is contemplated (in an admittedly different but nonetheless useful context for illustrative purposes) in O 29 r 9 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed), as well as the award dealt with in *Diag Human SE v Czech Republic* [2013] All ER (D) 309 (Oct) (although the tribunal in that case appears, in our judgment, to have mistakenly characterised the award as a partial rather than a provisional award) would also fall in this category. Such orders are inherently capable of being varied in due course. They do not give rise to a finding on or a determination of the substantive rights of the parties and, therefore, are *provisional* in nature. Section 12 of the IAA expressly permits an arbitral tribunal to make several such orders or directions in the course of an arbitration. However, s 2 of the IAA provides that such orders or directions are not to be regarded as "award[s]" for the purposes of the IAA.

22 The following propositions may be drawn from the above:

(a) Section 12 IAA "orders or directions" are *provisional* in nature – they do not definitively or finally dispose of either a preliminary issue or a claim in an arbitration.

(b) A provisional decision is inherently capable of being varied in due course.

(c) An order for interim payment of damages prior to a final assessment is a provisional decision.

(d) How a decision is labelled is not decisive as to its nature – see *Diag Human SE v Czech Republic* [2013] All ER (D) 309 (Oct) (cited by the CA in *Persero* at [50]; see [21] above).

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23 Turning to the Monthly Payment decision, the fact that this decision was contained in a document which the Tribunal called its "First Partial Award" did not necessarily mean that the Monthly Payment decision was a s 2 IAA "award" – see [22(d)] above. Counsel for the Contractor accepted this during the hearing before me.[17]

24 The question was one of substance, not form: what was the nature of the decision? This is reinforced by Article 28(1) of the ICC Rules (on Conservatory and Interim Measures), which states:

> Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons or of an award, as the tribunal considers appropriate.

25 A tribunal might thus decide to order an interim or conservatory measure, and embody that decision in a document called an "award" – but that does not make the decision a s 2 IAA "award". Moreover, a tribunal might issue a document containing several decisions, some of which are s 2 IAA "awards", but others s 12 IAA "orders or directions".

26 On a parity of reasoning, the mere fact that the Sub-Contractor made an application purportedly seeking "interim measures" does not necessarily mean that the decisions made by the Tribunal on that application were s 12 IAA "orders or directions", and not s 2 IAA "awards".

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17 Notes of Evidence ("NEs") dated 14 February 2025 at p 3, lines 1–3.

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27 I found that the Monthly Payment decision was a s 12 IAA "order or direction", and not a s 2 IAA "award". The Monthly Payment decision was a provisional one:

(a) The Monthly Payment decision did not definitively or finally dispose of either a preliminary issue or a claim in the arbitration (see [22(a)] above). In particular, the decision did not definitively or finally decide that the Sub-Contractor was entitled to the Monthly Payment ordered, [27(c)] below).

(b) The Monthly Payment decision was inherently capable of being varied in due course (see [22(b)] above). The decision itself recognised that the Sub-Contractor might subsequently be ordered to repay the Monthly Payment to the Contractor, and so the Monthly Payment order was made subject to the Sub-Contractor providing security for the sum it would receive. The requirement of security was a further indication that the decision was a provisional one; Art 28(1) of the ICC Rules recognises that the arbitral tribunal may make the granting of interim or conservatory measures subject to appropriate security being furnished by the requesting party.

(c) The Monthly Payment decision was an order for interim payment of damages prior to a final assessment, which is a provisional decision (see [22(c)] above). In the arbitration, the Sub-Contractor blamed the Contractor for delays in the completion of the Project, while the Contractor said the delay was solely attributable to the Sub-Contractor.[18] If the Sub-Contractor ultimately succeeded in establishing that the Contractor had delayed the project and so should compensate

[18] Contractor's 1st Affidavit at p 35 (First Partial Award at [33]).

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the Sub-Contractor for delay, the Monthly Payment that the Sub-Contractor received on an interim basis would be accounted for in the final award of damages in its favour. If, however, the Contractor ultimately succeeded on the issue of delay (or succeeded in contending that, in any event, the Sub-Contractor had no entitlement to compensation for delay), it would follow that the Sub-Contractor was not entitled to the Monthly Payment, and the Sub-Contractor would have to return the Monthly Payment. The Tribunal thus made the Monthly Payment order subject to the Sub-Contractor providing security "in the event that repayment is subsequently ordered" (see [27(b)] above). The Tribunal expressly recognised at [35] of the First Partial Award that:[19]

> The purpose of this Partial Award is to consider only the Interim Measures Application made on 3rd November 2023 and the request/application for inspection and production of documents made on 22nd January 2024. In particular:
>
> > (i) The Tribunal has not considered the allocation of responsibility for any period of delay; and
> >
> > (ii) The allegation or allegations of forgery in respect of the Agreement.
>
> Those matters must await the evidential hearing.

28 The Tribunal's reasoning at [85]–[86] of the First Partial Award supported the conclusion that the Monthly Payment order was a provisional one:[20]

> 85. Counsel for the [Contractor] (from page 91 of the Transcript) made a number of points about the unreliability of the financial information provided by the [Sub-Contractor] which he argues calls into question the accuracy of the monthly figure claimed in paragraph 188(a) of the Application. We cannot decide whether those points are justified or not without hearing

[19] Contractor's 1st Affidavit at p 36.

[20] Contractor's 1st Affidavit at pp 49–50.

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> evidence and we do not do so. The Tribunal's concern was foreseen by Counsel for the [Sub-Contractor] who at page 10 of the Transcript lines 6 to 23 proposed that if the Tribunal were minded to make an order it could be supported by a corporate or bank guarantee. The justification is that the relief claimed in paragraph 188(a) is genuinely interim in nature. Counsel for the [Contractor] did not address that proposal in his submissions, preferring to put his emphasis on the "interface" clause (Transcript pages 92-99 lines 21-4).
>
> 86. The Tribunal accepts the [Sub-Contractor's] argument, having rejected the [Contractor's] interpretation of the "interface" clause (see paragraphs 82-4 above). It orders the [Contractor] to pay the [Sub-Contractor] an amount equivalent to USD 172,135.54 per month with effect from 15 June 2023 until the final completion of Part 2 of the Project towards the amount of the [Sub-Contractor's] operational costs per month (including pay and allowances, transport and other mandatory expenses) provided that the [Sub-Contractor] shall first provide a corporate guarantee or other form of security, to secure that sum in the event that repayment is subsequently ordered, agreeable to the [Contractor], whose agreement shall not be unreasonably withheld. In the event that agreement cannot be reached, liberty to apply to the Tribunal. The Tribunal may require submissions on the form and amount of security. The Tribunal has in mind determining any issues arising by way of a procedural order.

29 At [85] of the First Partial Award, the Tribunal noted that the Sub-Contractor had proposed to provide security to support its application for the Monthly Payment order.[21] The Tribunal stated that the justification for such a proposal was that the relief claimed (*ie*, the Monthly Payment) was genuinely interim in nature (as indeed it was). The Tribunal accepted that proposal, and made the Monthly Payment decision subject to the Sub-Contractor providing security to cater for the possibility that repayment might eventually be ordered.

30 On 8 November 2024, the Tribunal heard the parties on the issue of the security to be provided by the Sub-Contractor, following which it determined that the corporate and personal guarantees offered by the Sub-Contractor

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[21] Contractor's 1st Affidavit at pp 49–50.

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provided reasonable protection to the Contractor to secure the Monthly Payment. That decision was embodied in an "Order with Reasons" dated 10 December 2024.[22] At [52] of the Order with Reasons, the Tribunal stated in conclusion:[23]

> The Tribunal therefore determines that the Revised Guarantees offered on 14 November 2024, and attached to this Order, provide adequate security to secure the money, the subject of paragraph 96(i) of the First Partial Award. On execution and delivery of both the Revised Corporate Guarantee and the Revised Personal Guarantee, the [Contractor] must pay the [Sub-Contractor] an amount equivalent to USD172,135.54 per month with effect from 1 June 2023 until the final completion of Part 2 of the Project towards the amount of the [Sub-Contractor's] operational costs per month (including pay and allowances, transport and other mandatory expenses). *That Order is subject to review in the Final Award and is of an interim nature.*
>
> [emphasis added]

31 The Tribunal had stated that the Monthly Payment decision was "subject to review in the Final Award", and that it was of an "interim nature". This cohered with how counsel for the Sub-Contractor had characterised the application for the Monthly Payment, in oral submissions made before the Tribunal:[24]

> … for claim 188(a) [for Monthly Payment], that's an interim award or an interim order, subject to final relief, so it's not in the nature of a summary judgment that we are seeking. The claims (c), (d), (e), (f), (g) [claim (f) being for the Lump Sum Payment of USD 117,339.48] can be said to be in summary nature, because it's like a judgment on admission, or an award on admission. If you agree with us that these are really admitted claims, then you could make that award.

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22 1st affidavit of the Sub-Contractor's representative filed on 17 January 2025 ("Sub-Contractor's 1st Affidavit") at pp 34–48.

23 Sub-Contractor's 1st Affidavit at p 48.

24 Contractor's 1st Affidavit at p 566 (Transcript dated 11 January 2024 at p 66, lines 8–15).

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32 As the Monthly Payment decision was a s 12 IAA "order or direction", it was not susceptible of being set aside under s 24 of the IAA or Article 34(1) of the Model Law read with s 3 of the IAA. It followed that the Contractor's application to set aside the Monthly Payment decision failed.

Was the Lump Sum Payment decision a s 2 IAA "award", or a s 12 IAA "order or direction"?

33 I reached a different conclusion as to the nature of the Lump Sum Payment decision: I found that the Lump Sum Payment decision was not a s 12 IAA "order or direction"; it was instead a s 2 IAA "award".

34 The Lump Sum Payment decision was not a provisional one:

(a) The Lump Sum Payment decision definitively or finally disposed of either a preliminary issue or a claim in the arbitration (see [22(a)] above) – in particular, the Tribunal found that the sum of US$117,339.48 or its equivalent "[was] owing and due to the [Sub-Contractor]"[25] and so required the Contractor to pay that sum to the Sub-Contractor on or before 28 June 2024, unless the Client were to release that sum to the Sub-Contractor on or before 14 June 2024. There was nothing further to be determined at the merits hearing in relation to this item.

(b) The Lump Sum Payment decision was not inherently capable of being varied in due course (see [22(b)] above). Unlike the Monthly Payment decision, the Lump Sum Payment decision did not contemplate the possibility of the Sub-Contractor having to return the Lump Sum

[25] Contractor's 1st Affidavit at p 53 (First Partial Award at [96(vi)]).

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Payment to the Contractor; nor was the Sub-Contractor required to provide security "in the event that repayment [was] subsequently ordered". Indeed, there was no prospect of the Sub-Contractor being ordered to repay what the Tribunal had already found to be owing and due from the Contractor to the Sub-Contractor.

(c) The Lump Sum Payment decision was not an order for interim payment of damages prior to a final assessment (which is a provisional decision; see [22(c)] above). It was, instead, an order for the Contractor to pay a sum that the Tribunal found to be owing and due to the Sub-Contractor. The Lump Sum Payment was not an interim payment, and there would have been no final assessment to come in this regard.

35 The Tribunal's reasoning at [76] of the First Partial Award supported the conclusion that the Lump Sum Payment decision was not provisional in nature.[26] There, the Tribunal stated:

> In relation to the relief claimed at paragraph 188(f) of the Application, the Tribunal finds that the sum of USD 117,339.48 or its equivalent is due to the [Sub-Contractor]. In this respect, the [Contractor] had by letter dated 18 January 2022 (at exhibit R-13) submitted to [the Client] its claim for VAT refund totalling [foreign currency amount] (equivalent to USD 737,638) which included the [Sub-Contractor's] claim for VAT refund equivalent to USD117,339.48 and there is no dispute that the refund would have been made by [the Client] to the [Contractor] but for the fact that the [Contractor's] bank account was frozen. Under Article 15.1 of the Agreement, the [Sub-Contractor] was entitled to be compensated for the introduction of new taxes, which extended to the imposition of VAT. "VAT" is a well-recognised abbreviation for Value Added Tax. The Tribunal orders that unless the [Client] releases that sum so that it is received by the [Sub-Contractor] on or before 14th June 2024 the [Contractor] shall pay that sum to the [Sub-Contractor] on or before 28th June 2024.

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[26] Contractor's 1st Affidavit at pp 47–48.

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36 The Tribunal found that the Lump Sum Payment of US$117,339.48 was owing and due to the Sub-Contractor. The Lump Sum Payment was the Sub-Contractor's claim for VAT refund, which the Sub-Contractor was contractually entitled to be compensated for. The Contractor had included that amount in its own claim for VAT refund to the Client, and there was no dispute that the Client would have refunded that among to the Contractor (including the sum the Sub-Contractor was entitled to) but for the fact that the Contractor's bank account was frozen. Nothing in this regard remained to be determined at the merits hearing. The Tribunal had definitively and finally determined that the Sub-Contractor was entitled to the sum of US$117,339.48, and required the Contractor to pay that.

37 Moreover, counsel for the Sub-Contractor, in its application for the US$117,339.49 payment, said it was seeking a partial *award* as the application was "dispositive on the basis of admissions":[27]

> So far as relief (c), (d), (e), (f) and (g) are concerned [(f) being for the Lump Sum Payment of USD 117,339.49], we would say these matters of a partial award on admission, and that therefore the tribunal, if they are satisfied with what we submit, would make a partial award, because all of them can be dispositive on the basis of admissions.

38 The Sub-Contractor's counsel correctly characterised the Lump Sum Payment sought as being in the nature of a partial award for sums admittedly owing and due. He contrasted that with the "interim nature claims", which included relief (a), for the Monthly Payment.[28]

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27 Contractor's 1st Affidavit at p 511 (Transcript dated 11 January 2024 at p 11, lines 8–15).

28 Contractor's 1st Affidavit at p 511 (Transcript dated 11 January 2024 at p 11, lines 8–15, 20–23).

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39 In the First Partial Award, the Tribunal agreed with the Sub-Contractor's counsel that what was sought in relation to the Lump Sum Payment of US$117,339.49, was an award on the basis of admissions:

> 52. … by the date when the application was heard the Application for Interim measures had become an application on the basis of admissions and in broad terms the [Contractor] admitted that the sums are due: see pages 11,12,17,18 and 66 of the Transcript of the hearing. No doubt it was because of that that although the requirements for the grant of interim measures were canvassed in the Parties' Written Submissions, they were not the subject of oral argument. In those circumstances there is no need for the Tribunal to consider the criteria for the grant or refusal of interim measures.
>
> […]
>
> 64. Counsel for the [Sub-Contractor] made plain that in relation to the relief sought at paragraphs 188(c)–(g) [including 188(f) for the Lump Sum Payment] that he was seeking relief on the basis of admissions (Transcript page 11 line 10) As set out at paragraph 66 below Counsel referred to correspondence between the parties in order to make good that assertion.

40 I found that the Lump Sum Payment decision was a s 2 IAA "award", and as such, it was susceptible of being set aside. With that, I turned to consider the case for setting-aside.

Should the decisions be set aside?

Should the Lump Sum Payment decision be set aside?

41 The Contractor sought to set aside the Lump Sum Payment decision on the following two bases:

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(a) under Art 34(2)(*a*)(iii) of the Model Law, because the Lump Sum Payment decision dealt with a matter falling outside the scope of submission to arbitration;[29] and

(b) under s 24(*b*) of the IAA and/or Art 34(2)(*a*)(iii) of the Model Law because there was a breach of natural justice that had caused prejudice to the Contractor, namely that the Tribunal had failed to consider a key argument raised by the Contractor.[30]

Exceeding scope of submission to arbitration

42 The Contractor's contention was as follows:[31]

(a) the Lump Sum Payment decision was not an interim measure, it was final relief;

(b) as such, the claim for the Lump Sum Payment had to have been pleaded in the statement of claim filed before the Tribunal on 3 November 2023 (the "Statement of Claim") to be within the scope of submissions;

(c) as the claim for the Lump Sum Payment was not pleaded in the Statement of Claim (nor was it stated in the terms of reference dated 11 October 2023 ("Terms of Reference")), the Lump Sum Payment decision dealt with a matter falling outside the scope of submission to arbitration.

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29 Contractor's 1st Affidavit at paras 52, 58–62.

30 Contractor's 1st Affidavit at paras 52 and 63.

31 Contractor's 1st Affidavit at paras 53–63; Contractor's Written Submissions dated 7 February 2025 ("Contractor's OA Submissions") at paras 72–81.

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43 The Contractor contended that the Lump Sum Payment was not within the scope of submission to arbitration because it was final relief, which had not been pleaded in the Statement of Claim.

44 In its submissions, however, the Contractor acknowledged that in considering whether matters fell within the scope of submission to arbitration, the court would not only consider the pleadings, but also the agreed list of issues, opening statements, evidence adduced, and closing submissions: *CDM v CDP* [2021] 2 SLR 235 at [18].[32] This position is further supported by the case of *CEF v CEH* [2022] 2 SLR 918 ("*CEF v CEH*"), where the Court of Appeal recognised (at [68]) that "[a]n issue which surfaces in the course of an arbitration and which is known to all the parties is within the scope of the submission to arbitration event if it is not part of any memorandum of issues or pleading".

45 In similar vein, I noted that the Contractor's affidavit did not merely say that the Lump Sum Payment was absent from the *Statement of Claim*, but also that it was absent from the *Terms of Reference*.[33] In this regard, the following chronology should be noted:

(a) the Terms of Reference were dated 11 October 2023;[34]

(b) the Statement of Claim was dated 3 November 2023;[35] and

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32 Contractor's OA Submissions at para 74.

33 Contractor's 1st Affidavit at para 61.

34 Contractor's 1st Affidavit at p 658.

35 Contractor's 1st Affidavit at p 221.

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(c) the First Partial Award was dated 19 June 2024.[36]

46 The Terms of Reference pre-dated the Statement of Claim. As such, the Terms of Reference did not purport to comprehensively set out the issues which the Tribunal would determine. The Terms of Reference stated at para 17:[37]

> Subject to Article 23(4) of the ICC Rules, the issues to be determined by the Arbitral Tribunal shall be those factual or legal issues resulting from the Parties' submissions, including forthcoming submissions, which are relevant to the adjudication of the relief respectively sought by the Parties, in particular of the claims, counter claims and defences raised and including any further questions of fact or law which the Arbitral Tribunal, in its discretion, may deem necessary or appropriate to decide upon, after hearing the Parties, for the purpose of resolving the present dispute. Pursuant to Article 23(1)(d) of the ICC Rules, the Arbitral Tribunal deems it inappropriate to set out an exhaustive list of issues to be determined.

47 At para 18 of the Terms of Reference, it was noted that the Sub-Contractor had requested that the formal memorandum of issues be determined and framed after completion of the pleadings by the parties, and therefore, the Sub-Contractor was not setting out its detailed list of issues at that time.[38] It was similarly noted that the Contractor was *also* not setting out its detailed list of issues at that time.[39]

48 Turning to the Statement of Claim, the Sub-Contractor sought both "interim reliefs" (as referred to at para 332(a) of the Statement of Claim) and "final reliefs" (as referred to at para 332(b) of the Statement of Claim).[40]

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36 Contractor's 1st Affidavit at p 26.

37 Contractor's 1st Affidavit at pp 675–676.

38 Contractor's 1st Affidavit at p 677.

39 Contractor's 1st Affidavit at p 677.

40 Contractor's 1st Affidavit at pp 321–323.

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49 The Contractor complained that while the Lump Sum Payment decision was in the nature of final relief, it did not correspond with any final relief sought in para 332(b) of the Statement of Claim.[41] There was, however, also para 332(a) of the Statement of Claim, which stated:

> **Interim Reliefs**: It is humbly submitted that the [Sub-Contractor] has sought certain urgent interim reliefs vide Application for Urgent Interim Reliefs dated 3 November 2023.

50 As that indicated, the Interim Measures Application was filed on the same date as the Statement of Claim (3 November 2023). In that application, an order for payment of US$117,339.48 (the Lump Sum Payment) was sought.[42]

51 I agreed with the Contractor that the Lump Sum Payment decision was not a s 12 IAA "order or direction"; it was a s 2 IAA "award" – specifically, a partial award on that aspect of the Sub-Contractor's claims. The Lump Sum Payment decision ordering payment of US$117,339.48 was in the nature of final relief, not interim relief. That did not, however, mean that it was a matter falling outside the scope of submission to arbitration. The claim for US$117,339.48 was contained in the Interim Measures Application, filed at the same time as the Statement of Claim; the Interim Measures Application was referred to at para 332(a) of the Statement of Claim, and was thereby incorporated by reference. Moreover, para 17 of the Terms of Reference recognised that the issues to be determined by the Tribunal "shall be those factual or legal issues resulting from the Parties' submissions, including forthcoming submissions, which are relevant to the adjudication of the relief respectively sought by the Parties".[43] The Interim

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41 Contractor's 1st Affidavit at para 54; Contractor's OA Submissions at para 89.

42 Contractor's 1st Affidavit at p 324–367 (Claimant's Application for Urgent Interim Measures at paras 100, 110, 185 and 188(f)).

43 Contractor's 1st Affidavit at pp 675–676.

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Measures Application would have been one such "submission", and payment of the US$117,339.48 was "relief…sought by the Parties".

52 It followed that the Lump Sum Payment decision had not dealt with a matter falling outside the scope of submission to arbitration.

Breach of natural justice

53 The Contractor complained that (a) it had argued that the Lump Sum Payment did not correspond to any final relief at para 332(b) of the Statement of Claim, and that interim relief could only be granted in aid of final relief; but (b) the Tribunal did not expressly deal with this argument in the First Partial Award.[44]

54 I agreed with the Contractor that the Lump Sum Payment decision was final relief. It thus followed that the Contractor's argument, that the Lump Sum Payment decision should not have been granted as interim relief, was thus moot. In relation to that claim, the Tribunal had granted *final* relief. The Tribunal's reasoning was amply set out at [76] of the First Partial Award: see [35]–[36] above. There was no need for the Tribunal to specifically address the Contractor's argument about interim relief being in support of final relief, when it had not granted interim relief.

55 The Contractor also argued that the Lump Sum Payment decision should not have been made without a "full evidentiary hearing".[45] This was a different point from its argument that interim relief could only be granted in aid of final relief. In this regard, I noted that the Contractor, in its Respondent's Reply to

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44 Contractor's 1st Affidavit at para 54; Contractor's OA Submissions at paras 84–91.

45 Contractor's 1st Affidavit at paras 65, 86 and 89.

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the Claimant's Application for Urgent Interim Measures dated 29 December 2023 ("Interim Measures Reply"),[46] did not seek an evidentiary hearing for the claim for the Lump Sum Payment of US$117,339.48, nor did its counsel at the hearing of the application.

56 Instead, the Contractor resisted that claim on the basis of a pay-when-paid argument, which the Tribunal rejected at [69]–[71] of the First Partial Award.[47] In particular, the Tribunal stated at [71] of the First Partial Award:[48]

> The Tribunal is of the view that a pay when paid clause is not intended to apply where, as here, there is no dispute that the money is due to the [Sub-Contractor] but the reason it has not been paid is because the [Client] cannot pay it due to the supervening act of the [Contractor's] bank account having been frozen.

57 At the hearing before the Tribunal, the Contractor's counsel said that the Contractor had written to the Client to directly release payment of the US$117,339.48 (to the Sub-Contractor).[49] Subject to the "pay-when-paid" argument (which later failed), the Contractor did not dispute that the Sub-Contractor was entitled to payment of the US$117,339.48.[50] The Contractor's counsel did not contend, in the alternative, that relief in respect of the US$117,339.48 could only be granted after a "full evidentiary hearing".

58 It was telling that neither in the Contractor's affidavit nor submissions, did the Contractor say what it *could* have put forward at a "full evidential

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46 Contractor's 1st Affidavit at p 449.

47 Contractor's 1st Affidavit at pp 45–46.

48 Contractor's 1st Affidavit at pp 45–46.

49 Contractor's 1st Affidavit at p 590 (Transcript dated 11 January 2024 at p 90, lines 1–2).

50 Contractor's 1st Affidavit at p 586 (Transcript dated 11 January 2024 at p 86, lines 5–22).

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hearing" to dispute the Sub-Contractor's entitlement to the sum of US$117,339.48. Instead:

(a) the Contractor had included that sum in its own claim to the Client for VAT refund (in effect, admitting the Sub-Contractor's claim, subject to the "pay-when-paid" argument);[51]

(b) there was no dispute that the refund would have been made by the Client to the Contractor (and in turn by the Contractor to the Sub-Contractor) but for the fact that the Contractor's bank account was frozen;[52] and

(c) as the Contractor's counsel said at the hearing, the Contractor had asked the Client to pay that amount directly to the Sub-Contractor.[53]

59 The Lump Sum Payment decision thus involved no breach of natural justice.

60 In any event, the Tribunal was not deprived of "the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to [its] deliberations" (*JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 at [194], citing *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 123 ("*L W Infrastructure*") at [54]). As such, no prejudice was caused to the Contractor.

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51 Contractor's 1st Affidavit at p 47 (First Partial Award at para 76).

52 Contractor's 1st Affidavit at p 586 (Transcript dated 11 January 2024 at p 86, lines 5–22).

53 Contractor's 1st Affidavit at p 577 (Transcript dated 11 January 2024 at p 77, lines 2–6).

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61 In view of the above, I decided on 14 February 2025 that the application to set aside the Lump Sum Payment decision was not granted on the material that was before the court.

62 SUM 316 (to add a further basis for setting-aside) remained pending, and I adjourned that, as well as OA 1185 (in relation to the Lump Sum Payment decision), for further hearing.

Should the Monthly Payment decision be set aside?

63 As explained above (at [19]–[32]), the Monthly Payment decision was not an "award" under s 2 of the IAA that was susceptible of being set aside. That was sufficient for me to dismiss the Contractor's application to set aside that decision.

64 For completeness, though, if the Monthly Payment decision were an "award" susceptible to being set aside, I would not have set it aside, for the Contractor had failed to establish grounds for doing so.

65 The Contractor sought to set aside the Monthly Payment decision under s 24(*b*) of the IAA and/or Art 34(2)(*a*)(ii) of the Model Law, claiming that there was a breach of natural justice that had caused prejudice to the Contractor. In particular, the Contractor alleged a breach of the "Fair Hearing Rule".[54]

66 The Contractor's contention was that it did not have a reasonable opportunity to address the basis (or bases) on which the Monthly Payment decision was made.

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[54] Contractor's 1st Affidavit at paras 23–24, 37–49.

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67 The Contractor recognised that:

(a) the Sub-Contractor had applied for the Monthly Payment in its Interim Measures Application of 3 November 2023;

(b) the Contractor had the opportunity to respond to the Interim Measures Application by 29 December 2023; and

(c) the Contractor replied to the Interim Measures Application by filing the Interim Measures Reply on 29 December 2023,[55] in which the Contractor specifically replied to the application for the Monthly Payment.[56]

68 However, the Contractor claimed that it only made two points in response to the Sub-Contractor's application for the Monthly Payment:[57]

(a) First, the Contractor argued that the Sub-Contractor could not rely on Article 6.4, Schedule 2 of the Agreement because there was an issue whether the version of the Agreement containing the clause was forged. Article 6.4 stated: "*In the event of delay in handing over the Site to [the Sub-Contractor] to commence/finish their work as per agreed work schedule, suitable compensation will be mutually agreed and paid by [the Contractor] to the [Sub-Contractor]*." ("Article 6.4 Argument")

(b) Second, the Contractor argued that the "Interface Clause" about interface with designated sub-contractors/associates barred the Sub-

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55 Contractor's 1st Affidavit at p 449.

56 Contractor's 1st Affidavit at p 449–475 (Interim Measures Reply at paras 9, 64, 68–76).

57 Contractor's OA Submissions at paras 43–45, 50–52.

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Contractor's claim for the Monthly Payment ("Interface Clause Argument").

69 In view of the allegations of forgery raised in the Article 6.4 Argument (at [68(a)] above), the Tribunal did not base its Monthly Payment decision on Article 6.4 (see [37] of the First Partial Award).[58]

70 In relation to the Interface Clause Argument (at [68(b)] above), the Tribunal decided that the "Interface Clause" did not give the Contractor a defence to the claim for the Monthly Payment: [82]–[84] of the First Partial Award.[59]

71 As the Tribunal proceeded to make the Monthly Payment decision in favour of the Sub-Contractor, the Contractor contended that the Tribunal must have made its decision on some basis (or bases) that the Contractor had not responded to in its Interim Measures Reply, and thus, there was a breach of natural justice.

72 That contention was flawed. The issue was not whether the Contractor *had addressed* all arguments raised in the Sub-Contractor's application for the Monthly Payment, but whether the Contractor had a *reasonable opportunity to address* those arguments. The Contractor obviously had a reasonable opportunity to address the Sub-Contractor's application for the Monthly Payment:

(a) First, the Contractor was given the opportunity to reply to the Interim Measures Application by 29 December 2023, and it took that

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58 Contractor's 1st Affidavit at p 37.

59 Contractor's 1st Affidavit at p 49.

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opportunity by filing its Interim Measures Reply (which included a response to the application for the Monthly Payment).

(b) Second, the parties had the opportunity to file written submissions. The Sub-Contractor did so on 5 January 2024;[60] the Contractor had four days thereafter to file responsive written submissions, but the Contractor did not take the opportunity to do so;[61]

(c) Third, the parties had the opportunity to make oral submissions at the hearing on 11 January 2024, and both parties' counsel did so – addressing matters that included the application for the Monthly Payment.[62]

73 In its affidavit filed in support of OA 1185, the Contractor contended that the Tribunal must have relied on an argument *put forward by the Sub-Contractor* but not responded to by the Contractor, and said that that was a breach of natural justice.[63] However, the Contractor's position subsequently shifted. In its written submissions, it suggested that the Tribunal might have made the Monthly Payment decision on *some other legal basis – known only to itself – on which neither party made any arguments*.[64] This contention was baseless – there was nothing in the First Partial Award supporting the conclusion that the Tribunal had made the Monthly Payment decision on some legal basis that had not been put before it, and indeed, the Contractor did not point to anything in the First Partial Award that might support this contention.

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60 Contractor's 1st Affidavit at p 476.

61 Sub-Contractor's 1st Affidavit at para 49.

62 Contractor's 1st Affidavit at para 34.

63 Contractor's 1st Affidavit at paras 37–39.

64 Contractor's OA Submissions at paras 48, 54–56.

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On the contrary, in making the Monthly Payment decision, the Tribunal stated at [86] of the First Partial Award:[65] "[t]he Tribunal *accepts the [Sub-Contractor's] argument*, having rejected the [Contractor's] interpretation of the 'interface' clause". The Tribunal then proceeded to order the Contractor to make the Monthly Payment.

74 The position was thus:

(a) the Tribunal (as it said) accepted the Sub-Contractor's argument that it was entitled to the Monthly Payment;

(b) the Contractor had a reasonable opportunity to address the Contractor's application for the Monthly Payment;

(c) the Contractor took the opportunity to do so by filing the Interim Measures Reply, and by its counsel making oral submissions at the hearing (although it did not file written submissions).

75 If the Contractor's response were incomplete, and it had not addressed some argument by the Sub-Contractor that eventually found favour with the Tribunal, the fact remained that the Contractor was given a reasonable opportunity to address the Sub-Contractor's application and arguments. There was no breach of natural justice.

76 The Contractor sought to explain away its incomplete response, by describing the arguments it did not respond to as "perfunctory".[66] However, in this setting-aside application, it was well able to identify and set out those

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65 Contractor's 1st Affidavit at p 50.

66 Contractor's 1st Affidavit at para 43.

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allegedly "perfunctory" arguments. In the Contractor's 1st Affidavit, the Contractor reproduced various assertions made by the Sub-Contractor in the arbitration proceedings, which included:[67]

(a) Paragraph 211 of the Statement of Claim, in which the Sub-Contractor asserted that it had insisted on amending the Agreement to include Article 6.4, owing to its past experience of having to absorb delay costs at the behest of the Contractor. Article 6.4 read, among others:

> In the event of delay in handing over the Site to [the Sub-Contractor] to commence / finish their work as per agreed work schedule, suitable compensation will be mutually agreed and paid by [the Contractor] to the [Sub-Contractor].

(b) Paragraph 212 of the Statement of Claim, where the Sub-Contractor asserted, in addition to its entitlement under Article 6.4 of the Agreement, its entitlement to relief under Article 13 of the Agreement, and a provision of country X's laws. Article 13 read, among others:

> If the completion period is extended due to the reasons not solely attributable to the [Sub-Contractor] and its Associates, the completion period shall be mutually discussed and agreed.

(c) Paragraph 60 of the Sub-Contractor's written submissions filed in support of the Interim Measures Application, in which the Sub-Contractor asserted its entitlement to the reliefs sought under Article 13 and the provisions of country X's laws (with the specific aspects quoted in the Contractor's 1st Affidavit underlined):

> The [Contractor] on one hand has alleged that the Claimant has furnished a forged copy of the Agreement. On the other hand, [Sub-Contractor] has produced

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67 Contractor's 1st Affidavit at paras 27, 29 and 31.

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> multiple versions of what it alleges to be the final executed version of the Agreement. The [Sub-Contractor] will demonstrate during the hearing that what documents have been produced by the [Contractor] cannot be the original Agreement. Without prejudice to the above, the reliefs sought by the [Sub-Contractor] in the instant Application are not emanating from Article 6.4 of the Agreement or even dependent upon the existence of the said clause. While the versions of the agreement sought to be relied upon by the parties differ, the contractual relationship is not in dispute and the execution of the contractual works is not in dispute either. Without prejudice to the [Sub-Contractor's] contention that Article 6.4 of the Agreement (sic), this issue cannot be an impediment on the Arbitral Tribunal while adjudicating the [Sub-Contractor's] interim reliefs. Even otherwise, both under Article 13 of the Agreement and under the provisions of [country X's] law, the [Sub-Contractor] is entitled to the reliefs it has sought.

77 There was nothing *perfunctory* about those arguments. In particular, at para 30 of its written submissions, the Sub-Contractor plainly stated that its claim for the Monthly Payment was not dependent on the existence of Article 6.4 of the Agreement – the Sub-Contractor had asserted that it was nevertheless entitled to the reliefs it had sought under both Article 13 of the Agreement, and relevant provisions of country X's laws. The same point had been made in para 219 of the Statement of Claim:[68]

> However, in any event, even in the absence of Article 6.4, Schedule 2 of the Agreement, independently each of Article 13 and [country X's law] entitles the [Sub-Contractor] to compensation of the amounts claimed. The facts demonstrate that there has been massive delay in the completion of the Project due to actions and inactions of the [Contractor]. The said delay has severely impacted the [Sub-contractor] and have exposed it to contractual risks, which was neither agreed by the [Sub-Contractor] nor does it make any commercial sense for the [Sub-Contractor] to be saddled with financial liability for delays and defaults of the [Contractor].

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68 Contractor's 1st Affidavit at p 290.

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78 The Sub-Contractor also relied on Article 13 of the Agreement as providing for consequences of delay, at para 223 of the Statement of Claim.[69]

79 Further, the Sub-Contractor had cited the particular provision of country X's laws that it was relying upon at para 238 of the Statement of Claim,[70] para 105 of the Interim Measures Application,[71] and para 26 of its written submissions for the Interim Measures Application.[72] Thus, the Contractor was well able to identify the legal provision in question, as it did at para 30 of the Contractor's 1st Affidavit.

80 If (as the Contractor acknowledged), the Sub-Contractor had not relied solely on (a) the disputed Article 6.4 of the Agreement but also on (b) Article 13 of the Agreement, and (c) a particular provision of country X's laws, by only addressing the first of these three points, the Contractor ran the risk that the Tribunal might find in favour of the Sub-Contractor on the second or third points, which the Contractor would then not have addressed. This was so even if the Sub-Contractor's arguments *were* perfunctory (a characterisation I did not agree with).

81 There is no breach of natural justice if a party does not address an argument that he had a reasonable opportunity to address.

82 In *CEF v CEH*, the appellants' natural justice challenge failed, with the court observing (at [81]):

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69 Contractor's 1st Affidavit at pp 290–291.

70 Contractor's 1st Affidavit at p 293.

71 Contractor's 1st Affidavit at pp 348–349.

72 Contractor's 1st Affidavit at p 483.

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> … there was a tactical burden on the appellants to take a position on counter-restitution as a natural consequence of rescission […] the appellants were well aware that counter-restitution *in specie* was a live issue in the Arbitration and simply chose to conduct their case without addressing the possibility that this relief would be ordered.

83 Similarly, in *DGE v DGF* [2024] SGHC 107, the natural justice challenge failed, with the court observing (at [89]–[92]) that on a particular issue, a party could adopt the case strategies of (a) hoping that the opposing party would not address the issue; or (b) assessing the steps it could take to address the issue. If the party chose the former, it could not be said to have been deprived of a reasonable opportunity to address the issue.

84 Ultimately, the Contractor had only itself to blame for how it did (or did not) respond to the Sub-Contractor's application for the Monthly Payment. There was no breach of natural justice, and the application to set aside the Monthly Payment decision would have failed accordingly.

Should the Contractor be allowed to introduce apparent bias as a new basis for setting-aside?

Preliminary observations

85 By SUM 316, the Contractor sought to add another basis for setting-aside, namely apparent bias of one of the arbitrators. The Contractor expressly recognised that this was a new basis that had not been raised in its initial supporting affidavits; it sought the court's permission to introduce facts and evidence in support of this new basis.[73]

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[73] 2nd affidavit of the Contractor's representative filed on 5 February 2025 ("Contractor's 2nd Affidavit") at para 6.

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86 In support of the application to add a new basis for setting-aside, the Contractor's representative filed a second affidavit on 5 February 2025 (the "Contractor's 2nd Affidavit), exhibiting (among other documents):

(a) the Contractor's Challenge, dated 19 January 2025;[74]

(b) the Sub-Contractor's Reply to the Challenge, dated 23 January 2025;[75]

(c) the Subject Arbitrator's Response, dated 23 January 2025;[76]

(d) the Contractor's Additional Submissions for the Challenge, dated 28 January 2025;[77] and

(e) the Sub-Contractor's Response to the Contractor's Additional Submissions, dated 28 January 2025.[78]

87 I first considered two preliminary points:

(a) whether the Contractor was precluded from introducing a new basis for setting-aside, after the three-month period allowed for applications to set-aside awards had passed; and

(b) the effect of the ICC Court's decision on the Challenge.

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74 Contractor's 2nd Affidavit at p 11.

75 Contractor's 2nd Affidavit at p 610.

76 Contractor's 2nd Affidavit at p 1062.

77 Contractor's 2nd Affidavit at p 1074.

78 Contractor's 2nd Affidavit at p 1086,

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Was the Contractor precluded from introducing a new basis for setting-aside, after the three-month period allowed for applications to set-aside awards had passed?

88 The Contractor was not precluded from seeking the court's permission to introduce a new basis for setting-aside, just because SUM 316 had not been filed within the three-month period allowed for applications to set aside awards.

89 In *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines* LLC [2021] 1 SLR 1045 ("*Bloomberry*"), the Court of Appeal held (at [81], [84] and [91]) that Art 34(3) of the Model Law prevents a court from entertaining setting-aside applications brought under Art 34 of the Model Law after the expiry of the three-month period for such applications to be brought, and that this applied to setting-aside applications under s 24 of the IAA as well. *Bloomberry* was, however, a case where *no* setting-aside application was brought within the prescribed three-month period.

90 As explained in *BZW v BZV* [2022] 1 SLR 1080 ("*BZW v BZV*") (at [44] and [48]), what needs to be filed within the three-month period is a setting-aside application that briefly states the provisions of the IAA or Model Law that are relied upon. In *BZW v BZV*, only the supporting affidavit was filed after the three-month period. and the application was not thereby out of time (at [40]–[45]).

91 In the present case, this originating application to set aside aspects of the First Partial Award had duly been filed within the prescribed three-month period, and the supporting affidavits were also filed at the same time as the application. The question was whether the court should permit a *supplementary* affidavit to be filed, outside the prescribed three-month period for the bringing of a setting-aside application, to add a *new basis* for setting aside the *same parts*

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of the First Partial Award that the Contractor had applied to set aside. On the authority of *BZW v BZV*, there was no issue of time-bar – if a supporting affidavit can be filed outside the three-month period, so too can a supplementary affidavit.

92 Instead, when the setting-aside application has already been served with its supporting affidavit(s), and the applicant wishes to file a supplementary affidavit, the issue is whether the court should give the applicant permission to do so.

93 In *BTN v BTP* [2022] 4 SLR 683 ("*BTN v BTP*"), the High Court held (at [62]) that the setting-aside application and the affidavit(s) in support are meant, *compendiously*, to inform the defendant of the specific grounds on which the arbitral award is being challenged. The court went on to say (at [63]) that while it may be common practice for an applicant to file further reply affidavits in response to the defendant's affidavits opposing the setting-aside application, "this does not mean that the plaintiff should be permitted to advance *new grounds* in *subsequent* affidavits by ***introducing new facts and circumstances that could and should have been raised at first instance***." [emphasis in original in italics, emphasis added in bold italics]

94 On the facts of *BTN v BTP*, the court found (at [65]) that the issue in question was not a new issue or ground raised by the applicants only in a subsequent affidavit, although the court considered the applicants' first affidavit to be sorely lacking in detail. The court further found (at [67]) that (a) no prejudice had been occasioned since the defendants had the opportunity to respond to the applicants' subsequent affidavit by way of subsequent reply affidavits; and (b) the issue was fully dealt with in evidence and submissions.

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As such, the court decided that the applicants were not precluded from raising the issue in question.

95 In the present case, the allegation of apparent bias was an admittedly new basis for setting-aside that was not raised at all in the setting-aside application and supporting affidavits. The court nevertheless had a discretion whether to allow the introduction of facts and evidence in relation to the new basis. I explain below at [101]–[185] how I exercised this discretion.

Effect of the ICC Court's decision on the Challenge

96 Article 11(1) of the ICC Rules provides that "[e]very arbitrator must be and remain impartial and independent of the parties involved in the arbitration." Article 11(2) of the ICC Rules provides that a prospective arbitrator "shall disclose […] any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality".

97 Article 14 of the ICC Rules provides:

> ARTICLE 14 CHALLENGE OF ARBITRATORS
>
> 1. A challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based.
>
> 2. For a challenge to be admissible, it must be submitted by a party either within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification.

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> 3. The Court shall decide on the admissibility and, at the same time, if necessary, on the merits of a challenge after the Secretariat has afforded an opportunity for the arbitrator concerned, the other party or parties and any other members of the arbitral tribunal to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.

98 The Contractor challenged the subject arbitrator's impartiality and independence under Art 14 of the ICC Rules.[79] The ICC Court dismissed that Challenge – that decision of the ICC Court is described as "final" in Art 11(4) of the ICC Rules, which provides:

> The decisions of the court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final.

99 That, however, only meant that the ICC Court would generally not reconsider its decision: *Handbook of ICC Arbitration* (5th Edition) (the "ICC Handbook") at para 11-41; it did not mean that the ICC Court's decision on the allegation of apparent bias could not be inquired into by the courts, if there were a court challenge to the arbitrator, an application for setting-aside, or an application to resist enforcement: ICC Handbook at paras 11-42, 14-10 to 14-14; see also *AT&T Corp Lucent Technologies v Saudi Cable Co* [2000] 2 All ER (Comm) 625 at [49]–[50]; *Aiteo Eastern E&P Co Ltd v Shell Western Supply and Trading Limited* [2024] EWHC 1993 (Comm) ("*Aiteo*") at [115]–[135]. The court in *Aiteo* stated at [140] that a decision of an institution like the ICC Court on a challenge to an arbitrator would be accorded "considerable respect", but also recognised that it was possible for a different view to be reached "notwithstanding that respect".

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[79] Contractor's 2nd Affidavit at p 12 (Contractor's Challenge at paras 3-4).

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100 Thus, the fact that the ICC Court had rejected the Challenge on the merits did not preclude the Contractor from seeking to set aside aspects of the First Partial Award on the basis of apparent bias, before the Singapore courts.

Exercise of the court's discretion whether to allow the introduction of apparent bias as a new basis for setting-aside

101 In exercising my discretion on whether to allow the Contractor to introduce apparent bias as a new basis for setting-aside, I considered in particular:

(a) whether the new basis of apparent bias "could and should have been raised at first instance" (*BTN v BTP* at [63]); and

(b) whether the new basis of apparent bias was hopeless.

Whether the new basis of apparent bias "could and should have been raised at first instance"

102 The Contractor's position was that it only came to know of the facts and circumstances underlying the new basis on 17 January 2025,[80] when its lawyers came to know – from a 5 July 2024 judgment (the "Prior Judgment") – that:

(a) the Sub-Contractor's chairman had been involved in a court case concerning a prior arbitration in which he was the claimant (the "Prior Arbitration");[81]

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80 Contractor's 2nd Affidavit at p 13 (Contractor's Challenge at para 9).

81 Contractor's 2nd Affidavit at p 13 (Contractor's Challenge at para 10).

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(b) the subject arbitrator was one of the members of the arbitral tribunal for the Prior Arbitration, in which the award was made on 16 April 2021;[82] and

(c) the Sub-Contractor's chairman was represented by the same law firm and common counsel, as those that represented the Sub-Contractor in the present arbitration against the Contractor.[83]

103 The Sub-Contractor disputed this chronology. It submitted that the Prior Judgment was an important one in the arbitration community; it was mentioned in a popular legal publication on 16 July 2024, and a social media post on the same article had three "likes" from lawyers in the law firm representing the Contractor.[84] The Sub-Contractor thus contended that the Contractor's counsel had known about the Prior Judgment in around July or August 2024, and the Challenge was accordingly time-barred,[85] – since under Article 14(2) of the ICC Rules (quoted at [97] above), the Challenge had to be brought "within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based".

104 In finding the Challenge admissible, the ICC Court rejected the time-bar objection. In the ICC Court's Reasons, it said it accepted that (a) the Contractor's counsel had only become aware of the Prior Judgment on 17

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82 Contractor's 2nd Affidavit at p 13 (Contractor's Challenge at para 10).

83 Contractor's 2nd Affidavit at pp 13–14 (Contractor's Challenge at para 11).

84 Contractor's 2nd Affidavit at pp 617–618 (Sub-Contractor's Reply to the Challenge at paras 38–40).

85 Contractor's 2nd Affidavit at pp 618–619 (Sub-Contractor's Reply to the Challenge at paras 41–48).

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January 2025;[86] (b) the Contractor could not be criticised for not having done searches on the Sub-Contractor's chairman earlier on;[87] and (c) the ICC Court could not assume that the Contractor's counsel was previously aware of the Prior Judgment or the Prior Arbitration.[88] In relation to point (c), the ICC Court noted that counsel are not expected to know or recall the names of all judgments discussed in publications, let alone the composition of the arbitral tribunals in respect of challenged awards.[89]

105 I reached the same conclusion as the ICC Court, and found that the Challenge was not time-barred. The Contractor's chronology of events regarding how its counsel team came to know of the Prior Judgment was deposed to in an affidavit from a lawyer in that team.[90] The lawyer said that he came across the Prior Judgment when he was doing a search on the Sub-Contractor's chairman, as part of preparations for cross-examination. I could not disbelieve him based on the circumstantial evidence cited by the Sub-Contractor, so as to reach the conclusion that the Contractor's counsel team must have known about the Prior Judgment from around July or August 2024.

106 As such, I accepted the Contractor's position that the new basis of apparent bias was not something that "could and should have been raised at first instance" (when the setting-aside application and supporting affidavits were filed on 13 November 2024), for it was only on 17 January 2025 that the

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86 Contractor's SUM 316 Submissions at p 31 (ICC's Court's Reasons at para 21(a)).

87 Contractor's SUM 316 Submissions at p 31 (ICC's Court's Reasons at para 21(a)).

88 Contractor's SUM 316 Submissions at p 31 (ICC's Court's Reasons at para 21(b)).

89 Contractor's SUM 316 Submissions at p 31 (ICC's Court's Reasons at para 21(b)).

90 Contractor's 2nd Affidavit at pp 1095–1098.

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Contractor's counsel team (and thus the Contractor) came to know of the subject arbitrator's involvement in the Prior Arbitration.

Whether the new basis of apparent bias was hopeless

107 In their submissions for SUM 316, both parties addressed not only whether the new basis of apparent bias *was hopeless* (which was relevant to whether SUM 316 should be allowed), but also whether the new basis of apparent bias *would succeed* as a basis for setting-aside.[91] I thus had full submissions on the merits (or lack thereof) of the new basis of apparent bias.

108 By analogy with applications to amend cause papers to add a new claim or defence, the Contractor should not be allowed to introduce apparent bias as a new basis for setting-aside, if that new basis were bound to fail: *Ng Chee Weng v Lim Jit Ming Bryan* [2012] 1 SLR 457 at [106]; see also *Lim Yong Swan v Lim Jee Tee* [1992] 3 SLR(R) 940 at [43].

109 In oral submissions, the Contractor's counsel accepted that if the new basis were hopeless, SUM 316 should be dismissed.[92] However, he submitted that this was a high threshold that had not been met.[93]

110 I will first summarise the ICC Court's Reasons for rejecting the Challenge on its merits, before discussing my own analysis.

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91 Contractor's SUM 316 Submissions at paras 12–34; Sub-Contractor's SUM 316 Submissions at paras 36–63.

92 NEs dated 27 March 2025 at p 1.

93 NEs dated 27 March 2025 at p 1.

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(1) The ICC Court's Reasons

111 The ICC Court considered:

(a) Whether the subject arbitrator should have disclosed his appointment as arbitrator in the Prior Arbitration;[94]

(b) Whether that prior appointment gave rise to apparent bias;[95] and

(c) Whether the circumstances of non-disclosure gave rise to apparent bias.[96]

(A) WHETHER THERE HAD BEEN A FAILURE TO DISCLOSE

112 The ICC Court accepted the subject arbitrator's explanation that it was only in October 2024 that he became aware that the claimant in the Prior Arbitration was the chairman of the Sub-Contractor (who was the claimant in the present arbitration), and at that point he considered whether disclosure should be made.[97]

113 The ICC Court accepted that the subject arbitrator had properly considered para 27 of the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (1 January 2021) (the "ICC Note"),[98] and that he had reasonably considered other guidance,

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94 Contractor's SUM 316 Submissions at pp 31–32 (ICC's Court's Reasons at para 25).

95 Contractor's SUM 316 Submissions at pp 32 (ICC's Court's Reasons at para 27).

96 Contractor's SUM 316 Submissions at pp 32–33 (ICC's Court's Reasons at paras 26, 28–30).

97 Contractor's SUM 316 Submissions at p 31 (ICC Court's Reasons at para 25(b)).

98 Contractor's SUM 316 Submissions at pp 31–32 (ICC Court's Reasons at paras 25(d) and 25(e)); Contractor's 2nd Affidavit at p 543.

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including the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (25 May 2024) (the "IBA Guidelines").[99]

114 However, the ICC Court pointed out that the ICC Note does not specify any specific time periods for past appointments.[100] In that regard, the appointments here were some four years apart,[101] and the IBA Guidelines suggest that only recent appointments (within three years) need to be disclosed.[102]

115 In the event, the ICC Court decided that the subject arbitrator should have disclosed his appointment as arbitrator in the Prior Arbitration.[103]

(B) WHETHER THE SUBJECT ARBITRATOR'S APPOINTMENT AS ARBITRATOR IN THE PRIOR ARBITRATION GAVE RISE TO APPARENT BIAS

116 The ICC Court did not consider that any challenge to the subject arbitrator based on his involvement in the Prior Arbitration (had it been disclosed) would have succeeded, for the following reasons:[104]

(a) There was no connection between the facts and subject matter of the two arbitrations nor the issues arising therein.

(b) The Prior Arbitration involved [the Sub-Contractor's chairman] in his personal capacity.

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99 Contractor's 2nd Affidavit at p 743.

100 Contractor's SUM 316 Submissions at p 31 (ICC Court's Reasons at para 25(d)).

101 Contractor's SUM 316 Submissions at pp 31–32 (ICC Court's Reasons at paras 25(d) and 25(f)).

102 Contractor's 2nd Affidavit at pp 759–760 (IBA Guidelines, Part II, Orange List, at paras 3.1.3 and 3.2.8).

103 Contractor's SUM 316 Submissions at pp 31–32 (ICC's Court's Reasons at para 25).

104 Contractor's SUM 316 Submissions at p 32 (ICC Court's Reasons at para 28).

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(c) There was a gap of more than four years between the two appointments.

(d) There was no evidence of any other connection between [the subject arbitrator] and [the Sub-Contractor], [the Sub-Contractor's chairman] or [the Sub-Contractor's counsel].

(e) There were no other factors arising out of the [subject arbitrator's] conduct of the arbitration that raised questions about his impartiality or independence.

(C) WHETHER THE CIRCUMSTANCES OF NON-DISCLOSURE GAVE RISE TO APPARENT BIAS

117 The ICC Court decided that the subject arbitrator's failure to disclose the Prior Arbitration was not sufficient to give rise to reasonable doubt as to his impartiality or independence,[105] for the following reasons:

(a) Aside from non-disclosure, there was no evidence to support reasonable doubt as to the subject arbitrator's impartiality or independence.[106]

(b) The subject arbitrator's decision not to disclosure the Prior Arbitration was made after consulting relevant guidance, and was based on the length of time between the appointments; it was a decision open to him on the facts, although the more prudent course of action would have been to err on the side of disclosure.[107]

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105 Contractor's SUM 316 Submissions at p 32 (ICC Court's Reasons at para 26).

106 Contractor's SUM 316 Submissions at p 32 (ICC Court's Reasons at para 27).

107 Contractor's SUM 316 Submissions at p 32 (ICC Court's Reasons at para 29).

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(c) The subject arbitrator's failure to disclose the Prior Arbitration did not, in and of itself, give rise to reasonable doubts as to his impartiality or independence.[108]

(d) The subject arbitrator should not have taken into account the possibility of disclosure leading to a challenge at a time when the First Partial Award was also likely to be challenged – that was not a relevant consideration in deciding whether to make disclosure. However, he had considered this only *after* deciding that disclosure was not warranted due to the four-year time difference between the appointments.[109]

(2) The Court's analysis

(A) THE CONTRACTOR'S CASE ON APPARENT BIAS

118 The parties' submissions on SUM 316 were filed after they had received the ICC Court's Reasons. In those submissions, the Contractor's focus was on the circumstances of non-disclosure. The Contractor did not challenge the ICC Court's reasoned decision that a challenge *based on the Prior Arbitration* would have failed; and this position was confirmed by the Contractor's counsel in oral submissions.[110]

119 Instead, the Contractor's case on apparent bias was based on the subject arbitrator's *conduct in relation to non-disclosure*, specifically:

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108 Contractor's SUM 316 Submissions at p 33 (ICC Court's Reasons at para 30).

109 Contractor's SUM 316 Submissions at pp 32–33 (ICC Court's Reasons at paras 25(g) and 31).

110 NEs dated 27 March 2025 at p 3.

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(a) that, contrary to what the ICC Court accepted, the subject arbitrator "knew, or ought to have known" that the claimant in the Prior Arbitration was related to the claimant in the present arbitration, even before the inception of the present arbitration, and that he "knew" of this connection when he signed his Statement of Acceptance;[111] and

(b) the subject arbitrator's acknowledgment that, in not disclosing the Prior Arbitration, he took into account the possibility of the Contractor challenging his impartiality.[112]

(B) THE COURT'S APPROACH IN EVALUATING ALLEGATIONS OF APPARENT BIAS

120 The Singapore court applies the following test for apparent bias: "whether there are circumstances which would give rise to a reasonable suspicion or apprehension in a fair-minded reasonable person with knowledge of the relevant facts that the tribunal may be biased and that a fair hearing may not be possible as a result" (*BYL v BYN* [2020] 4 SLR 1 ("*BYL v BYN*") at [50], citing *UES Holdings Pte Ltd v KH Foges Pte Ltd* [2018] 3 SLR 648 ("*UES*") at [29] and *PT Central Investindo v Franciscus Wongso* [2014] 4 SLR 978 at [51] and [142]). Like the present case, *BYL v BYN* involved an ICC arbitration.

121 In considering the circumstances of the case, the court will consider the circumstances that were not disclosed, as well as the circumstances of any alleged failure to disclosure. As noted above at [118], the Contractor's focus in these proceedings was on the latter aspect – the *circumstances* of the alleged failure to disclosure.

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111 Contractor's SUM 316 Submissions at paras 23–24.

112 Contractor's SUM 316 Submissions at paras 25–26.

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122 Before I address that latter aspect, I briefly state that, having considered the ICC Court's Reasons (summarised above at [116]), I agreed with the ICC Court's conclusion on the former aspect: that the circumstances that were not disclosed (*ie*, the subject arbitrator's appointment as arbitrator in the Prior Arbitration) did not amount to apparent bias.

(C) WAS THERE APPARENT BIAS FROM THE CIRCUMSTANCES OF THE ALLEGED NON-DISCLOSURE?

123 I start first with the proposition that even if there is non-disclosure of circumstances that ought to have been disclosed, it does not necessarily follow that there is apparent bias. Paragraph 26 of the ICC Note recognises that failure to disclose is not in itself a ground for disqualification, but will be considered in determining whether there is apparent bias: [113]

> Although failure to disclose is not in itself a ground for disqualification, it will however be considered by the Court in assessing whether an objection to confirmation or a challenge is well founded.

124 The point above was illustrated by the ICC Court's rejection of the Challenge in the present case, despite its finding that there had been a failure to disclose.

125 The IBA Guidelines state to similar effect (in General Standard 3(g) and its accompanying explanation):

> An arbitrator's failure to disclose certain facts and circumstances that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, does not necessarily mean that a conflict of interest exists, or that a disqualification should ensue.
>
> […]

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[113] Contractor's 2nd Affidavit at p 548.

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> A corollary to the fact that, as explained in Explanation to General Standard 3(c), a challenge may only be successful if an objective test is met, is General Standard 3(g), which makes clear that a failure to disclose certain facts and circumstances that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, does not necessarily mean that a conflict of interest exists, or that a disqualification should ensue.

126 This proposition has also been accepted judicially. In *BYL v BYN*, the court at [59] quoted the following passage from the judgment of Hamblen LJ in *Halliburton Co v Chubb Bermuda Insurance Ltd and others* [2018] 1 WLR 3361 ("*Halliburton CA*") at [74]–[76]:

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

127 The court in *BYL v BYN* went on to hold (at [66], citing *Halliburton CA* at [76]) that if there is no apparent bias from the circumstances that were not disclosed, a failure to disclose cannot "in and of itself justify an inference of apparent bias". The court also cited *UES* (see [120] above) at [42], where Loh J

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stated, "a failure to disclose will only give rise to apparent bias if there are other circumstances which supported such a finding". On the facts of *BYL v BYN*, the court found that there were no "other circumstances" (*UES* at [42]) or "something more" (*Halliburton CA* at [76]) to support an inference of apparent bias, apart from the posited belated disclosure.

128 When *BYL v BYN* was decided on 3 March 2020, the UK Supreme Court's decision on appeal from *Halliburton CA* had yet to be given – the UK Supreme Court issued its judgment on 27 November 2020, dismissing the appeal against *Halliburton CA* in *Halliburton Co v Chubb Bermuda Insurance Ltd and others (International Court of Arbitration of the International Chamber of Commerce and others intervening)* [2021] AC 1083 ("*Halliburton SC*"). Lord Hodge (with whom Lord Reed, Lady Black and Lord Lloyd-Jones agreed) delivered the leading judgment, with Lady Arden delivering a concurring judgment.

129 At [74] of his judgment, Lord Hodge reproduced the English Court of Appeal's holding in *Halliburton CA* (at [71]):

> … The Court of Appeal held (para 71):
>
> > "the present position under English law to be that disclosure should be given of facts and circumstances known to the arbitrator which, in the language of section 24 of the Act, would or might give rise to justifiable doubts as to his impartiality."
>
> The court continued:
>
> > "Under English law this means facts or circumstances which *would or might* lead the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the arbitrator was biased."

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> [UK Supreme Court's emphasis in *Halliburton SC* in italics]

130 At [107] of *Halliburton SC*, Lord Hodge agreed with the English Court of Appeal's formulation of the legal duty of disclosure, subject to the qualification that there may be circumstances in which an arbitrator would be under a duty to make reasonable enquiries, in order to comply with their duty of disclosure. Lord Hodge explained at [116] of *Halliburton SC*:

> The legal obligation [of disclosure] can arise when the matters to be disclosed fall short of matters which would cause the informed observer to conclude that there was a real possibility of a lack of impartiality. It is sufficient that the matters are such that they are relevant and material to such an assessment of the arbitrator's impartiality and could reasonably lead to such an adverse conclusion.

131 Lord Hodge also elaborated on the meaning of the phrase "*might* give rise to justifiable doubts", stating (at [107] of *Halliburton SC*): "[a]n obligation to disclose a matter which 'might' give rise to justifiable doubts arises only where the matter might reasonably give rise to such doubts."

132 Lord Hodge went on to address at [117]–[118] of *Halliburton SC*, the question of whether a failure to make disclosure could demonstrate a lack of impartiality:

> 117. Is disclosure relevant to apparent bias? Mr Michael Crane QC on behalf of Chubb correctly makes the point that the inequality of knowledge, which Halliburton lists as one of the principal concerns arising from multiple references concerning overlapping subject matter with only one common party, raises a question of the fairness of the arbitral proceedings, which can be dealt with under section 24(1)(d)(i) of the 1996 Act if there is proof of substantial injustice. That is so; but a failure of that arbitrator to disclose the other references could give rise to justifiable doubts as to his or her impartiality. I agree with the dicta of Cockerill J in *PAO Tatneft v Ukraine* [2019] EWHC 3740 (Ch), para 57 that:
>
> > "the obligation of disclosure extends … to matters which may not ultimately prove to be sufficient to establish

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> justifiable doubts as to the arbitrator's impartiality. However, a failure of disclosure may then be a factor in the latter exercise."
>
> 118. Where an arbitrator has accepted an appointment in such multiple references in circumstances which might reasonably give rise to justifiable doubts as to his or her impartiality, or is aware of other matters which might reasonably give rise to those doubts, a failure in his or her duty to disclose those matters to the party who is not the common party to the references deprives that party of the opportunity to address and perhaps resolve the matters which should have been disclosed. The failure to disclose may demonstrate a lack of regard to the interests of the non-common party and may in certain circumstances amount to apparent bias.

133 In his summary of the law, Lord Hodge stated (at [153] of *Halliburton SC*) that where "circumstances might reasonably give rise to a conclusion by the objective observer that there was a real possibility of bias", the arbitrator is under a duty to disclose those circumstances. He recognised (at [155] of *Halliburton SC*):

> A failure of an arbitrator to make disclosure in the circumstances described in para 153 is a factor for the fair-minded and informed observer to take into account in assessing whether there is a real possibility of bias (paras 117–118).

134 Lord Hodge's judgment in *Halliburton SC* is in similar vein to Hamblen LJ's judgment in *Halliburton CA* (cited above at [123]): a failure to make disclosure does not necessarily amount to apparent bias; rather, a failure to disclose is a *factor to take into account* in assessing whether there is apparent bias. Whether there is apparent bias ultimately depends on all the circumstances of the case, including the circumstances of any failure to disclose.

135 In oral submissions, the Contractor's counsel accepted that a failure to disclose did not necessarily amount to apparent bias, but submitted that the

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circumstances of the alleged failure to disclosure in the present case supported an inference of apparent bias.[114]

136 On a related note, if the court concluded that there was no apparent bias from the circumstances of the case (including the circumstances of any alleged failure to disclose), the court would not need to decide whether there was *actually* a failure to disclose. That was the approach taken by the court in *BYL v BYN*, where the court found that there was no apparent bias from the non-disclosed circumstances, and that there was nothing in the circumstances of the posited failure to disclosure that supported an inference of apparent bias (*BYL v BYN* at [66]). Given that there was no apparent bias from the circumstances of the case, the court did not decide on whether there was actually a failure to disclose (*BYL v BYN* at [65]–[66]). I approached the present case in the same way.

137 The Contractor cited two specific circumstances of the alleged failure to disclose (as noted at [118] above), which it said supported an inference of apparent bias; these related to:

(a) whether the subject arbitrator knew, at a time earlier than he claimed to have known, that the claimants in the two arbitrations were related; and

(b) the subject arbitrator's reasons for non-disclosure.

138 I will address them in turn.

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114 NEs dated 27 March 2025 at p 2.

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(I) WHEN DID THE SUBJECT ARBITRATOR KNOW THAT THE CLAIMANTS IN THE TWO ARBITRATIONS WERE RELATED?

139 From the Subject Arbitrator's Response,[115] it was only in or around October 2024 that he realised that the claimants in the two arbitrations were related, in that the claimant in the Prior Arbitration was the chairman of the claimant in the present arbitration (the Sub-Contractor).

140 The subject arbitrator said:

(a) At the time he provided his Statement of Acceptance, he did not appreciate that the Sub-Contractor's chairman (who was referred to by his full name, as a party in the Prior Arbitration) either owned or controlled the Sub-Contractor;[116]

(b) The case information provided by the ICC for checking of conflicts did not name the Sub-Contractor's chairman as a relevant entity for this purpose;[117]

(c) He had not paid attention to the Sub-Contractor's email address as provided in the request for arbitration (which in any event did not reflect the full name of the Sub-Contractor's chairman);[118] and

(d) It only became apparent to him in or around October 2024 that the claimant in the Prior Arbitration was the Sub-Contractor's chairman, when that individual sought to provide a personal guarantee to support

115 Contractor's 2nd Affidavit at pp 1062–1063.

116 Contractor's 2nd Affidavit at p 1062 (Subject Arbitrator's Response at para 2).

117 Contractor's 2nd Affidavit at p 1062 (Subject Arbitrator's Response at para 2).

118 Contractor's 2nd Affidavit at p 1062 (Subject Arbitrator's Response at para 3).

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> the Sub-Contractor's provision of the security required for the Monthly Payment order.[119]

The Contractor attacked the above explanation as being "inherently unbelievable", and said that the ICC Court had erred in accepting it.[120] The Contractor contended that the subject arbitrator: (a) "knew, or ought to have known" of the Sub-Contractor's chairman's ownership or control of the Sub-Contractor even before the inception of the Arbitration; and (b) "knew" of that relationship when he signed his Statement of Acceptance.[121]

141 In support of the above contention, the Contractor pointed to the following:

> (a) first, that it was stated in [17(ii)] of the Prior Judgment that the Sub-Contractor company had been established by the Sub-Contractor's chairman (citing the statement of claim in the Prior Arbitration);[122]
>
> (b) second, that in the request for arbitration in the present arbitration, the Sub-Contractor provided two email addresses, of which one was that of the Sub-Contractor's chairman;[123] and
>
> (c) third, that the same lawyers and law firm represented the Sub-Contractor's chairman in the Prior Arbitration, and the Sub-Contractor in the present arbitration.[124]

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119 Contractor's 2nd Affidavit at p 1062 (Subject Arbitrator's Response at para 5).

120 Contractor's SUM 316 Submissions at para 23.

121 Contractor's SUM 316 Submissions at para 23.

122 Contractor's SUM 316 Submissions at para 23(a).

123 Contractor's SUM 316 Submissions at para 23(b).

124 Contractor's SUM 316 Submissions at para 23(c).

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142 In the Challenge, the Contractor had also contended that various documents before the Tribunal in this arbitration referred to the Sub-Contractor's chairman by his full name.[125] However, that point was not repeated in the Contractor's SUM 316 submissions. In oral submissions, the Contractor's counsel confirmed that the Contractor was not relying on this contention.[126] In any event, I would not have accepted that the mere fact that the Sub-Contractor's chairman's full name appeared in various documents in the arbitration meant that the subject arbitrator *knew* of the relationship between the claimants in the two arbitrations, at an earlier point in the present arbitration (than October 2024). Notably, the Sub-Contractor's chairman's full name did not appear in the First Partial Award, the request for arbitration, or the pleadings. I also observed that the Contractor apparently had not put into the record of these court proceedings any of the arbitration documents which the Contractor said bore the full name of the Sub-Contractor's chairman.

143 On [141(a)] above, it did appear from [17(ii)] of the Prior Judgment that the statement of claim in the Prior Arbitration had stated that the Sub-Contractor was a company that the Chairman had established.[127] However, as the ICC Court noted (and the Contractor did not dispute), the Prior Arbitration involved the Sub-Contractor's chairman in his personal capacity, and there was no connection between the facts and subject matter of the two arbitrations or the issues arising therein.[128] Moreover, the subject arbitrator was appointed in

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125 Contractor's 2nd Affidavit at pp 1080–1082 (Contractor's Additional Submissions dated 28 January 2025 at para 26).

126 NEs dated 27 March 2025 at p 2.

127 Contractor's 2nd Affidavit at p 55.

128 Contractor's SUM 316 Submissions at p 32 (ICC Court's Reasons at paras 28(a) and 28(b)).

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November 2018 for the Prior Arbitration;[129] it had been more than four years since then, when the subject arbitrator came to submit his Statement of Acceptance on 19 April 2023.[130] By then, it was also more than two years since the conclusion of the Prior Arbitration on 16 April 2021.[131]

144 When queried, the Contractor's counsel was not able to provide the date of the statement of claim in the Prior Arbitration.[132] However, it was reasonable to infer that the statement of claim would have been filed relatively early in the process, *ie*, shortly after the subject arbitrator was appointed in November 2018. On the assumption that the statement of claim in the Prior Arbitration was filed in or around 2019, that would have been some four years before the present arbitration was commenced on 12 April 2023. The fact that the statement of claim in the Prior Arbitration had stated that the claimant (the Sub-Contractor's chairman, in the present case) had founded a particular company, did not mean that this would have remained in the subject arbitrator's mind some four years later, when that company (the Sub-Contractor) commenced the present arbitration and nominated him as arbitrator.

145 In oral submissions, the Contractor's counsel contended that it would have stuck in the subject arbitrator's mind that the company in question was carrying on a particular business in country X.[133] Counsel submitted that not many arbitrations emanated from country X, but provided nothing to substantiate this.

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129 Contractor's 2nd Affidavit at p 1063 (Subject Arbitrator's Response at para 8(2)).

130 Contractor's 2nd Affidavit at pp 532–534.

131 Contractor's 2nd Affidavit at para 10.

132 NEs dated 27 March 2025 at p 2.

133 NEs dated 27 March 2025 at p 2.

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146 The Contractor did not address the significance (or otherwise) of the statement concerning the Sub-Contractor's chairman's founding of the Sub-Contractor in relation to the issues or matters in the Prior Arbitration. If this statement was not significant in the context of the Prior Arbitration, it was quite believable that the subject arbitrator would not have remembered it some four years later when the Sub-Contractor commenced an unrelated arbitration and nominated him as arbitrator. The Contractor provided no basis for me to conclude that the statement about the claimant in the Prior Arbitration having founded a company which carried out a particular business in country X, was significant in the context of the Prior Arbitration.

147 On [141(b)] above, the fact that the Sub-Contractor had provided its chairman's email address as one of its two email addresses in the request for arbitration did not mean that the subject arbitrator knew of the connection thereby. As the subject arbitrator explained, [134] the email address did not bear the full name of the Sub-Contractor's chairman.[135] Just looking at the email address would not have alerted the subject arbitrator to the connection between the parties.

148 On [141(c)] above, the fact that the same *lawyers and law firm* represented claimants in two unrelated arbitrations more than four years apart, would not have alerted the subject arbitrator that the *parties* might be related. The subject arbitrator may well have assumed that it was just a matter of the lawyers or law firm knowing him from the Prior Arbitration.

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134 Contractor's 2nd Affidavit at p 1062 (Subject Arbitrator's Response at para 3).

135 Contractor's 2nd Affidavit at p 23 (Request for Arbitration at para 9).

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149 For the above reasons, I accepted (as the ICC Court did) that the subject arbitrator did not *know* at the time he submitted his Statement of Acceptance on 19 April 2023 that the claimants in the two arbitrations were related. I accepted the subject arbitrator's explanation (as did the ICC Court) that in relation to the present arbitration, it was only in or around October 2024, that he realised that the claimants in the two arbitrations were related.

150 As for whether the subject arbitrator "ought to have known" of the relationship between the claimants in the two arbitrations when he submitted the Statement of Acceptance, the ICC Court did not accept that, and neither did I. The ICC Court decided that the subject arbitrator had "acted reasonably when making inquiries prior to signing his Statement of Acceptance",[136] and I respectfully agreed with that.

151 On this point, what remains is: in or around October 2024, when the subject arbitrator came to learn of the relationship between the claimants in the two arbitrations, he considered whether to disclose the Prior Arbitration and decided – with reference to the IBA Guidelines – that disclosure was (among other things) "unnecessary" and "unwarranted".[137]

152 The ICC Court disagreed with that conclusion – it considered that the subject arbitrator should have disclosed the Prior Arbitration. Nevertheless, the ICC Court accepted that the subject arbitrator:

(a) became aware of the potential disclosure in or around October 2024 and considered at that time whether disclosure should be made;[138]

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136 Contractor's SUM 316 Submissions at p 31 (ICC Court's Reasons at para 25(a)).

137 Contractor's 2nd Affidavit at p 1063 (Subject Arbitrator's Response at para 8).

138 Contractor's SUM 316 Submissions at p 31 (ICC Court's Reasons at para 25(b)).

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(b) properly considered para 27 of the ICC Note;[139]

(c) acted reasonably in considering other guidelines, including the IBA Guidelines;[140] and

(d) decided not to disclose the Prior Arbitration after consulting relevant guidance, a decision that "was open to him on the facts", although the "more prudent course of action" would have been to err on the side of disclosure.[141]

153 The ICC Court decided that the subject arbitrator acted "properly" and "reasonably" in evaluating whether it was necessary to disclose the Prior Arbitration,[142] although it reached a different conclusion on whether the Prior Arbitration should have been disclosed. I respectfully agreed with the ICC Court that the subject arbitrator had acted properly and reasonably in evaluating the need for disclosure, and that the subject arbitrator's conduct did not support an inference of apparent bias.

154 In this regard, I considered the interplay between the ICC Rules (and the ICC Note), and the IBA Guidelines. Article 11(2) of the ICC Rules requires a prospective arbitrator to disclose "any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality".

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139 Contractor's SUM 316 Submissions at p 31 (ICC Court's Reasons at para 25(d)).

140 Contractor's SUM 316 Submissions at p 32 (ICC Court's Reasons at para 25(e)).

141 Contractor's SUM 316 Submissions at p 32 (ICC Court's Reasons at para 29).

142 Contractor's SUM 316 Submissions at pp 31–32 (ICC Court's Reasons at paras 25(d) and 25(e)).

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155 The ICC Note provides a non-exhaustive list of "potentially relevant circumstances" which the arbitrator should consider in assessing "what circumstances, if any, are such as to call into question his or her independence in the eyes of the parties or give rise to reasonable doubts as to his or her impartiality".

156 For fuller context, I set out below paras 25–27 of the ICC Note (with the specific aspects relied upon by the Contractor in the Challenge underlined):

> 25. An arbitrator or prospective arbitrator must disclose in his or her Statement, at the time of his or her appointment and as the arbitration is ongoing, any circumstance that might be of such a nature as to call into question his or her independence in the eyes of any of the parties or give rise to reasonable doubts as to his or her impartiality. Any doubt must be resolved in favour of disclosure.
>
> 26. A disclosure does not imply the existence of a conflict. On the contrary, arbitrators who make disclosures consider themselves to be impartial and independent, notwithstanding the disclosed facts, or else they would decline to serve. In the event of an objection or a challenge, it is for the Court to assess whether the matter disclosed is an impediment to service as arbitrator. Although failure to disclose is not in itself a ground for disqualification, it will however be considered by the Court in assessing whether an objection to confirmation or a challenge is well founded.
>
> 27. Each arbitrator or prospective arbitrator must assess what circumstances, if any, are such as to call into question his or her independence in the eyes of the parties or give rise to reasonable doubts as to his or her impartiality. In making such assessment, an arbitrator or prospective arbitrator should consider all ***potentially relevant circumstances***, including *but not limited to* the following:
>
> • The arbitrator or prospective arbitrator or his or her law firm represents or advises, or has represented or advised, one of the parties or one of its affiliates.
>
> • The arbitrator or prospective arbitrator or his or her law firm acts or has acted against one of the parties or one of its affiliates.

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> • The arbitrator or prospective arbitrator or his or her law firm has a business relationship with one of the parties or one of its affiliates, or a personal interest of any nature in the outcome of the dispute.
>
> • The arbitrator or prospective arbitrator or his or her law firm acts or has acted on behalf of one of the parties or one of its affiliates as director, board member, officer, or otherwise.
>
> • The arbitrator or prospective arbitrator or his or her law firm is or has been involved in the dispute, or has expressed a view on the dispute in a manner that might affect his or her impartiality.
>
> • The arbitrator or prospective arbitrator has a professional or close personal relationship with counsel to one of the parties or the counsel's law firm.
>
> • The arbitrator or prospective arbitrator acts or has acted as arbitrator in a case involving one of the parties or one of its affiliates.
>
> • The arbitrator or prospective arbitrator acts or has acted as arbitrator in a related case.
>
> • The arbitrator or prospective arbitrator has in the past been appointed as arbitrator by one of the parties or one of its affiliates, or by counsel to one of the parties or the counsel's law firm.
>
> In assessing whether a disclosure should be made, an arbitrator or prospective arbitrator should consider relationships with non-parties having an interest in the outcome of the arbitration, such as third-party funders as well as relationships with other members of the arbitral tribunal, as well as experts or witnesses in the case.
>
> [emphasis in original in italics; emphasis added in bold italics]

157 On its terms, para 27 of the ICC Note does not mandate disclosure of all the matters listed therein. Rather, the listed matters are described as "potentially relevant circumstances" which the arbitrator should consider in assessing whether disclosure is necessary.

158 As the court in *Aiteo* observed at [75]:

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> The checklist in paragraph 23 of the Note includes (the final bullet point) a past appointment as arbitrator by the law firm of one of the parties. Unlike the IBA Guidelines, there is here no reference to a number of appointments or a time period. *It does not follow from the Note that an arbitrator is bound to disclose all prior appointments, however distant in time or few in number. Indeed, the Note does not positively require disclosure of any of the other matters set out on the checklist, as opposed to identifying matters for consideration.* (This is a point which was accepted by Flaux J in *A v B* as discussed below [2011] EWHC 2345 (Comm) [55]-[56] and [78]). However, the checklist clearly provides very useful guidance to any arbitrator as to the types of matters which should be considered as part of his or her consideration of "all potentially relevant circumstances". The text of the ICC Arbitrator Statement itself says that any doubt must be resolved in favour of disclosure.
>
> [emphasis added]

159 In similar vein is the comment on the ICC Note, found at para 11-31 of the ICC Handbook:[143]

> Since the disclosure requirements are drafted systematically in an open-ended fashion, the authors submit that they provide in the end little guidance as to the limits of disclosure, which is unfortunate especially given the ongoing nature of the disclosure obligation under art.11(3). There is no indication as to whether disclosure must be made of what is in the public domain, for example. Since there are no time limits, there is no guidance as to whether an arbitrator should disclose events from 10 or 20 years previously. Since there is no de minimis rule, any direct or indirect financial transaction may potentially need to be disclosed.

160 The authors of the ICC Handbook go on (at para 11-34 of the ICC Handbook) to advocate that arbitrators consult the IBA Guidelines:[144] "In dealing with what should in any event be disclosed, the authors submit that reference should be had by arbitrators as well to the IBA Conflicts Guidelines."

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143 Contractor's 2nd Affidavit at pp 635–636.

144 Contractor's 2nd Affidavit at p 636.

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161 The IBA Guidelines have also been judicially commended. In *BYL v BYN*, the court stated (at [48]) that the IBA Guidelines "provide helpful guidance on an arbitrator's duty of disclosure in respect of potential conflicts of interest". To the same effect is the observation in *Halliburton SC* at [71] that "[t]he IBA Guidelines 2014 set out good arbitral practice which is recognised internationally, and […] they can assist the court in identifying what is an unacceptable conflict of interest and what matters may require disclosure".

162 The test for disclosure under the IBA Guidelines is found in General Standard 3, which states as follows:

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

163 The test of disclosure under the IBA Guidelines ("facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence") is very similar to that under the Article 11(2) of the ICC Rules ("facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality"). The ICC Rules apply the *subjective* "in the eyes of the parties" standard to independence, and apply an *objective* standard to impartiality. On the other hand, the IBA Guidelines apply the subjective "in the eyes of the parties" standard to *both* independence and impartiality. From that, one might expect an application of the IBA Guidelines to result in greater disclosure than if one simply referred to the ICC Rules and the ICC Note.

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164 As the subject arbitrator concluded,[145] if one applied the IBA Guidelines, disclosure of the Prior Arbitration would not have been necessary. The "Orange List", found in Part II of the IBA Guidelines, contains a list of specific situations which may, depending on the facts of a given case, give rise to doubts as to the arbitrator's independence or impartiality. Arbitrators in such situations would be expected to make disclosure. However, the present situation did not fall within the Orange List:

(a) The present situation did not fall within para 3.1.3 of the Orange List, as (i) there was only one prior appointment by the party's affiliate (and not two), and (ii) the prior appointment was more than three years ago.

(b) The present situation did not fall within para 3.2.8 of the Orange List, as (i) there was only one prior appointment by the same law firm (and not more than three), and (ii) the prior appointment was more than three years ago.

(c) The present situation did not fall within para 3.1.5 of the Orange List, as the Prior Arbitration was not "on a related issue or matter". In this regard:

(i) in the Challenge before the ICC Court, the Contractor did not contend that the two arbitrations were related in this way; and

(ii) in these court proceedings, the Contractor did not dispute the ICC Court's conclusion that there was no connection

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145 Contractor's 2nd Affidavit at pp 1062–1063 (Subject Arbitrator's Response at paras 6–8).

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> between the facts and subject matter of the two arbitrations nor the issues arising therein (see [116(a)] above).

165 Relying on the ICC Guidelines, the Sub-Contractor submitted that the subject arbitrator had correctly decided that it was unnecessary to disclose the Prior Arbitration (and, by implication, the ICC Court was wrong to reach the opposite conclusion).[146] However, as foreshadowed above (at [136]), this was not an issue that I had to decide, given my finding that the circumstances of the case (including the circumstances of the alleged failure to disclose) did not amount to apparent bias. For the present, it sufficed to say that I agreed with the ICC Court that the subject arbitrator had acted properly and reasonably in evaluating the necessity of disclosure, having regard to the ICC Guidelines in the process.

(II) THE SUBJECT ARBITRATOR'S REASONS FOR NON-DISCLOSURE.

166 The Contractor took issue with the fact that the subject arbitrator did not stop at saying that it was "unnecessary" and "unwarranted" to disclose the Prior Arbitration, but instead went on to say that it was "even possibly inappropriate" for him to make disclosure, referring to the prospect of the Contractor challenging his impartiality as a reason for him not making disclosure:[147]

> 8. […] I came to the conclusion that the circumstances concerning my appointment in the previous arbitration by [the Sub-Contractor's chairman / law firm] were nowhere near and indeed far away from the matters set out in the Orange List and that it was unnecessary, unwarranted and even possibly inappropriate for me to make any disclosure that I had previously been nominated / appointed arbitrator by [the Sub-Contractor's chairman / law firm].

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146 Sub-Contractor's SUM 316 Submissions at paras 42–46.

147 Contractor's SUM 316 Submissions at paras 25–26; Contractor's 2nd Affidavit at p 1063.

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> 9. By the time I realized [the Sub-Contractor's chairman] was the Chairman of the [Sub-Contractor], the [Contractor's] counsel had at least foreshadowed, if not even confirmed, that the [Contractor] was commencing or had commenced proceedings in the Singapore Courts to set aside the [First] Partial Award. Had I made the disclosure, the possibility of the [Contractor] seeking to challenge my impartiality could not be discounted.

167 On this, the ICC Court decided the subject arbitrator should not have taken into account the possibility that his disclosure would lead to a challenge at a time when the First Partial Award was also likely to be challenged – that was not a relevant consideration in deciding whether to make disclosure.[148] However, the ICC Court noted that the subject arbitrator appeared to have considered this only *after* deciding that disclosure was not warranted due to the four-year time difference between the appointments.[149] Given the circumstances, the ICC Court rejected the Challenge, finding that there was no apparent bias.[150]

168 The Contractor contended that when the subject arbitrator referred to the possibility of his impartiality being challenged, he had not merely taken into account an irrelevant consideration. Instead, the Contractor asserted that the subject arbitrator "deliberately chose not to make disclosure so that the spotlight would not be turned on issues of bias and impartiality".[151]

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148 Contractor's SUM 316 Submissions at pp 32–33 (ICC Court's Reasons at paras 25(g) and 31).

149 Contractor's SUM 316 Submissions at p 33 (ICC Court's Reasons at para 31).

150 Contractor's SUM 316 Submissions at p 33 (ICC Court's Reasons at paras 30 and 32).

151 Contractor's SUM 316 Submissions at para 26.

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169 The Contractor said that that the subject arbitrator's apprehension of a challenge to his impartiality took on a different complexion "when one consider[ed] that the Subject Arbitrator knew or ought to have known from the get-go of the connection between the [Sub-Contractor's chairman] and the [Sub-Contractor] and yet, made the deliberate choice to state "Nothing to disclose" in his Statement of Acceptance".[152] That submission was, however, undermined by my finding that the subject arbitrator did not know (nor ought he to have known) of that connection at the time he submitted his Statement of Acceptance, a conclusion also reached by the ICC Court.

170 As the ICC Court accepted,[153] the subject arbitrator referred to a likely application to set aside the First Partial Award, and a possible challenge to his impartiality, only after he had concluded that disclosure was *unnecessary*. In that context, his reference to an irrelevant consideration did not support an inference of apparent bias. This was not a case where the subject arbitrator considered that disclosure was *necessary*, but decided not to make disclosure because of an irrelevant consideration. Even in that situation, one would still have to consider whether the circumstances supported an inference of apparent bias, as illustrated by the case of *BYL v BYN*. In *BYL v BYN*, the court dealt with a contention that the arbitrator had consciously refrained from making disclosure at an earlier time, because he did not wish to be knocked out from the arbitration before the issuance of the award. The court pointed out (at [57]) that even if that were the case, it was not apparent why such calculation would give rise to a possibility of the arbitrator being more disposed towards one side or the other – the court stated: "so long as he remained on the tribunal, he would

152 Contractor's SUM 316 Submissions at para 25.

153 Contractor's SUM 316 Submissions at p 33 (ICC Court's Reasons at para 31).

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be indifferent to the outcome". Thus, even deliberate non-disclosure to avoid challenge would not necessarily give rise to apparent bias.

171 The Contractor did not challenge the correctness of what was decided in *BYL v BYN* at [57].[154] Instead, the Contractor sought to distinguish the case on the basis that the alleged non-disclosure in *BYL v BYN* was of a development *subsequent* to the arbitrator's appointment, whereas the Contractor was complaining of non-disclosure *from the outset* – when the subject arbitrator had submitted his Statement of Acceptance.

172 *BYL v BYN* cannot be distinguished in this way:

(a) Both *BYL v BYN* and the present case concerned ICC arbitrations, in which there is an ongoing disclosure requirement under Article 11(3) of the ICC Rules:

> An arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature to those referred to in Article 11(2) concerning the arbitrator's impartiality or independence which may arise during the arbitration.

(b) In both *BYL v BYN* and the present case, the complaint was of purportedly *deliberate* non-disclosure, owing to the arbitrator's concern of potential challenge.

173 I respectfully agreed with the reasoning in *BYL v BYN* at [57], that deliberate non-disclosure to avoid a challenge would not necessarily give rise to apparent bias.

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154 NEs dated 27 March 2025 at p 2.

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174 There was, however, an added dimension in the present case. It appeared that the subject arbitrator was not only concerned about a challenge to his appointment: he also mentioned the likelihood of an application to set aside the First Partial Award.[155] There is an obvious nexus between the two: if the subject arbitrator disclosed the Prior Arbitration (which he had already concluded was unnecessary to disclose), the Contractor might not only bring a challenge to his impartiality, but also use what was disclosed in its likely application to set aside the First Partial Award. The subject arbitrator evidently did not want to provide the Contractor with information to challenge him, or to seek to set aside the First Partial Award, when he had already concluded that disclosure of that information was unnecessary (and by extension, that it would be unmeritorious for the Contractor to use that information to attack both the arbitrator and the First Partial Award). That explained his remark that it was "possibly inappropriate" for him to make disclosure.

175 I did not need to decide whether the subject arbitrator was right to consider the consequences of disclosing what he had already decided was unnecessary to disclose, in arriving at his ultimate decision not to disclose the Prior Arbitration. The issue before me was whether the subject arbitrator's conduct in relation to disclosure supported an inference of apparent bias, and it did not.

(D) IF THERE WERE APPARENT BIAS, WHAT CONSEQUENCES WOULD THAT HAVE FOR THE DECISIONS IN THE FIRST PARTIAL AWARD?

176 If, contrary to my finding above, there were apparent bias, that would be a necessary but not sufficient element for setting-aside an award under s 24(*b*) of the IAA. What is required, is that "a breach of the rules of natural justice

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155 Contractor's 2nd Affidavit at p 1063 (Subject Arbitrator's Response at para 9).

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occurred in connection with the making of the award by which the rights of any party have been prejudiced".

177 In so far as the Contractor relied on Art 34(2) of the Model Law, which does not expressly refer to prejudice, the presence or absence of prejudice remained relevant, for the court retains a discretion to refuse to set aside an award if no prejudice has been suffered by the challenging party: *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2021] 2 SLR 1279 at [72].

178 I accepted, as did the ICC Court, that the subject arbitrator only realised in or around October 2024 that the claimants in the two arbitrations were related. That being the case, even if it were found that there was apparent bias, that finding would not apply *retrospectively* to affect decisions already made by the Tribunal – in particular, the First Partial Award which had already been issued on 19 June 2024. Any breach of natural justice would not have "occurred in connection with the making of the [First Partial Award]". This was not a case where the Tribunal could reasonably have arrived at a different result if not for the breach of natural justice: *L W Infrastructure* (see [60] above) at [54].

179 As the subject arbitrator explained, it was only after the First Partial Award was made, that he realised the connection between the claimants in the two arbitrations. This was when the Tribunal was considering the issue of the security to be provided by the Sub-Contractor (for the Monthly Payment order) and a personal guarantee by the Sub-Contractor's chairman was offered.[156] The Tribunal heard the parties on the issue of security on 8 November 2024, and its decision on that issue was embodied in an "Order With Reasons" dated 10

[156] Contractor's 2nd Affidavit at p 1062 (Subject Arbitrator's Response at paras 4–5).

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December 2024.[157] If the Contractor wished to set aside the Tribunal's decision on security, the Contractor had to file its setting-aside application within three months of 10 December 2024 – the Contractor did not do so. In any event, the Tribunal's decision on security was an order consequential to the Monthly Payment decision. As explained above, the Monthly Payment decision was a s 12 IAA "order or direction", and as such, was not susceptible of being set aside. The Tribunal's decision on security too, was a s 12 IAA "order or direction" that was not susceptible of being set aside.

180 Thus, any apparent bias stemming from the subject arbitrator's realisation in or around October 2024 that the claimants in the two arbitrations were related, had not occurred "in connection with the making of [any] award by which the rights of [the Contractor] have been prejudiced": s 24(*b*) of the IAA.

181 If, however, the subject arbitrator had known about the connection between the claimants in the two arbitrations *prior* to the issuance of the First Partial Award (a contention made by the Contractor, which both the ICC Court and I rejected), the question remained whether any part of the First Partial Award should be set aside, considering that the Tribunal comprised *three* arbitrators who reached a unanimous decision, and that there was no allegation of bias against the other two arbitrators.

182 In this regard, the Contractor cited *Aiteo* for the propositions that:

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157 Sub-Contractor's 1st Affidavit at p 39.

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(a) the "parties were entitled to a determination by a tribunal where each member was unaffected by actual or apparent bias" (at [223] of *Aiteo*); and

(b) even where only one member of a three-member tribunal is apparently biased, substantial injustice will normally be inferred as being "inherently likely" or "likely in the very nature of things", and should be inferred unless there are circumstances which rebut it (at [221], [223] and [226] of *Aiteo*).

183 On the other hand, the Sub-Contractor cited authorities to the effect that apparent bias on the part of one member of a three-member tribunal would not necessarily have affected the award that is being attacked:

(a) *AMZ v AXX* [2016] 1 SLR 549 (at [174]–[176]),[158] wherein the court proceeded on the premise that apparent bias on the part of one of three tribunal members does not necessarily infect the other members; and

(b) Gary B Born, *International Commercial Arbitration* (Kluwer Law International 2021, 3rd Ed, updated December 2023) ch 25 at p 34:

> … In general, therefore, the unanimity of an award should not preclude annulment [*ie*, setting aside] of the award on grounds of arbitrator partiality.
>
> Nonetheless, where the exceptional remedy of annulment of an arbitral award is sought, it is appropriate to consider the likely impact of an arbitrator's lack of independence on the arbitral process and award. Where an award is unanimous, there may well be grounds for concluding that any lack of independence or impartiality had no material effect on the arbitral process. This conclusion is more

158 Sub-Contractor's SUM 316 Submissions at para 62.

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> appropriate in cases not involving corruption or flagrant bias on the part of an arbitrator; where an arbitrator failed to disclose a conflict which was a good faith error of judgment, and the award was unanimous, annulment will properly be very unlikely.

184 In the present case, of the two decisions that the Contractor sought to set aside, only one – the Lump Sum Payment decision – was a s 2 IAA "award" that was susceptible of being set aside. The Lump Sum Payment decision was in respect of a sum for the Contractor had admitted liability, subject only to its reliance on a "pay-when-paid" clause which the Tribunal found inapplicable. As the decision was not based *purely* on an admission of liability, but also involved the Tribunal's consideration of whether the "pay-when-paid" clause applied, I was not prepared to find that apparent bias on the part of one of the three arbitrators was inconsequential to the Lump Sum Payment decision.

Conclusion on SUM 316 and whether apparent bias would have succeeded as a basis for setting aside the Lump Sum Payment decision

185 In the present case, the parties made full submissions on the Contractor's intended new basis of apparent bias. I was thus able to decide not only whether that intended new basis, if it introduced, *could* succeed, but also whether it *would* succeed.

186 I concluded that apparent bias as a new basis of setting-aside could not succeed: it was hopeless, and as such the Contractor should not be allowed to introduce it. I dismissed SUM 316 accordingly. Consequently, I dismissed the application to set aside the Lump Sum Payment decision, unreservedly.

187 For completeness, if I had granted SUM 316 and allowed the Contractor to introduce apparent bias as a new basis for setting-aside, I would have rejected that on the merits.

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188 Bearing in mind that submissions were made not only on SUM 316 but also on the setting-aside of the Lump Sum Payment decision for apparent bias (*ie*, the remainder of OA 1185), I awarded the Sub-Contractor a further sum of $16,850 (all in), in costs.

Conclusion

189 For the above reasons:

(a) I dismissed the Contractor's setting-aside application in OA 1185.

(b) I dismissed SUM 316, by which the Contractor had sought to introduce apparent bias as a new basis for setting-aside.

(c) If I had allowed SUM 316, I would nevertheless have rejected the allegation of apparent bias as a basis for setting aside the Lump Sum Payment decision.

Andre Maniam
Judge of the High Court

Prakash Pillai, Koh Junxiang and Ng Pi Wei (Clasis LLC) for the claimant;
Chou Sean Yu, Oh Sheng Loong (Hu ShengLong), Wong Zheng Hui Daryl and Neela Alagusundaram (WongPartnership LLP) for the defendant.

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