IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC(I) 2

Originating Application No 1 of 2022

Between

(1) CUW
(2) CUX
(3) CUY

… *Claimants*

And

CUZ

… *Respondent*

JUDGMENT

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

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CUW and others
v
CUZ

[2023] SGHC(I) 2

Singapore International Commercial Court — Originating Application No 1 of 2022
Vivian Ramsey IJ
27 October 2022

6 February 2023 Judgment reserved.

Vivian Ramsey IJ:

1 This case concerns an application by the claimants, CUW, CUX and CUY, to set aside the Final Award dated 11 February 2022 (the "Award") made in an arbitration under the auspices of the Singapore International Arbitration Centre (the "SIAC") (the "Arbitration"), pursuant to s 24 of the International Arbitration Act 1994 (2020 Rev Ed) ("IAA") and/or Art 34(2)(*b*)(ii) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), as incorporated under s 3 of the IAA on the ground that breaches of natural justice had occurred in connection with the making of the Award.

Background

2 The dispute arose out of two agreements entered into by the parties concerning arrangements for providing two power plants in India (the "Project").

3 On or around 15 January 2013, CUX entered into a Term Sheet with CUZ. On 25 February 2013, two agreements were executed between the claimants and the respondent, with the respondent replacing another company as the claimants' partner in the Project.

4 Those agreements (the "Agreements") were:

(a) A Share Subscription Agreement dated 25 February 2013 (the "SSA") under which CUW was the "Promoter", CUX was the "Company", and the respondent was the "Investor". Under the SSA, CUX agreed to issue and allot equity shares to the respondent and the respondent agreed to subscribe to those equity shares.

(b) A Shareholders' Agreement dated 25 February 2013 (the "SHA") which set out the rights and obligations of the parties as shareholders in CUX.

5 Pursuant to the SSA, the respondent was to invest INR5.64b into the Project as a subscription to equity shares in CUX in three tranches:

(a) INR210m (the "First Tranche Investment");

(b) INR270m (the "Second Tranche Investment"); and

(c) INR 2.41b (the "Third Tranche Investment").

6 The respondent made the First Tranche Investment on 7 June 2013 and obtained certain management rights in CUX, including the right to nominate one director to CUX's board of directors. The Second Tranche Investment was made on 16 August 2013.

7 Under the SSA, there was a condition precedent that CUX would enter into a Common Loan Agreement (the "CLA") with certain finance companies (collectively, the "Lenders") in relation to the debt financing for the Project, prior to the Third Tranche Investment from the respondent.

8 The respondent raised objections to the terms of the draft CLA and, in particular, contended that those terms requested amendments which were contrary to the terms of the respondent's investment in the Project, including a "no guarantee" provision in cl 19 of the SHA. The claimants contended that despite their attempts in 2014 and 2015 to address and resolve the respondent's alleged concerns and objections to the draft CLA, the respondent refused to agree to the terms of the CLA.

9 On 17 December 2015, the respondent issued a letter alleging that the Project cost had increased by more than 20% and that the expected commercial operation date had been delayed by more than 24 months.

10 On 18 April 2016, the respondent issued to CUW and CUY a Material Adverse Change Notice ("MAC Notice") under the SSA on the basis that a material adverse change on the Project had occurred and was still subsisting and calling on CUW to cure the MAC.

11 In addition, the respondent also objected to awarding [VVV] the contract for the works which formed the balance of project ("BOP" works) on the basis that a sole engineering, procurement, construction ("EPC") contractor should be appointed to carry out both the boiler, turbine and generator work ("BTG") and the BOP works.

12 On 30 May 2016, CUW, on behalf of itself, CUX and CUY issued a letter to the respondent in which it sought to terminate the Agreements (the "May 2016 Letter") on the basis that the respondent had committed a repudiatory breach of the Agreements and that the repudiation was accepted with effect from 18 April 2016, the date of the MAC Notice.

13 On 22 December 2017, the respondent (as claimant) commenced the Arbitration against the claimants (as respondents) by filing a notice of arbitration (the "Notice of Arbitration") referring disputes under the SSA and SHA to arbitration. Under the SIAC Rules, the Notice of Arbitration was treated as commencing two arbitrations which were then consolidated under the SIAC Rules (6th edition, 1 August 2016) ("SIAC Rules"). The appointment of the arbitral tribunal (the "Tribunal") was completed on 4 May 2018.

14 On 25 July 2018, the respondent sent a written notice to the claimants (the "July 2018 Letter") stating that the issuance of the purported termination letter of 30 May 2016, as well as the allegations in it, cumulatively or otherwise amounted to a repudiation of the Agreements, which the respondent accepted.

15 In the Arbitration, the claimants submitted that they had validly terminated the Agreements by way of the May 2016 Letter due to the respondent's conduct in obstructing the CLA. They also contended that even if their termination on 30 May 2016 was wrongful, the respondent affirmed the Agreements. The respondent's position in the Arbitration was that its conduct in relation to the CLA was not a breach of the Agreements. Further, it contended that it did not affirm the Agreements after the May 2016 Letter. It also contended that, even if it did affirm the Agreements, the claimants committed a continuing repudiatory breach by treating the Agreements as terminated after

30 May 2016 so that it was entitled to terminate the Agreements on 25 July 2018.

16 During the course of the Arbitration, the claimants filed an "Application for Early Dismissal of Claims" dated 26 October 2018 ("EDA Application"). That Application was heard on 31 January 2019 and the Tribunal's Partial Award deciding the EDA Application was issued on 20 September 2019 (the "Partial Award").

17 Directions were given by the Tribunal which led to a final oral hearing on 28 July 2021. The Tribunal then made the Award on 11 February 2022.

18 The claimants commenced these proceedings by way of an Originating Application in the High Court on 10 May 2022. The proceedings were then transferred to the Singapore International Commercial Court on 28 July 2022. Following a virtual case management conference on 20 September 2022, the virtual hearing took place on 27 October 2022.

The Application to set aside the Award

19 The claimants seek to set aside the Award on the following grounds:

(a) That the Tribunal, in breach of natural justice, failed to consider the claimants' arguments that the respondent had, by its conduct, affirmed the Agreements following the issuance of the May 2016 Letter, thereby disentitling the respondent from subsequently terminating the Agreements for the same breach (the "Affirmation Defence Ground").

(b) That the Tribunal, in breach of natural justice, in considering whether the respondent's conduct in relation to the CLA was reasonable, failed to consider the claimants' arguments that the respondent's

objection to being classified as a "promoter" in the CLA was only an afterthought (the "Afterthought Argument Ground").

(c) That the Tribunal, in breach of natural justice, failed to consider the claimants' argument that the respondent had breached cl 16.5 of the SHA (the "Clause 16.5 Breach Ground") and had thereby committed a repudiatory breach of the Agreements, which breach the claimants accepted in their May 2016 Letter.

(d) That the Tribunal, in breach of natural justice, having made a finding in the Partial Award that it would not make any ruling that CUY would be jointly and severally liable with CUW and CUX for any breach of the Agreements and having made findings at paragraphs 215 to 225 of the Partial Award, ruled in the Award that CUY is jointly and severally liable with CUW and CUX which is inconsistent with the Partial Award and CUY was deprived of an opportunity to be heard on cl 14.1 of the SSA (the "Inconsistency Ground").

The legal basis for setting aside an award for breach of natural justice

20 The relevant grounds for setting aside an arbitral award are contained in s 24(*b*) of the IAA which provides that:

> **Court may set aside award**
>
> **24.** Despite Article 34(1) of the Model Law, the General Division of the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if —
>
> …
>
> (*b*) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

21 It is common ground that, as set out in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*"), a party challenging an arbitration award as having contravened the rules of natural justice has to establish the following: (a) which rule of natural justice was breached; (b) how it was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced its rights (at [29]).

22 *Soh Beng Tee* is also authority for the following propositions:

(a) The threshold for a finding of breach of natural justice is a high one and it is only in an "exceptional case" that a court will find that threshold crossed (at [54]).

(b) The setting aside application cannot be a stage where a dissatisfied party can have a second bite at the cherry (at [65(b)]).

(c) The failure of an arbitrator to refer every point for decision to the parties for submissions is not invariably a valid ground for challenge. Only in instances such as where the impugned decision reveals a dramatic departure from the submissions, or involves an arbitrator receiving extraneous evidence, or adopts a view wholly at odds with the established evidence adduced by the parties, or arrives at a conclusion unequivocally rejected by the parties as being trivial or irrelevant, might it be appropriate for a court to intervene. In short, there must be a real basis for alleging that the arbitrator has conducted the arbitral process either irrationally or capriciously. The overriding burden on the applicant is to show that a reasonable litigant in his shoes could not have foreseen the possibility of reasoning of the type revealed in the award (at [65(d)]).

(d) Each case should be decided within its own factual matrix. It must always be borne in mind that it is not the function of the court to assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process; rather, an award should be read generously such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied (at [65(f)]).

(e) Even if there had been a breach of the rules of natural justice, a causal nexus must be established between the breach and the award made (at [73]).

(f) In addition, the breach must have prejudiced the rights of the parties concerned. A breach of natural justice alone is distinct from satisfying the "prejudice" requirement (at [84]).

23 In *BZV v BZW and another* [2022] 3 SLR 447 ("*BZV (HC)*") the applicable principles were summarised at [52] as follows:

(a) The grounds for setting aside an award are to be construed and applied bearing in mind the policy of minimal curial intervention in arbitration.

(b) An application to set aside an award is not a pretext for the losing party to appeal on the merits against the tribunal's award.

(c) A court hearing a setting-aside application will not strive to find fault with the tribunal or to find errors in the award.

(d) A court will set aside an award only if the breach of natural justice is "demonstrably clear on the face of the record without the need to pore over thousands of pages of facts and submissions".

(e) The fundamental touchstone of the fair hearing rule is naturally the concept of "fairness". But there are two sides to fairness. It is, of course, unfair to the losing party if the tribunal did not give it a fair hearing. But it is equally unfair to the successful party if it is deprived of the fruits of its success on an arid or technical challenge mounted *ex post facto*. The court will therefore read the award generously in order to remedy only meaningful breaches of natural justice which have caused actual prejudice.

(f) A breach of the fair hearing rule can arise from the tribunal's failure to apply its mind to the essential issues arising from the parties' arguments. The court will give the tribunal "fair latitude" to determine what is and is not an essential issue and also when reading the award to determine whether the tribunal failed to apply its mind to the essential issues.

(g) The fact that a tribunal's decision is inexplicable is only one factor which goes towards establishing that the tribunal failed to apply its mind to the essential issues arising from the parties' arguments. If a fair reading of the award shows that the tribunal did apply its mind to the essential issues "but failed to comprehend the submissions or comprehended them erroneously, and thereby came to a decision which may fall to be characterised as inexplicable", that will be simply an error of fact or law and the award will not be set aside.

(h) So too, the fact that an award fails to address one of the parties' arguments expressly does not, in itself, mean that the tribunal failed to apply its mind to that argument. There may be a valid alternative explanation for the failure.

(i) An award will therefore not be set aside on the ground that the tribunal failed to apply its mind to an essential issue arising from the parties' arguments unless the failure is a clear and virtually inescapable inference from the award.

(j) A breach of the fair hearing rule can also arise from the chain of reasoning which the tribunal adopts in its award. To comply with the fair hearing rule, the tribunal's chain of reasoning must be: (a) one which the parties had reasonable notice that the tribunal could adopt; and (b) one which has a sufficient nexus to the parties' arguments.

(k) A party has reasonable notice of a particular chain of reasoning (and of the issues forming the links in that chain) if: (a) it arose from the parties' pleadings; (b) it arose by reasonable implication from their pleadings; (c) it is unpleaded but arose in some other way in the arbitration and was reasonably brought to the party's actual notice; or (d) it flows reasonably from the arguments actually advanced by either party or is related to those arguments.

(l) To set aside an award on the basis of a defect in the chain of reasoning, a party must establish that the tribunal conducted itself either irrationally or capriciously such that "a reasonable litigant in his shoes could not have foreseen the possibility of reasoning of the type revealed in the award". A tribunal's failure to hear from the challenging party on every single link in its chain of reasoning is therefore not in itself a

> breach of natural justice. It is also not in itself a breach of natural justice for the tribunal's chain of reasoning to adopt a middle path between the parties' diametrically opposed cases, whether on the appropriate inferences to be drawn from the primary facts, on the state or effect of the law or on the application of the law to the facts. Adopting a chain of reasoning, or a particular issue as a link in that chain, will be a breach of natural justice only if it represents a dramatic departure from the parties' cases, is wholly at odds with the established evidence or arrives at a conclusion unequivocally rejected by both parties as being trivial or irrelevant.

24 The claimants also rely on a passage in *BZW and another v BZV* [2022] 1 SLR 1080 ("*BZV (CA)*") where the Court of Appeal, while rejecting the challenge to *BZV HC*, stated at [54] that:

> … While generally speaking an assertion of a breach of the fair hearing rule does not require the degree of study of the Award and the record that the Judge undertook in this case, the allegations here that the impugned portions of the Award had no nexus to the case as actually presented to the Tribunal, required the exercise that the Judge undertook. If it takes time to make sense of an award to ascertain whether an important point was overlooked or addressed at all or whether the tribunal decided on a point that the parties did not have the opportunity to address, then the judge will have to look at the award, the pleadings, the submissions and any other documents that may throw light on what happened in the arbitral proceedings and what cases the parties were running. Then the judge will have to analyse the award in some depth in order to decide whether the allegations made by the party seeking to impugn the award on the basis of breach of natural justice have substance.

25 The claimants also refer to the decision of the Court of Appeal in *Glaziers Engineering Pte Ltd v WCS Engineering Construction Pte Ltd* [2018] 2 SLR 1311 at [37] where the court observed that:

> It was in view of these specific concerns that this court stated in *AKN v ALC* that we would only infer that the decision-maker had wholly failed to consider an issue if the inference was clear and virtually inescapable. That is not to say that the applicant who alleges such a breach of natural justice must do anything more than to establish its case on the balance of probabilities. In fact, the statement (at [46]) that the court will not draw the inference against the decision-maker "… if the facts are *also consistent* with the [decision-maker] simply having misunderstood the aggrieved party's case, or having been mistaken as to the law, or having chosen not to deal with [the] point …" [emphasis added] dovetails with the rule that the applicant must show that the facts are more consistent with the decision-maker having failed to consider the point entirely – that is to say, the applicant must show that this hypothesis is *more likely than not.*

26 The respondent also refers to *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 806 ("*Front Row*") where it was held at [31] that "a court or tribunal will be in breach of natural justice if in the course of reaching its decision, it disregarded the submissions and arguments made by the parties on the issues (without considering the merits thereof)".

27 The respondent submits that a breach of natural justice only occurs if the arbitrator had regard to the submissions made by a party during the hearing but did not really try to understand them and so failed to deal with the matter substantively and refers to *Front Row* at [37] as well as *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN*"). It also refers to the decision in *TMM Division Maritima SA de CV v Pacific Richfield Maine Pte Ltd [2013] 4 SLR 972* ("*TMM Division*") and submits that the central inquiry in all such cases is whether the award reflects the fact that the arbitral tribunal had applied its mind to the critical issues and arguments. It further refers to a passage in *AQU v AQV* [2015] SGHC 269 where it was said that "courts should not undertake a review of the substantive merits of the underlying dispute between the parties" (at [32]).

28 In relation to the arbitral tribunal's duty to give reasons and explanations, the respondent refers to *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 ("*SEF*") where it was held at [60] that the fact that the tribunal did not feel it necessary to discuss its reasoning and explicitly state its conclusions does not necessarily mean that the tribunal did not have regard to those submissions at all, because it may be an accidental omission on its part or it may have found the points so unconvincing that it thought it was not necessary to explicitly state his findings. Further, the court stated that "[n]atural justice requires that the parties should be heard; it does not require that they be given responses on all submissions made".

29 The respondent also refers to *TMM* where the court held that even if some of an arbitral tribunal's conclusions are bereft of reasons, that is not necessarily fatal. There are a variety of reasons why an arbitral tribunal may elect not to say something. The crux is whether the contents of the arbitral award taken as a whole inform the parties of the bases on which the arbitral tribunal reached its decision on the material or essential issues (at [104]).

30 It also refers to *AKN* where it was stated at [46] that:

> … It will usually be a matter of inference rather than of explicit indication that the arbitrator wholly missed one or more important pleaded issues. However, the inference – that the arbitrator indeed failed to consider an important pleaded issue – if it is to be drawn at all, must be shown to be clear and virtually inescapable. If the facts are also consistent with the arbitrator simply having misunderstood the aggrieved party's case, or having been mistaken as to the law, or having chosen not to deal with a point pleaded by the aggrieved party because he thought it unnecessary (notwithstanding that this view may have been formed based on a misunderstanding of the aggrieved party's case), then the inference that the arbitrator did not apply his mind at all to the dispute before him (or to an important aspect of that dispute) and so acted in breach of natural justice should *not* be drawn.

31 The respondent also refers to *AKN* and says that the court clarified the "important distinction" between an arbitral tribunal's decision to reject an argument (whether implicitly or otherwise, whether rightly or wrongly, and whether or not as a result of its failure to comprehend the argument and so to appreciate its merits) and the arbitral tribunal's failure to even consider that argument. Only the latter amounts to a breach of natural justice. The former is an error of law, not a breach of natural justice (*AKN* at [47]).

32 It also relies on *TMM* where the court stated that no party to an arbitration has a right to have its evidence believed, just as no party has a right to have its submissions comprehended and consequently accepted (at [120]).

33 The respondent also submits that:

(a) There is no right of recourse to the courts to set aside the arbitral award if an arbitrator has simply made an error of law and/or fact and relies on *BLC and others v BLB and another* [2014] 4 SLR 79 ("*BLC*") at [53].

(b) Poor reasoning on the part of an arbitral tribunal is not a ground to set aside an arbitral award; even a misunderstanding of the arguments put forward by a party is not such a ground and relies on *AKN* at [59].

(c) The court is not required to carry out a hypercritical or excessively syntactical analysis of what the arbitrator has written. Neither should it approach an arbitral award with a "meticulous legal eye endeavouring to pick holes, inconsistencies and faults … with the objective of upsetting or frustrating the process of arbitration" and relies on *AKN* at [59].

(d) The breach of natural justice cannot merely be technical or inconsequential. The arbitrator must have been denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to his deliberations and relies on *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 ("*LW Infrastructure*") at [54].

(e) In determining whether a matter was within the scope of parties' submission to arbitration (and in this case the attendant issue of what the Tribunal may have considered), the Singapore Court of Appeal in *CDM and another v CDP* [2021] 2 SLR 235 ("*CDM*") held that this must be answered by reference to five sources – the parties' pleadings, agreed list of issues, opening statements, evidence adduced and closing submissions at the arbitration (at [18]).

34 In relation to the test to be applied, the Court of Appeal held in *LW Infrastructure* at [54] that:

> … the issue is whether the material *could reasonably* have made a difference to the arbitrator; rather than whether it *would necessarily* have done so. Where it is evident that there is no prospect whatsoever that the material if presented would have made any difference because it wholly lacked any legal or factual weight, then it could not seriously be said that the complainant has suffered actual or real prejudice in not having had the opportunity to present this to the arbitrator …

35 With those matters in mind, I now turn to consider each of the four grounds relied on by the claimants.

Affirmation Defence Ground

Claimants' submissions

36 The claimants submit that, as set out in the Agreed List of Issues and reproduced in paragraph 22 of the Final Award, the Tribunal was required to determine: (a) whether the claimants were entitled to terminate the Agreements on 30 May 2016; (b) if not, whether the respondent had subsequently affirmed the Agreements; and (c) if yes, whether the respondent was subsequently disentitled from terminating the Agreements.

37 The defence of affirmation was raised by the claimants in the Statement of Defence where, at paragraph 80, they noted that the respondent's purported acceptance of their alleged repudiation by way of the respondent's 25 July 2018 letter was "incredibly late, more than 2 years after the [30 May 2016 Letter] had been issued … Further, it was contrary to [[the respondent]'s] own previous conduct where it had purportedly elected to affirm and enforce the Agreements…". The claimants then pleaded at paragraph 448 that the respondent was "estopped from subsequently electing to accept the alleged wrongful repudiation".

38 The claimants also refer to paragraph 451 of the Statement of Defence where they refer to the fact that the respondent had later challenged the validity of the May 2016 Letter as a termination notice under the Agreements and to paragraph 452 where they refer to the respondent's claim for specific performance of the Agreements in the Notice of Arbitration. On that basis the claimants say that they argued that these facts further prevented the respondent from purporting to accept the claimants' alleged repudiation by way of the July 2018 Letter.

39 Whilst the claimants say that the respondent did not expressly deal with the affirmation defence in its Statement of Reply and Defence to Counterclaim, it recognised that it was nevertheless an important limb of the claimants' defence in the Arbitration and devoted over two full pages at section B4 of its opening submissions to addressing it. The respondent also dealt with it in paragraphs 107 to 112 of its written closing submissions where it contended that it was nevertheless entitled to subsequently accept the claimants' alleged continuing repudiatory breach. In response, the claimants argued in paragraph 192 of their reply closing submissions that the respondent's position was unsupported by Indian law which was the governing law of the Agreements and, in particular, that under Indian law a contract cannot be subsequently rescinded after it is affirmed.

40 On that basis, the claimants submit that the affirmation defence was an essential issue to be considered by the Tribunal in its determination of the respondent's wrongful termination claim. Nonetheless, it submits that the Tribunal failed to consider this affirmation defence.

41 The claimants refer to the Tribunal's reasoning on this issue in paragraphs 548 to 558 of the Award. They say that at paragraphs 552 to 558 of the Award, the Tribunal set out certain facts indicating that there was some factual basis to support the respondent's continuing breach contention. At paragraph 559 of the Award, the Tribunal then found that "[the respondent] affirmed the Agreements subsequent to [the claimants'] termination of the Agreements". At paragraph 560 of the Award, the Tribunal found that the claimants "continued to be in repudiatory breach of the Agreements until at least 27 June 2018".

42 However, the claimants submit that at no point did the Tribunal actually make any determination or finding on whether the respondent was "estopped from subsequently" terminating the Agreements or otherwise rule on why the affirmation defence was inapplicable in light of the continuing breach contention or the contract law position in India on the continuing breach contention following affirmation of the Agreements by the respondent.

43 On that basis, the claimants submit that "the Tribunal did very little, if anything, to connect the proverbial dots" (see *BZV (CA)* at [58]). They also submit that "[a] breach of the fair hearing rule can arise from the tribunal's failure to apply its mind to the essential issues arising from the parties' arguments" (see *TMM Division* at [72] and [74]; *BZV (CA)* at [31]).

44 Accordingly, the claimants submit that there was a breach of the fair hearing rule. Applying the test whether a different result could (not would) have occurred but for the breach of natural justice, the claimants contend that, if the Tribunal had considered the affirmation defence, the Tribunal could have arrived at the conclusion that the respondent was not entitled to terminate the Agreements on 25 July 2018 and its wrongful termination claim would then fall away completely. On that basis the claimants submit that they have suffered real or actual prejudice.

Respondent's submissions

45 The respondent refers to the contentions that formed the background to the affirmation defence. It says that the claimants alleged that the respondent had repudiated the Agreements which the claimants then accepted on 30 May 2016, terminating the Agreements. The respondent, in turn, alleged that the claimants had repudiated the Agreements and that the respondent accepted that repudiation and terminated the Agreements on 30 May 2016. The claimants had

then raised the affirmation defence based on two matters. First, a letter dated 7 June 2016, in which the respondent maintained that the claimant's 30 May 2016 Termination Notice "[did] not fulfil the criteria laid down in the SHA to qualify as a Default Notice" and accordingly, the SHA had not been terminated. Secondly, by the Notice of Arbitration in which the respondents requested a "permanent injunction restraining the [claimants] from acting in a manner contrary to the Agreements" and "from taking any action or decisions in contravention of Clause 6.14.3 of the SHA" which showed that the respondent had not accepted the 30 May 2016 Termination but was seeking to enforce the Agreements.

46 It was in that context that the respondent says that, as pleaded at paragraphs 44 to 48, 83 to 84, 334 and 336 of the Statement of Reply and Defence to Counterclaim, it pleaded the alternative fall back case that the claimants continued to breach the Agreements in any event by continually denying its rights under the Agreements which included denying the respondent's rights to inspect CUX's books on the basis that the SHA had been terminated or had lapsed. The respondent therefore alleged that it was entitled to issue its notice of termination on 25 July 2018.

47 The respondent refers to the Agreed List of Issues, cited in the Award at [22], which set out these relevant issues:

> a. Whether any provisions of the CLA violated any provisions of the SHA or the SSA.
>
> b. Whether the [claimants] were entitled to terminate the Agreements on 30 May 2016 given [the respondent's] conduct in relation to the CLA and/or issuance of the MAC Notice in April 2016.
>
> c. If the First and Third [claimants] were not entitled to terminate the Agreements such that their termination was wrongful, did [the respondent] subsequently affirm the Agreements with any of its conduct?

> d. Whether [the respondent] has a claim arising from the [claimants'] alleged violation of [the respondent's] rights under the SHA post 30 May 2016.
>
> e. The parties' entitlement to damages and if so, quantum.

48 In relation to issue (d), the respondent relied on correspondence. First, on 1 February 2017, when its representatives were denied entry to CUX's premises, and it was told that its rights to inspect the books and records of CUX pursuant to the SHA were void as the SHA had been terminated by the 30 May 2016 Termination Notice. Secondly, on 27 June 2018 when it received a letter from the claimants which stated that "any rights to information and consultation or any affirmative voting rights previously held by [the respondent's] appointed director have lapsed and/or terminated pursuant to Clause 3.3 and/or Clause 24 of the Shareholders Agreement".

49 The respondent submits that the claimants made no factual arguments in respect of these allegations that they violated the respondent's rights under the SHA post 30 May 2016. Instead, the claimants advanced legal arguments that once a breach had been ratified or affirmed, it could no longer form the basis for a further repudiatory breach. In particular, the claimants' case was that the respondent's affirmation of the Agreements disentitled it from subsequently terminating the Agreements for the same alleged breach.

50 However, the respondent submits that the claimants failed to address the core point that given there was a continuing breach by the claimants and that the claimants had treated the Agreements as ended, the respondent was entitled, by its July 2018 Letter, to bring the Agreements to an end.

51 The respondent submits that the Tribunal did consider the affirmation defence. It refers to the Award at [261] where the Tribunal recognised and

acknowledged the arguments which the claimants made in respect of the affirmation defence:

> The Respondents' submission to the Claimant's argument of continuing repudiatory breach is two-fold: First, the authorities relied on by the Claimant are decisions on anticipatory breaches and do not apply to the current facts. Second, the position under Indian law is that termination after affirmation is not allowed (see *Union of India v Kesar Singh* and Section 27(2)(a) of the Specific Relief Act 1963), which is different from the English authorities that the Claimant relies on.

52 The respondent says that the Tribunal then considered the affirmation defence at [548] to [559] of the Award. At [548] to [549] of the Award, it says that the Tribunal appeared to accept the validity of the Affirmation Defence in respect of issues relating to the 30 May 2016 breach. In relation to the continuing breach, the respondent refers to [550] to [553] of the Award where the Tribunal set out the evidence that the claimants were treating the Agreements as terminated pursuant to cl 3.3 and/or cl 24 of the SHA. In essence, the respondent says that the Tribunal accepted that there was a continuing breach of the terms of the Agreements by the claimants. This, the respondent says, then led to the Tribunal's holding at [560(d)] of the Award that "the [claimants] continued to be in repudiatory breach of the Agreements until at least 27 June 2018. The [respondent] was entitled to and did on 25 July 2018 accept the [claimants'] repudiatory breaches".

53 The respondent submits that the Tribunal applied its mind to the parties' arguments including the affirmation defence but ultimately agreed with the respondent's submissions and rejected the affirmation defence in respect of the continuing breach. In so far as there is criticism that the Tribunal did not appreciate the point that the claimants were making in its reliance on Indian law, the respondent submits that this is not a fair criticism. Rather it says that the claimants appear to have failed to appreciate that the respondent was entitled to

accept the repudiation because of the continuing breach, by its July 2018 Letter. The submissions and authorities cited at paragraphs 187 to 192 of the claimants' reply closing submissions were, the respondent says, related to single event breaches which, after being affirmed, can no longer form the basis for termination which is different from the respondent's argument based on continuing breaches.

54 Accordingly, the respondent submits that the Tribunal did consider the affirmation defence. In any event, the respondent submits that no prejudice was caused because the claimants have not shown that there is a reasonable or credible argument that any tribunal might agree with it on the affirmation defence in relation to the continuing breach.

55 Specifically, the respondent submits that the claimants would need to show that under Indian law, once a breach has been affirmed, even a continuing or later breach by the defaulting party no longer entitles an innocent party from terminating the contract. The respondent submits that there is no such proposition and the claimants do not suggest that there is other case law which supports that proposition. In any event, in so far as the claimants contend that the Tribunal was wrong to have dismissed the affirmation defence on the basis of a misunderstanding of Indian case law, this would be an error of law that is not a ground for a setting aside application.

My decision

56 It is necessary to review the basis on which the claimants put forward the affirmation defence. It was raised in the Statement of Defence and Counterclaim, starting at paragraph 448 and continuing at paragraphs 451 to 453, in these terms:

> 448. Further, in any event, for more than 2 years after the issuance of the Default Notice, the [respondent] purported to affirm the Agreements and sought specific performance of the SHA. The [respondent], having already elected to enforce the performance of the SHA, is estopped from subsequently electing to accept the alleged wrongful repudiation by the [claimants] to terminate the Agreements.
>
> …
>
> 451. In its letter dated 7 June 2016 to the [claimants], the [respondent] maintained that the Default Notice "*does not fulfil the criteria laid down in the SHA to qualify as a Default Notice*". In doing so, the [respondent] denied that the SHA had been terminated.
>
> 452. In the Arbitration Notice, the [respondent] requested a "*permanent injunction restraining [CUW and CUY] from acting in a manner contrary to the Agreements*", and also "*restraining [CUW and CUY] from taking any action or decisions in contravention of Clause 6.14.3 of the SHA in relation to the 'Reserved Matters' under the SHA*." The relief sought by the [respondent] showed that it had not accepted the alleged wrongful repudiation by the [claimants], but was actively seeking to enforce the Agreements.
>
> 453. That being the case, the [respondent's] extremely late attempt in its letter dated 25 July 2018 to retrospectively reverse its election and "accept" the alleged wrongful repudiation by the [claimants] in May 2016 is clearly invalid and contrived.

57 The allegation is therefore that the respondent affirmed the SHA and was therefore not entitled on 25 July 2018 to accept the claimants' wrongful repudiation in May 2016, two years after 30 May 2016. It is to be noted that at paragraphs 449 and 450, the claimants relied on two English authorities relating to affirmation.

58 The respondent's response to that allegation is summarised in paragraphs 107 to 112 of its closing submissions under the heading "The [claimants] committed a continuing repudiatory breach which [the respondent] was nevertheless entitled to accept on 25 July 2018". In that section, the respondent's position is set out as follows:

> 107. Even if [the respondent] did affirm the Agreements following the [claimants'] initial breach (which is denied), if the Tribunal finds that the [claimants] wrongfully terminated the Agreements then it follows that by continuing to treat the Agreements as terminated, the [claimants] committed a continuing or anticipatory repudiatory breach.
>
> …
>
> 112. Thus, to the extent that [the respondent] affirmed the Agreements after 30 May 2016 (which is denied), [the respondent's] letter of 25 July 2018 was a valid acceptance of the [claimants'] continuing renunciation.

59 In their closing submissions, the claimants repeated the points on affirmation in the Statement of Defence and Counterclaims but at paragraph 31(b), after referring to an English authority, added "[s]imilarly, the doctrine of election is applicable under Indian law, and once an innocent party elects to affirm a contract, it cannot then seek to repudiate it". They then cite *Union of India v. Kesar Singh*, AIR 1978 J&K 102 at [6] ("*Kesar Singh*").

60 In their reply closings submissions, the claimants set out their position on the continuing breach under the heading "[The respondent] was not entitled to accept the [claimants'] alleged continuing repudiatory breach after affirming the Agreements". They then said this on affirmation at paragraph 192:

> **Secondly**, the position under Indian law is different from that laid down by the English authorities relied on by [the respondent]. [The respondent] has not provided any Indian law authority that suggests that once a contract has been affirmed, such affirmation may at a later point be revoked. The position under Indian law is that termination after affirmation is not allowed:
>
> > (a) *Union of India v. Kesar Singh* held that once an innocent party elects to affirm a contract, it cannot then seek to repudiate it. In particular, the court emphasised that 6 months after affirming the contract was "too late in the day to cancel the contract". Here, [the respondent] purported to terminate the Agreements nearly two years after first affirming them.

> (b) Furthermore, Section 27(2)(a) of the Specific Relief Act 1963 provides that the court may refuse to rescind a contract where the plaintiff has expressly or impliedly ratified the contract. As explained before (see [183] above) [the respondent] had clearly and unequivocally ratified the Agreements. Therefore, under Indian law, the contract cannot be rescinded.

61 The claimants refer to the Tribunal's findings at [559] and [560] of the Award, where the Tribunal stated:

> CONCLUSION ON ISSUE 3
>
> 559. The Tribunal finds that the Claimant affirmed the Agreements subsequent to the First and Third Respondents' termination of the Agreements reserving its right to raise all claims and contentions under the Agreements.
>
> D. CONCLUSION ON LIABILITY ON CLAIMANT'S CLAIM — ISSUES 1 TO 3
>
> 560. In all the circumstances the Tribunal finds as follows:
>
> > a. The Respondents' termination letter of 30 May 2016 stated clearly that the Claimant had committed a repudiatory breach of the Agreements which the Respondents accepted with effect from 18 April 2016, and it demonstrated a clear intention on the part of the Respondents not to perform the Agreements.
> >
> > b. In the light of the Tribunal's findings above, the Respondents wrongfully terminated the Agreements on 30 May 2016.
> >
> > c. The Claimant's 7 June 2016 response to the Respondents' 30 May 2016 wrongful termination contained a clear reservation of rights including the right to treat the Agreements as discharged at a later date.
> >
> > D. The Respondents continued to be in repudiatory breach of the Agreements until at least 27 June 2018. The Claimant was entitled to and did on 25 July 2018 accept the Respondents' repudiatory breaches.

62 The claimants say that whilst the Tribunal found at [559] that the respondent had affirmed the Agreements subsequent to the claimants' termination of the Agreements and at [560] that the claimants continued to be

in repudiatory breach of the Agreements until at least 27 June 2018, the Tribunal did not "make any determination or finding on whether [the respondent] was 'estopped from subsequently' terminating the Agreements or otherwise rule on why the affirmation defence was inapplicable in light of the continuing breach point, or the position of contract law in India on the continuing breach point following affirmation of the Agreements by [the respondent]".

63 It is necessary to put in context the findings made by the Tribunal. At [547] of the Award in respect of Issue 2, the Tribunal found that "the [claimants] were not entitled to terminate the Agreements on 30 May 2016 given the [respondent's] conduct in relation to the CLA and/or issuance of the MAC Notice in April 2016".

64 The Tribunal then went on to consider Issue 3, namely, "[i]f the First and Third [claimants] were not entitled to terminate the Agreements such that their termination was wrongful, did the [respondent] subsequently affirm the Agreements with any of its conduct?"

65 The affirmation defence was set out by the Tribunal at [548], as follows:

> 548. There is merit in the Respondents' submissions that by the Claimant's following conduct the Claimant clearly and unequivocally communicated its affirmation of the Agreements:
>
> (a) The Claimant's letter to Respondents dated 7 June 2016;
>
> (b) The Claimant's letter to Respondents dated 27 September 2016;
>
> (c) The Claimant's letter to Respondents dated 28 December 2016;
>
> (d) The Claimant's letter dated 2 February 2017, where it said that "*the SHA is still very much in existence*:, and sought to exercise its rights under the SHA to vote on Reserved Matters and to inspect [CUX's] records; and

> (e) The NOA dated 22 December 2017 sought affirmative action in performing contracts.

66 As set out above, the Tribunal found in its conclusion on Issue 3 that the respondent "affirmed the Agreements subsequent to the First and Third Respondents' termination of the Agreements", that is following the 30 May 2016 Termination Notice.

67 The Tribunal considered the allegation of continuing breach at [551] of the Award where it said:

> 551. The [respondent] submit[s] among other things that by continuing to treat the Agreements as terminated after 30 May 2016, the [claimants] committed a continuing or anticipatory repudiatory breach which the [respondent] was entitled to accept on 25 July 2018.

68 The Tribunal then considered the continuing or anticipatory breaches in February 2017 (at [552] of the Award) and in June 2018 (at [553] and [554] of the Award). The Tribunal then concluded at [560(d)] that "[t]he [claimants] continued to be in repudiatory breach of the Agreements until at least 27 June 2018. The [respondent] was entitled to and did on 25 July 2018 accept the [claimants'] repudiatory breaches".

69 Whilst the claimants say that the Tribunal did not deal with the affirmation defence in relation to the continuing breach, it is not clear what the claimants' affirmation defence was in relation to the continuing breach. The facts relied on as affirmation only went to the end of 2017, as set out in [548(e)] of the Award. The final act of affirmation was the Notice of Arbitration of 22 December 2017. There was no act of affirmation alleged in relation to the continuing breach in June 2018 which was accepted on 25 July 2018. It is therefore difficult to see that there was the factual basis for an affirmation

defence that applied to the breach which gave rise to the findings of repudiatory breach in June 2018 as set out in [560(d)] of the Award.

70 Although, in their reply submissions, the claimants included a section under the heading "[The respondent] was not entitled to accept the [claimants'] alleged continuing repudiatory breach after affirming the Agreements", that section merely sets out the position by reference to *Kesar Singh*. In their closing submissions at paragraph 31(b), they had said that the case was similar to the English authorities on affirmation and in their reply submissions they said that the "position under Indian law is that termination after affirmation is not allowed". That does not, however, identify the act of affirmation. Nor does it set out any basis for the early acts of affirmation applying to later breaches of the Agreements.

71 On that basis, I do not consider that the claimants can criticise the Tribunal on natural justice grounds for not dealing with an affirmation defence raised at a late stage in the reply closing submissions and not properly articulated either as to the factual or legal basis for that contention. Indeed, the conclusion would be that in contradistinction to the finding of affirmation in relation to the 30 May 2016 breach, there was a clear finding of repudiatory breach and entitlement to terminate in July 2018. That would show that the Tribunal had found that no case of affirmation had been made out of the continuing breach which was accepted on 25 July 2018. That would amount to a finding or fact and law which cannot be challenged on this application to set aside.

72 In any event, even if, contrary to my finding, there was a breach of the rules of natural justice because the Tribunal did not consider the affirmation defence in relation to the continuing breach, the claimants have put forward no

factual or legal basis on which the Tribunal might have found that the affirmation defence could be made out in relation to the continuing breach. On that basis, the claimants have not established the necessary prejudice.

73 On that basis, I reject the claimants' application to set aside the Award on the basis of the Affirmation Defence Ground.

Afterthought Argument Ground

Claimants' submissions

74 The claimants refer to the Agreed List of Issues reproduced at [22] of the Award and say that the Tribunal was required to determine the following issues:

> (a) whether any provisions of the CLA violated any provisions of the Agreements; and
>
> (b) whether the [claimants] were entitled to terminate the Agreements on 30 May 2016 given [the respondent's] conduct in relation to the CLA and/or issuance of the MAC Notice in April 2016.

75 The claimants say that the respondent had taken issue with being named as a "promoter" on the basis that it would thereby incur additional financial obligations. The respondent therefore refused to proceed with the CLA until those provisions were renegotiated.

76 In the Arbitration, the claimants say that they contended that the respondent's alleged concerns regarding being named as a "promoter" were unreasonable and evidenced an intention not to perform its obligations under the Agreements. They argued that the respondent's alleged concerns with being

named as a "promoter" were nothing more than an afterthought since the respondent had previously signed the lenders' entity appraisal forms which identified it as a "promoter". The claimants say that the respondent's explanation was only considered by the Tribunal from the lens of whether the respondent would incur any additional liabilities if it were named as a "promoter" under Indian law. Instead, the claimants submit that the Afterthought Argument ought to have been considered by the Tribunal in deciding whether the respondent's alleged concerns regarding being named as a "promoter" were unreasonable and evidenced an intention not to perform its obligations under the Agreements.

77 The claimants submit that had the Tribunal considered the Afterthought Argument, it could have disentitled the respondent from asserting that they could not be considered "promoters" under the CLA or incur liabilities under Indian law as a promoter of CUX. However, the claimants say that the Tribunal failed to do so. They submit that, even if as the respondent submits, the Tribunal decided the promoter issue on the basis that being classified as a "promoter" would give rise to additional financial obligations on the part of the respondent, the Afterthought Argument would still need to be addressed as it is a "logically prior issue" that could not have been dispensed with. The claimants refer to *TMM Division* at [77]). They say that, as stated in *TMM Division* at [72] and [74] and *BZV (CA)* at [31], a breach of the fair hearing rule can arise from the tribunal's failure to apply its mind to the essential issues arising from the parties' arguments.

78 Accordingly, the claimants submit that the Afterthought Argument was an essential issue that had to be decided by the Tribunal in its determination of whether the respondent's alleged concerns regarding being named as a "promoter" were unreasonable and evidenced an intention not to perform its

obligations under the Agreements. However, the claimants submit that the Tribunal failed to consider the Afterthought Argument.

79 In the Statement of Defence at paragraph 192, the claimants pleaded that:

> … the [respondent] itself had filled in the [lender's] loan application form, which identified the [respondent] as a "*Promoter Company*". An email from Mr. [DDD] to [CUY], attaching the same document, confirms that the [respondent] was well aware of this. In fact, the [respondent], through Mr. [EEE], had submitted the "*Promoter Appraisal information of [the respondent]*" to [the lender].

80 The claimants' opening submissions also set out that:

> Through its comments provided on 15 July 2014, [the respondent] took issue with several provisions of the draft CLA, including being named as a promoter. This was surprising to the [claimants] as [the respondent] itself had filled in [the lender's] core promoter management evaluation form and confirmed and submitted the promoter entity appraisal information.

81 The claimants also refer to their closing submissions which set out that the respondent's defences to its categorisation as a promoter was a "clear afterthought and totally unreasonable for [the respondent] to belatedly argue that whatever perceived 'evidential disadvantage' might arise from it *also* being named a promoter in the CLA therefore gave [the respondent] free rein to block the CLA, cause the project to fail and waste the millions of dollars which parties had invested".

82 Therefore, the claimants submit that the issue of whether the respondent was disentitled from raising any objection on the basis of being named as a promoter as a defence to its delay to execute the CLA was a live issue. Having failed to address this issue which was central and essential to the determination of whether the respondent's alleged concerns regarding being named as a

"promoter" were unreasonable and evidenced an intention not to perform its obligations under the Agreements while accepting [the respondent's] justification for not executing the CLA, the claimants submit that the Tribunal deprived them of their right to a fair opportunity to be heard.

83 In addition or alternatively, the claimants submit that there is a breach of natural justice as there is no indication that the Tribunal engaged its mind on the Afterthought Argument issue. In particular, the claimants say that there is no analysis as to why the Tribunal took the view that the Afterthought Argument was unpersuasive or otherwise did not have to be decided in light of their previous findings. Indeed, the claimants say that the Tribunal did not even make a finding on the Afterthought Argument.

84 The claimants say that parallels can be drawn with the decision in *BZV (CA)* at [58], where the Court of Appeal was critical of the quality of the tribunal's reasoning when it noted that the tribunal's analysis in the award spanned from pages 41 to 75 of the 78-page award (roughly 47% of the total page count) and remarked that the tribunal's "analysis of evidence also appear[ed] thin".

85 The claimants submit that it is not sufficient for a tribunal to make mere assertions. It must make it apparent that its findings are the result of examining the evidence and submissions. The Tribunal must also "connect the proverbial dots".

86 In this case, the claimants say that the Award, excluding annexures, was 200 pages long but the entirety of the Tribunal's analysis on liability accounts for only a quarter of the total page count and pages 1 to 129 of the Award are merely a summary of the procedural history, the agreed facts, and the parties'

cases and the Tribunal's reasoning on this particular central issue is merely contained in [427] to [439] of the Award.

87 The claimants refer to the Tribunal's statement at [625] of the Award that:

> … In coming to its decision, the Tribunal has considered not only the positions of the Parties as summarised in this Final Award, but also the numerous detailed arguments made in their written and oral submissions. The Tribunal has taken into account all evidence, documents, arguments and submissions even if not referred to expressly, or not set out in full in this Final Award and they are subsumed in the Tribunal's analysis.

88 They submit that such a statement should be given little weight because as stated in *BZV (HC)* at [128]:

> … a general and self-serving paragraph can[not] operate, in itself, to immunise an award against an allegation that the tribunal has breached the fair hearing rule. … The law does not go so far as to allow a self-serving, boilerplate paragraph such as this to conclude the assessment in the tribunal's favour.

89 Whilst the Tribunal had purported to provide a brief summary of the claimants' submissions on this point at [182] of the Award, the claimants say that this alone does not show that the Tribunal considered the issue as "[a] breach of the fair hearing rule can arise from the tribunal's failure to apply its mind to the essential issues arising from the parties' arguments", and they rely on *TMM Division* at [72] and [74] and *BZV (CA)* at [31]. The claimants submit that the Tribunal's finding that being classified as a "promoter" would give rise to additional financial obligations on the part of the respondent is not a "logically prior issue" which rendered the Afterthought Argument otiose.

90 Accordingly, the claimants submit that a breach of the fair hearing rule occurred. Further, they say that they have suffered actual or real prejudice as, if the Tribunal had considered the Afterthought Argument, then it is entirely

possible that the Tribunal may have come to a different conclusion on the issue of whether the respondent's alleged concerns regarding being named as a "promoter" were unreasonable and evidenced an intention not to perform its obligations under the Agreements. If the Tribunal had done so, then it is also possible that the Tribunal could have come to a different conclusion on the issue of whether the claimants were entitled to terminate the Agreements on 30 May 2016 due to the respondent's "unreasonable and obstructive" conduct in relation to the CLA.

91 If the Tribunal had found that they were entitled to terminate the Agreements on 30 May 2016, then they would have been entitled to damages and the respondent's wrongful termination claim would fall away. Accordingly, the claimants submit that they have suffered real or actual prejudice.

Respondent's submissions

92 The respondent says that the Afterthought Argument was part of the claimants' case that the respondent had committed repudiatory breaches of the SHA which entitled them to terminate the Agreements on 30 May 2016. Specifically, the claimants argued that the respondent was not entitled to withhold approval for the CLA and that its concerns about being named as a Promoter in the CLA were simply an afterthought because it had previously signed loan application forms in which it was identified as a Promoter.

93 The respondent argued that the CLA contained provisions that named it as a promoter amounted to a guarantee or similar obligation which was contrary to cl 19 of the SHA which provides that "[the respondent] shall not be obliged to participate in any guarantee or similar undertaking for the benefit of the Company, including, without limitation, in respect of the CLA".

94 Accordingly, the respondent argued that it was entitled to withhold its approval for any document or CLA with the various banks and financial institutions which labelled it as a promoter. The claimants argued, among other things, that under Indian Law, the term "promoter" generally did not amount to a "guarantor" and that in any event the respondent had signed the previous forms which already indicated it was a promoter (albeit in incorporation and other documents and not in bank or financial documents).

95 The respondent says that, in its proper context, the Afterthought Argument is not an argument which is grounded in legal principle or reasoning. It is a factual point intended to colour the factual circumstances and highlight the purported motive/conduct of the respondent which, the claimants alleged, evidenced the understanding of the respondent. The respondents submit that the real issue is whether the respondent was entitled to refuse to approve certain financial documents labelling it as a promoter and this turned on what "promoter" meant and the exposure it carried under Indian law

96 The respondent refers to the pleaded positions of the parties. At paragraph 98 of the Statement of Claim, the respondent pleaded that [BA] provided [the respondent] with certain documents that were in the standard format of [the lender] (one of the Lenders) which terms named every investor into a project seeking funding as a "promoter". [The respondent] filled out the documents as requested by [BA] as it trusted its Indian partner to fulfil its obligations under the Agreement, which explicitly provided that the [respondent] would not undertake any guarantees for the CLA. [The respondent] did not believe that, by merely being named a "promoter" in the [lender's] loan application, it would be coerced to undertake obligations, contrary to what had been expressly agreed in the SHA. Moreover, neither [CUW nor CUY], nor

[BA] advised [the respondent] that by filing out the loan application form, it may be subjecting itself to the obligations of a "promoter".

97 At paragraphs 100 to 102 of the Statement of Claim, the respondent then pleaded that "since the CLA was to be an elaboration of the terms and conditions as agreed in the sanction letters" and the sanction letters required the respondent to be termed as a "promoter" and undertake a corporate guarantee which was "completely contrary to the Agreements between the parties and in contravention of specific terms of the SHA", the respondent did not accept the CLA.

98 Then at paragraphs 43 and 190 to 195 of the Statement of Defence and Counterclaim, the claimants rejected the respondent's arguments and pleaded, among other things, that the respondent had itself signed the loan application forms which identified it as a 'Promoter Company' and that the respondent was already assured that it was not required to undertake any additional liability.

99 In paragraphs 187 to 197 of the Statement of Reply and Defence to Counterclaim, the respondent addressed this and pleaded that it "did not believe that by merely being named as a 'promoter' in the application, it would be coerced to undertake obligations, contrary to what had been agreed in the SHA, and neither [the claimants] nor [BA] warned [the respondent] of these obligations. [The respondent] believed that it would only have to undertake the financial obligations as agreed by it under the Agreements, and since the provision of the Agreements were known to the Lenders and the [claimants], they would not attempt to subject [the respondent] to further obligations just because it was named as a 'promoter' under the financing documents" and further, that "being named as a promoter under the CLA meant that [the

respondent] would have to undertake additional financial obligations under the Agreements and were completely contrary to the Agreements".

100 Then at paragraphs 26 to 34 of the Statement of Reply to Defence to Counterclaim, the claimants addressed the promoter issue but focused on addressing a point that the respondent made that BA had a vested interest in getting the CLA executed.

101 The respondent says that the issue relating to the promoter and the evidential fact of the previous forms were dealt with in witnesses statements filed by the parties. The respondent points out that the references were extensive, and the Tribunal created an annexure to the Award identifying the relevant paragraphs of the witnesses. In addition, an Indian law issue on the effect of being labelled a promoter was also dealt with.

102 At [433] of the Award, the Tribunal referred to the opinion of Ms [FFF], the respondent's expert witness, on what a "promoter" meant under Indian law.

> In her report dated 6 November 2020 Ms [FFF] among other things opined as follows:
>
> 7.28 In this regard, I find that the word 'Promoter' is used in only one Article of the Draft CLAs which is germane to this Expert Report, as follows:
>
> 7.29 In this context, it is noteworthy that while Article 5.1.2 of the Draft CLAs requires the Memorandum and Articles of the Company to be amended such that [the respondent], [CUW] and the Individual Sponsor are identified as either 'Promoters' or 'Sponsors' of the Company, the [lender's] Sanction Letter, in paragraph A (1), requires [the respondent] to be named as a promoter and, in paragraph A (15), requires that the Articles of the Company be amended to reflect [the respondent], [CUW] and the Individual Sponsor as 'Promoters' of the Company.
>
> 7.30 In light of the above, there do not appear to be any direct additional financial obligations on the Promoters arising

> from the terms of the Draft CLAs themselves, which are beyond those imposed on the Sponsors. However, under Indian law, there are situations where persons or companies who are named or categorised as 'promoters' of a company may be subject to certain obligations at law. The obligations which apply to 'promoters' vary depending on the definition of the term 'promoter' under the statutes imposing those obligations. Whilst I am not providing a general opinion on all of the Indian law obligations which might apply to anyone described as a 'promoter' under Indian law, as a general point, a person recognised or designated as a promoter of a company is generally presumed to be in control of such company. There are certain liabilities, pecuniary or otherwise, which are concomitant with such attribution and can often be severe. Illustratively, under the Companies Act, 2013 a 'promoter' is liable to compensate for gain resulting from non-disclosure or insufficient disclosure of information in the statement annexed to the notice of board meetings of a company. Similarly, under the Companies Act, 2013, in the course of winding up of a company on an application made by the official liquidator, the court may make the promoter liable for misfeasance or breach of trust.

103 The respondent says that, at [434] of the Award, the Tribunal noted that Ms [FFF] was not cross-examined on these opinions.

104 The respondent says that the claimants also produced the legal opinion of a Senior Advocate endorsed by a retired Judge, who stated as follows:

> The queries of the company have been examined with reference to law as applicable and corporate practices generally followed and prevalent as well as guidelines of the Regulatory Authorities where necessary in the context.
>
> 1. The Company was incorporated as a private limited Company as stated supra in the Office of the Registrar of Companies, [Indian State] on [date]. The subscribers to the Memorandum of Association of the Company are [CUY] and Mrs. [BBB] and these are the first directors named in the Articles of Association of the Company who, as per the provisions of Companies legislation, will be treated as the first shareholders.
>
> 15. To address the second query, based on the analysis of the obligations of [the respondent] (as briefed to me), I

> do not think [the respondent] qualifies as a promoter. In any event, I cannot pinpoint any law that would specifically require that promoters be identified and named in the financing documents. As regards whether or not lenders are advantaged by naming [the respondent] as promoter if the project runs in ordinary course, in addition to the obligations/acknowledgements that [the respondent] is liable to commit/furnish, I cannot see how the lenders will necessarily advantaged by naming [the respondent] as promoter in the financing documents if the project runs in ordinary course. That said, under certain circumstances, assuming [the respondent] were established as promoter, identifying [the respondent] as promoter (such as in cases of restructuring where guarantees of promoters are sought or cases of wilful default where promoters are to be held accountable/responsible) may be said to bear certain degree of evidentiary upside. This is in view of the provisions of Section 114 of the Evidence Act, 1872 (Evidence Act), whereby the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to facts of the particular case. Further, certain judicial pronouncements premised, *inter alia*, on Section 114 of the Evidence Act suggest that the effect of Section 114 of the Evidence Act is to make it perfectly clear that the Courts of Justice are to use their own common sense and experience in judging the effect of particular facts and they are to be subjected to no technical rules whatever on the subject. Further, Section 114 of the Evidence Act has been viewed as being wide enough to raise a presumption not only with regard to oral evidence but also with regard to documentary evidence.

105 The respondent says that Ms [FFF] expressed similar views on this aspect.

106 At the end of the hearing, the respondent says that the parties also made extensive submissions on the promoter issue, including the evidence of the previous forms, as follows:

(a) At paragraph 170(c) of the respondent's closing submissions, the respondent emphasised that its expert witness, Ms [FFF] had made clear in her report that being named a "promoter" would impose obligations as a matter of law under the Indian Companies Act but the claimants did not cross-examine her on this point. Further, that "both Ms [FFF] and a legal opinion obtained by [CUY] from a retired judge in August 2015 confirmed that promoters have obligations to provide corporate guarantees in cases of restructuring and are held accountable in cases of wilful default by a company, and that if the respondent was named as a promoter, that would give rise to an evidential presumption that the respondent assumed the obligations of a promoter".

(b) At paragraphs 64 to 68 of Appendix 2 of the respondent's closing submissions, the respondent made further submissions on how the respondent would incur additional liabilities as a matter of Indian law by assuming the title of "promoter" under the CLA.

(c) At paragraphs 114 to 141 of the claimants' closing submissions, the claimants made extensive arguments about the promoter issue, arguing, *inter alia*, that:

(i) "[the respondent] had no contractual right under the Agreements to not be called a promoter in the sanction letters and the CLA" (at paragraph 119);

(ii) "whether or not [the respondent] was named a 'Promoter' made no difference to its contractual obligations under the CLA" (at paragraph 123); and

(iii) there was no basis to the respondent's objections on being named a 'Promoter' and the Afterthought Argument that

having signed the Previous Forms where the respondent was already identified as a promoter, the respondent's objections were "a clear afterthought and totally unreasonable" (at paragraph 141).

(d) At paragraphs 64 to 68 of the respondent's reply closing submissions, the respondent reiterated its earlier submissions and addressed the Afterthought Argument and the evidence of the previous forms. The respondent argued, *inter alia*, at paragraph 68 that the previous forms "described the applicant as a Promoter but did not explain or indicate that the term carried any further legal significance. Moreover, Mr [DDD's] witness evidence (which was not challenged on cross-examination) is clear that he did not receive legal advice when he was completing the forms, he did not know that being described as a Promoter would carry any particular significance at that time, and he simply filled-in the forms as he had been asked by [BA]. This cannot be taken as an unequivocal acceptance by the respondent that it agreed to be defined as a Promoter in the CLA".

(e) At paragraphs 57 to 59 of the claimants' reply closing submissions, the claimants argued that both Ms [FFF] and the Senior Advocate's opinion did not say that a party called a "promoter" was obliged to provide additional funding.

107 The respondent submits that, on the basis of the references above, the Afterthought Argument and the emphasis on the respondent's conduct in signing the previous forms was, in reality, evidence relied upon by the claimants to support their contention that the respondent cannot now insist that it should not be considered a "promoter" because it had already agreed to be a "promoter"

previously. It was, the respondent says, a factual point relevant to the wider issue which was to be determined with reference to what "promoter" means under Indian law.

108 The respondent says that if the Tribunal accepted that being labelled as a "promoter" in bank and financial institution documents under Indian Law was akin to being a guarantor then the Afterthought Argument and the circumstances surrounding the signing of the previous forms would be irrelevant.

109 The respondent refers to [432] of the Award and submits that the Tribunal recognised that the issue relating to the "promoter" was "appreciated by all sides to be very much a live issue". It says that the Tribunal also acknowledged and set out the Afterthought Argument in the Award, including references to the previous forms which were the basis of the Afterthought Argument and to the expert evidence adduced by parties on the effect of being labelled a "promoter" under Indian law. It refers to the following:

(a) At [177] to [182] of the Award, the Tribunal set out the claimants' arguments on the issue relating to the "promoter" and the evidence of the previous forms.

(b) At [429] and [430], read with Annexure 2 of the Award, the Tribunal took pains to list down and exhibit the evidence given by the factual witnesses of both sides on the promoter issue and the previous forms.

(c) At [433] to [436], the Tribunal dealt with the legal opinions of Ms [FFF] and the Senior Advocate.

110 The Tribunal then ultimately concluded at [438] of the Award that "there is much to the submission of the [respondent's] counsel that by having the title of Promoter forced upon it the [respondent] would incur additional liabilities as a matter of Indian law under the CLA" and at [439] of the Award that "the requirement that the [respondent] be classified as Promoter violates Article 19.1 of the SHA".

111 Once the Tribunal accepted that being classified as a promoter in the CLA violated Art 19 of the SHA, the respondent submits that the reasons for and the fact that the respondent's representatives signed the previous forms were irrelevant.

112 In so far as the claimants assert that the Tribunal did not apply its mind to the Afterthought Defence simply because it did not explicitly state its conclusion on whether the previous forms showed that the promoter issue was thought about belatedly by the respondent, the respondent submits that this cannot be a ground for finding that the Tribunal failed to consider the Afterthought Argument.

113 The respondent, relying on the decision in *SEF*, submits that natural justice does not require that the claimants are given responses on all submissions made. The respondent submits that as stated in *TMM Division*, the key is whether the award informs parties of the basis on which the tribunal reached its decision on the material or essential issues. The Tribunal rightly identified that the crux was whether the CLA contravened the SHA such that the respondent could withhold approval for it and the Tribunal clearly laid out its reasoning on why it found in favour of the respondent on this issue. Once the CLA contravened the SHA, even if it was true that the respondent only brought up the promoter issue as an afterthought, this is irrelevant as the respondent would

be entitled to withhold approval for the CLA on the basis that it was contrary to the SHA. Accordingly, the Tribunal may have found it unnecessary to state its finding on the previous forms and this, in itself, is not a valid basis to impugn the Award.

114 In so far as the claimants allege that the Tribunal was wrong in its finding that being named a Promoter in the CLA contravened the SHA, this is an error of law that is not a ground for setting aside the Award.

115 In any event, even if the Tribunal failed to consider the Afterthought Argument, the respondent submits that the argument becomes irrelevant with the Tribunal's finding that forcing the respondent to be labelled as a promoter in the CLA was a breach of cl 19.1 of the SHA. It is not the claimants' case that the previous forms altered the parties' agreement under the SHA and, accordingly, it would not have reasonably made a difference to the outcome and no prejudice would be occasioned.

116 In addition, in the Arbitration, the respondent's position was that it was entitled to withhold approval of the CLA because there were nine provisions in the CLA which were not consistent with parties' agreement under the SHA and the promoter issue relates to just one out of the nine provisions complained of by the respondent. The Tribunal found that five out of the remaining eight provisions of the CLA were contrary to the SHA and thus the respondent was entitled to withhold approval of the CLA.

117 Accordingly, even if the Tribunal failed to consider the Afterthought Argument, the other five impugned provisions of the CLA would remain as the basis for the Tribunal's determination and there would not have been a reasonable difference to the outcome.

My decision

118 The Afterthought Argument was essentially an argument that having signed the lender's documents which named the respondent as a "promoter", the respondent's contention that it did not enter into the CLA because it named the respondent as a "promoter" was an afterthought.

119 In their written submissions, the claimants put forward a contention that the Afterthought Argument meant that "the respondent was disentitled from raising any objection on the basis of being named as a Promoter as a defence to its delay to execute the CLA". However, the claimants accepted in argument that it put forward no case that the conduct of the respondent in signing the lender's documents had any legal effect, such as an estoppel or waiver, on the respondent's entitlement to object to the CLA on the basis that its terms conflicted with cl 19.1 of the SHA.

120 Whilst the claimants contended that the respondent's alleged concerns with being named as a "promoter" were nothing more than an afterthought since the respondent had previously signed the lenders' entity appraisal forms which identified it as a "promoter", on analysis that has no effect on the relevant issue of whether the terms of the CLA conflicted with cl 19.1 of the SHA. If the terms of the CLA required the respondent to be a "promoter" and those terms conflicted with cl 19.1 of the SHA, then whether the concerns were an afterthought in terms of the respondent's conduct in relation to the previous forms was irrelevant and of no consequence to that issue.

121 The Afterthought Argument, as finally articulated in paragraph 141 of the claimants' closing submissions was as follows:

> Further and in any case, **[the respondent] itself had completed and signed the Lenders' entity appraisal forms**

> **where [the respondent] was already identified as a promoter**. It is a clear afterthought and totally unreasonable for [the respondent] to belatedly argue that whatever perceived "evidential disadvantage" might arise from it also being named a promoter in the CLA therefore gave [the respondent] free rein to block the CLA, cause the Project to fail and waste the millions of dollars which parties had invested.

122 However, as stated above, the Tribunal set out its findings on the relevant issue at [427] to [428] and [437] to [439] of the Award:

> 427. In the SHA only [CUW] is defined as "Promoter", and the [respondent] is defined as ["the respondent"]. Likewise, in the SSA. For some reasons which remained vague and indeed unexplained in the arbitration, the Lenders insisted not only on the [respondent] being named Promoter for the purposes of the CLA, they also required the definition of "Promoter" in [CUX's] Articles of Association be amended accordingly. There was no backing down from this position.
>
> 428. The question which arises is why this intransigence in the face of the legal opinions obtained by both the [respondent] and the [claimants] that at least in some circumstances legal obligations inhere in a "Promoter" …
>
> 437. Indeed, on the strength of the Judge's endorsement of the legal opinion the [claimants] wrote to [the lender] on 15 October 2015 requesting the [respondent] not be classified as Promoter in the financing documents. And yet the Lenders did not ameliorate their position.
>
> 438. In these circumstances there is much to the submission of [the respondent's] Counsel that by having the title of Promoter forced upon it the Claimant would incur additional liabilities as a matter of Indian law under the CLA which incorporates the [lender's] letter by reference.
>
> 439. The Tribunal therefore finds that the requirement that the [respondent] be classified as Promoter violates Article 19.1 of the SHA.

123 On that basis, the respondent was evidently entitled to object to the terms of the CLA and the Afterthought Argument has no relevance to the promoter issue.

124 The Tribunal evidently considered the Afterthought Argument and set it out in [182] of the Award in these terms, with a footnote referring to paragraph 141 of the claimants' closing submissions set out above:

> In any case, the Claimant itself had completed and signed the Lenders' entity appraisal forms where the Claimant was already identified as a promoter.

125 In those circumstances, there was no basis on which the Afterthought Argument could affect the legal position and therefore no basis on which the Tribunal needed to deal with it.

126 In any event, even if I had come to the conclusion that the Tribunal was in breach of the rules of natural justice by failing to consider the point then, as the respondent pointed out, this would only go to one of the nine breaches relied on and the Tribunal found that five of the other eight breaches had been established. Whilst, in argument, the claimants sought to say that the Afterthought Argument might have had an effect on the Tribunal's other findings, I consider that to be unarguable. Those objective findings of breach would not have been affected by the argument that the respondent's contention that the requirement for it to be a promoter in the CLA in breach of cl 19.1 of the SHA was an afterthought.

127 On that basis, I reject the claimants' application to set aside the Award on the basis of the Afterthought Argument Ground.

Clause 16.5 Breach Ground

Claimants' submissions

128 The claimants state that there is no dispute that the Clause 16.5 Breach Issue was an issue in dispute in the Arbitration but say that the respondent

contends that it was merely part of the claimants' case that the respondent had committed a repudiatory breach of the SHA entitling the claimants to terminate on 30 May 2016.

129 The claimants submit that the Clause 16.5 Breach Issue was an essential issue which the Tribunal had to consider in determining whether they were entitled to terminate the Agreements on 30 May 2016 and had the Tribunal determined that issue in their favour, this would also have determined the wider repudiation issue in their favour. They say that the other breaches by the respondent which they relied on, such as that the respondent had disabled itself from making the Third Tranche Investment or that the respondent had breached its duty to cooperate in good faith were not logically prior issues such that the Tribunal could be justified in disregarding the Clause 16.5 Breach Issue and they refer to *TMM Division* at [77].

130 The claimants submit that, as stated in *TMM Division* at [72] and [74] and *BZV (CA)* at [31], a breach of the fair hearing rule can arise from the tribunal's failure to apply its mind to the essential issues arising from the parties' arguments.

131 The Tribunal's reasoning in respect of the Clause 16.5 Breach Issue was set out in [524] to [527] of the Award and the Tribunal's summary of the claimants' submissions on this issue is contained in [234] of the Award. The claimants submit that it is clear from those paragraphs that the Tribunal did not make any effort to consider let alone understand the claimants' submissions.

132 In their written closing submissions, the claimants say that they had argued that CUY had given evidence that the award of the BOP contract to [VVV] was negotiated during the commercial discussions prior to the

respondent's entry into the Project. Consequently, the Term Sheet to the SHA recorded that the BOP works were to be undertaken by [VVV] and this understanding was retained in cl 16.5 of the SHA. However, none of this was addressed by the Tribunal in their reasoning at [524] to [527] of the Final Award. Accordingly, the claimants submit that a breach of the fair hearing rule occurred.

133 The claimants contend that if the Tribunal had considered the Clause 16.5 Breach Issue, it could have arrived at the conclusion that the claimants were entitled to terminate the Agreements on 30 May 2016. If the Tribunal had done so, then they say that not only would they be entitled to damages for the respondent's breach of the Agreements, but the respondent's wrongful termination claim would have fallen away. Accordingly, they submit that they have suffered real or actual prejudice.

Respondent's submissions

134 The respondent submits that the Clause 16.5 Breach Issue was a part of the claimants' case that the respondent had committed repudiatory breach of the SHA which entitled them to terminate on 30 May 2016. They alleged that the respondent breached cl 16.5 of the SHA by insisting that a single EPC contractor be appointed in place of [VVV] and that this entitled them to terminate the Agreements.

135 The respondent refers to cl 16.5 of the SHA which provides:

> All other aspects of the Project execution, other than the supply of BTG pursuant to Clause 16.4 above, shall, in principle, be undertaken by [VVV] subject to the provisions of Clause 6.7 above; **provided** that [VVV] shall guarantee unconditionally (including, without limitation, providing for guarantees of performance and taking full responsibility for any financial losses resulting therefrom) the quality, the performance and the

> time aspects (e.g. meeting material delivery schedules) of the Project as is customarily guaranteed, performed and undertaken by internationally reputable service providers in similar projects.

136 The respondent says that its position was that it had issues with [VVV]'s ability to perform and that [VVV] would not have been able to provide the requested guarantee under cl 16.5. It refers to the pleaded positions of the parties:

(a) At paragraphs 70 to 72 of the Statement of Claim, the respondent pleaded that the claimants were in repudiatory breach by wrongfully terminating the Agreements by way of the 30 May 2016 Termination Notice.

(b) Further, at paragraphs 118(c) and 119 of the Statement of Claim, the respondent pleaded that "Clause 16.5 of the SHA further provides that all the balance aspects of the Project (BOP) were to be undertaken by [VVV]. Since [VVV] lacked experience, manpower and expertise, it was decided to involve another company along with [VVV]. This was in the interest of the Project and was agreed to by [CUW and CUY] in a meeting held on 9 March 2014. It is also common practice in EPC contracts that the BTG supplier also does the erection work. [VVV] insisted that the erection work should be undertaken by them as they were the BOP contracts. [The respondent] did not agree to this, as it was against the interest of the Project and moreover [VVV] did not have the capability required for the work" and that therefore "it is evident that it is [CUW and CUY], and not [the respondent], who are responsible for the delay in the finalisation and execution of the CLA".

(c) At paragraphs 260 and 261 of the Statement of Defence and Counterclaim, the claimants pleaded that "[The respondent] sought to

change the terms of the Agreements so that there would be a single EPC contractor instead. While [the respondent] has alleged that [VVV] lacked experience, manpower, and expertise, no explanation or substantiation has been provided for those bare assertions. Moreover, although it was decided at a meeting dated 9 March 2014 to involve another company along with [VVV] for the BOP packages, identification of [VVV's] partners was 'in its sole discretion'" and the respondent "unreasonably sustained its objection to the BTG and BOP contracts and demanded that the SHA and SSA be amended so as to execute a single EPC contract".

(d) At paragraphs 255 to 257 of the Statement of Reply and Defence to Counterclaim, the respondent pleaded that "due to the lack of expertise and experience of [VVV], it was already agreed that another company would be engaged along with [VVV] as the BOP Contractor. This establishes that the [claimants] also agreed with [the respondent] and could not sufficiently rely on the credentials of [VVV] to handle the BOP contract on its own … the amendments to the Agreement for a single EPC contractor were suggested for the benefit of the Project as well as to control the Project Cost".

(e) At paragraphs 64 to 66 of the Statement of Reply to Defence to Counterclaim, the claimants pleaded that:

(i) the "mere fact that it was agreed that another company would be engaged along with [VVV] as the BOP Contractor at [VVV's] sole discretion does not show any lack of expertise or experience by [VVV] to carry out the BOP contract";

(ii) the "proposed amendments to the Agreements for a single EPC contractor would not have controlled the Project Costs"; and

(iii) "the Claimant was not entitled to put forth any demands to alter the commercial understanding between the parties as it was bound by the arrangements already agreed upon in the Agreements".

137 The respondent says that it also submitted at paragraph 23 of its opening statement that the "SHA also required [VVV] to guarantee the performance of the works to the standard of internationally reputable service providers" but there was "simply no evidence [VVV] could do this and thus the respondent – who was the only party with experience and technical expertise of constructing coalfired plants – was therefore entitled to suggest other possibilities".

138 The respondent says that these issues were dealt with in witness statements and evidence, including the following:

(a) The respondent filed the witness statement of Mr [EEE] where he set out in paragraphs 135 to 143 the respondent's doubts on [VVV's] ability to perform and the basis for that, and that this was why the respondent proposed to have a major, reputable EPC contractor involved to control the cost and quality of the work. Mr [EEE] was not cross-examined on these concerns.

(b) The claimants led no evidence either in witness statements or in oral evidence on [VVV's] ability to perform the work.

139 In the submissions following the evidentiary hearing, the respondent says that:

(a) At paragraphs 408 to 410 of the claimants' closing submissions, they reiterated their position that the respondent was refusing to act in accordance with the SHA by insisting to have a single EPC contractor. However, the respondent comments that the claimants did not address the respondent's point about [VVV's] ability to perform.

(b) At Appendix 3 read with paragraph 181 of the respondent's closing submissions, the respondent submitted that its request to amend the Agreements to provide for a single EPC contractor was "justified because [VVV] could not guarantee the performance of the work as required under Clause 16.5". The claimants did not make any submissions to address this in their reply closing submissions.

140 In relation to the development of the arguments in respect of the Clause 16.5 Breach Issue, the respondent says that the claimants were asserting a claim that the respondent had breached cl 16.5 by insisting that a single EPC contractor be used instead of [VVV] and the respondent had responded to the claim stating that the respondent had issues with [VVV's] ability to perform and this was the reason for the proposal to have a major reputable EPC contractor. The respondent had also led evidence on this but the claimants led no evidence on this issue even though it was the claimants' burden to prove the breach. The Clause 16.5 Breach Issue was considered but rejected by the Tribunal.

141 The respondent submits that it is evident that the Tribunal appreciated that the claimants were relying on the Clause 16.5 Breach as a basis to prove that the respondent committed repudiatory breach of the Agreements. At [234] of the Award, the Tribunal set out precisely what the claimants' position was:

> The [claimants] submit that [the respondent's] demands to replace the agreed BTG/BOP contractual arrangements with a new commercial arrangement for a single EPC contractor was a failure to perform and/or act in compliance with the SHA. In so doing, the Claimant deprived the [claimants] of the benefit they were supposed derive from the BOP contract (that is, awarding the BOP contract to [VVV]) and was in repudiatory breach of the SHA.

142 However, the respondent submits that the Tribunal in fact dealt with and rejected the claimants' case on the Clause 16.5 Breach Issue at [523] to [527] of the Award, making it explicit at [526] that the Tribunal did appreciate and consider the claimants' arguments on the Clause 16.5 Breach. The Tribunal stated that "[the claimants] say that because Clause 16.5 expressly reserved in principle the BOP works for [VVV] the [respondent's] insistence on having one EPC contractor and opposition to [VVV] was unjustified and in breach of contract". At [527] of the Award, the Tribunal highlighted that the "SHA stipulated that [VVV] would guarantee the performance of the works to the standard of internationally reputable service providers" and that the Clause 16.5 Breach had no merit because the claimants "have not suggested that [VVV] could provide such a guarantee" as required under cl 16.5 of the SHA.

143 The respondent says that given that the claimants were the party asserting that the respondent had committed a repudiatory breach of the SHA including the Clause 16.5 Breach, the burden of proof was on the claimants and it refers to s 103 of the Evidence Act (Cap 97, 1997 Rev Ed) and to *Bumi Armada Offshore Holdings Ltd and another v Tozzi Srl (formerly known as Tozzi Industries SpA)* [2019] 1 SLR 10 at [33].

144 The Tribunal's finding at [527] of the Award essentially meant, the respondent submits, that the Tribunal found that the claimants had failed to

discharge their burden of proof on, *inter alia*, the Clause 16.5 Breach because there was no evidence of [VVV's] guarantee.

145 The respondent says that no evidence was provided by the claimants to the Tribunal and the claimants were content simply to assert that the respondent was in breach without actually showing, as *per* their burden of proof, that [VVV] could perform the works. They simply assumed, quite wrongly and without basis, that the Tribunal would rule that [VVV] could guarantee the performance without any evidence.

146 The respondent submits that the claimants cannot now complain that the Tribunal failed to apply its mind to the Clause 16.5 Breach when the Award patently shows otherwise and they were the ones who failed to provide sufficient evidence to discharge their burden of proof on the same.

147 In so far as the claimants are arguing that it was wrong for the Tribunal to interpret that [VVV] had to provide the requisite guarantee under cl 16.5 of the SHA, the respondent submits that this is an error of law and not a breach of natural justice. In so far as the claimants are arguing that the Tribunal was wrong to have found that there was no evidence of the requisite guarantee, this is an error of fact that is not a ground for setting aside the Award.

148 In any event, the respondent says that the claimants cannot show any prejudice because they did not adduce any evidence of [VVV's] ability to perform nor can they complain of any prejudice given that they had failed to satisfy their burden of proof, making no attempt to adduce any evidence or submissions to address the respondent's point on [VVV's] ability to perform the works including to show that [VVV] could provide the requisite guarantee under

cl 16.5 of the SHA which was the basis for the Tribunal's finding on the Clause 16.5 Breach.

149 Even if the Tribunal did fail to consider the Clause 16.5 Breach, the respondents submits that it would not have reasonably made a difference to the Tribunal's factual finding that there was no evidence that [VVV] could provide the guarantee under cl 16.5 and accordingly would not have reasonably made a difference to the outcome.

My decision

150 The Clause 16.5 Issue was raised by the claimants as part of its case that the respondent was in repudiatory breach entitling the claimants to issue the termination notice on 30 May 2016. As set out in [220] of the Award, "the [claimants] submit that the [respondent] had committed repudiatory breach because it … (v) refused to perform its obligations under Clause 16.5 of the SHA". That was then further elaborated on by the claimants, as set out in [234] of the Award, the allegation being that the respondent's insistence on a single EPC contractor was a breach of cl 16.5 of the SHA which provided for [VVV] to carry out the BOP work.

151 The respondent pleaded that it was not in breach in insisting that a single EPC contractor be appointed for the BOP/BTG works because [VVV] lacked experience, manpower and expertise and it was decided to involve another company along with [VVV] to carry out the BOP work. It also raised concerns about [VVV's] ability to provide the necessary guarantee. The claimants did not provide any evidence to contradict the respondent's evidence on [VVV].

152 The Tribunal dealt with this part of the case at [524] to [527] as follows:

> 524. Clause 16.5 of the SHA provides that "*All other aspects of the Project execution, other than the supply of BTG … shall, in principle, be undertaken by [VVV] … provided that [VVV] shall guarantee unconditionally (including, without limitation … the quality, the performance and the time aspects (e.g. meeting material delivery schedules) of the Project as is customarily guaranteed, performed and undertaken by internationally reputable service providers in similar projects*".
>
> 525. EPC contractor(s) were required to complete the BTG and BOP works. The Claimant wanted to engage one EPC contractor to carry out both works.
>
> 526. The Respondents say that because Clause 16.5 expressly reserved in principle the BOP works for [VVV] the Claimant's insistence on having one EPC contractor and opposition to [VVV] was unjustified and in breach of contract.
>
> 527. However, the SHA stipulated that [VVV] would guarantee the performance of the works to the standard of internationally reputable service providers. The Respondents have not suggested that [VVV] could provide such a guarantee. The Claimant had the experience and technical expertise of constructing [power] plants and in the view of the Tribunal it was not unreasonable for them to suggest that one EPC contractor undertake both tasks. In doing so, the Claimant did not act in breach of the SHA.

153 On that basis, there is no merit whatsoever in the claimants' submission that there was a breach of the rules of natural justice because the Tribunal did not consider the Clause 16.5 Issue. The Tribunal considered and made a finding on the Clause 16.5 Issue and found that the respondent was not in breach, as alleged by the claimants. An application to set aside is not concerned with the decision of the Tribunal on the facts and the law, which is binding on the parties. In any event, there is no basis for asserting that the Tribunal could have come to any different decision and therefore the claimants cannot establish that there was any prejudice.

154 On that basis, I reject the claimants' application to set aside the Award on the basis of the Clause 16.5 Breach Ground.

Inconsistency Ground

Claimants' submissions

155 The claimants submit that the Tribunal found in the Partial Award that CUY only bore secondary liability in case of an award against CUW and CUX. At [224] of the Partial Award the Tribunal stated:

> 224. The interpretation of Clause 14.1 [of the SSA] which gives it meaning and substance is that [the respondent] may sue [CUY] in the same proceedings instituted against [CUW] and [CUX] but can enforce any award against [CUY] only after [CUW] and [CUX] have failed or refused to comply with it.

156 The claimants submit that this paragraph of the Partial Award represents a finding by the Tribunal that CUY would only bear secondary liability in case of any award which the Tribunal may make against CUW and CUX in the Final Award.

157 Under Indian law, the claimants submit that [224] of the Partial Award represents the Tribunal's adjudication on the effect of cl 14.1 of the SSA, which is a contractual document that is governed by Indian law, thereby finally disposing the issue on the devolution of liabilities between CUW, CUX and CUY under the Agreements

158 This finding, say the claimants, is in accordance with ss 43 (and 42) of the Indian Contract Act 1872 (Act No 9 of 1872) (India) ("Indian Contract Act") and they refer to *Sham Lal vs Gurbachan Singh* [1929] SCC OnLine Lah 622 at [4]. They say that these provisions permit the parties to agree that joint and several liability would not apply despite having made a joint promise in the underlying agreement.

159 Even if Indian law is not considered, the claimants submit that it is clear from a plain reading of [224] of the Partial Award that the respondent could not enforce the Final Award against CUY unless it was first unsuccessful in enforcing the Final Award against CUW and CUX.

160 However, the claimants submit that by ruling in the Award that CUY is "jointly and severally" liable with CUW and CUX to pay damages and costs to the respondent, without including any proviso that the respondent could enforce the Award against CUY only after CUW and CUX have failed or refused to comply with it, the Tribunal has effectively ascribed primary liability to CUY. Such primary liability has been ascribed because it is possible for the respondent, should it wish to do so, to proceed against CUY alone in enforcement proceedings worldwide, since he was ordered to be jointly and severally liable in respect of the respondent's damages and costs. The claimants submit that there is no obligation for the respondent to join CUW and/or CUX, let alone prove that it has failed or refused to comply with the Award.

161 The claimants refer to the respondent's contention, relying on [217] and [218] of the Partial Award, that the Tribunal determined that the wording in cl 14.1 did not introduce a qualification as to when the joint liability of all the claimants could be ascertained. However, the claimants submit that the Tribunal did not make any such "determination" or "finding" in the Partial Award. Rather, the claimants submit that [215] to [223] of the Partial Award merely set out the Tribunal's chain of reasoning which support its finding at [224] that CUY would only bear secondary liability in case of any award which the Tribunal may make in the Arbitration.

162 In this regard, the claimants say that it is clear from [215] to [223] of the Partial Award that the Tribunal was concerned with the hypothetical of what

would happen if CUY could not be joined as a co-respondent in the same proceedings with CUW and CUX and it was only at [224] that the Tribunal pronounced its view on the "interpretation of Clause 14.1 which gives it meaning and substance".

163 The claimants also says that there is evidence showing that the respondent, itself, had come to the conclusion that the Tribunal had found that CUY only bore secondary liability when, at paragraph 159 of its written closing submissions it accepted that it must first pursue CUW and CUX before CUY on enforcement.

164 Accordingly, the claimants submit that the Tribunal's finding at [224] of the Partial Award was inconsistent with the Tribunal's orders/rulings in the Award that CUY is jointly and severally liable to pay damages and costs to the respondent.

165 On the basis that the Award is inconsistent with the Partial Award, the claimants submit that a breach of the fair hearing rule has occurred as they were not given an opportunity to address the Tribunal on the effect of cl 14.1 of the SSA prior to the Tribunal's decision to depart from its finding in [224] of the Partial Award that CUY only bore secondary liability in respect of any award made in the Arbitration. The claimants say that they were not informed by the Tribunal that it was considering making a ruling in the Award that was inconsistent with its finding in [224] of the Partial Award.

166 Furthermore, the claimants say that [224] of the Partial Award caused the claimants to believe that the Tribunal would not, in the Award, make any ruling that CUY was jointly and severally liable with CUW and/or CUX, that is that CUY bore primary liability for breach of the Agreements.

167 As [224] of the Partial Award represents a final and binding pronouncement by the Tribunal on the issue of devolution of liabilities between CUW, CUX and CUY under the Agreements, the claimants submit that, under Indian law, such a finding made in a partial award is final and cannot be re-adjudicated, unless it is first set aside. It refers to *Indian Farmers Fertilizer Cooperative Limited v Bhadra Products* [2018] 2 SCC 534 at [13] to [15].

168 Further, under Singapore law which is the law of the seat of the Arbitration, partial and interim awards are final and binding and it refers to s 19B of the IAA and *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [46] to [48].

169 The claimants submit that CUY has suffered actual or real prejudice because had CUY been given notice that the Tribunal would be departing from its finding at [224] of the Partial Award, CUY would have made further submissions on the effect of cl 14.1 of the SSA.

170 On that basis, the claimants say that it is entirely possible that counsel would have reminded the Tribunal that it could not depart from its findings at [224] under Singapore law and, if the Tribunal had the benefit of those submissions, the claimants submit that the Tribunal could reasonably have decided against ordering that CUY was jointly and severally liable to pay damages and costs to the respondent, without reference to the fact that CUY's liability was only secondary in nature.

171 The claimants also submit that the mere fact that it is open for CUY to challenge enforceability of the Award in any foreign jurisdiction where the respondent may wish to enforce the Award would not cure the prejudice suffered. First, CUY would have to incur additional costs for defending the right

to be held not jointly and severally liable to the amounts set out in the Award, without the respondent having first proceeded against CUW and CUX and being unsuccessful. Having already defended the right not to be held jointly and severally liable under for breaches under the SHA and SSA and consequently already having incurred those costs, the claimants submit that CUY would have to incur additional costs to address the very same assertions which were disposed of by the Partial Award.

172 Secondly, the claimants say that there is no guarantee that courts in foreign jurisdictions would accept that the Award cannot override findings made in the Partial Award. The rules of the enforcing court may be subject to standards different to Singapore or Indian Law.

173 On that basis, the claimants submit that CUY has suffered real and actual prejudice should those parts of the Award not be set aside.

Respondent's submissions

174 The respondent says that CUY's argument that he was deprived of the opportunity to present his case on cl 14.1 of the SSA is based on his claim that the finding in the Award that he was jointly and severally liable towards the respondent is at odds with the Partial Award finding that the respondent has to enforce against CUW and CUX first before looking to CUY. CUY claims that this was an unexpected and unanticipated finding, and he was deprived of an opportunity to address it.

175 The respondent says that CUY conceded that the claimants did not make the argument in the Arbitration that the findings in the Partial Award barred any finding on joint and several liability against him.

176 The Partial Award arose out of CUY's application for an early dismissal of certain claims by the respondent. In that application, the respondent says that CUY argued that cl 14.1 of the SSA required the respondent first to exhaust all legal remedies available to it against CUW and CUX before it could mount any claim against CUY. In essence, CUY argued that he only bore secondary liability, as compared to primary liability, through the operation of cl 14.1 of the SSA.

177 The respondent refers to cl 14.1 of the SSA which provided that:

> [CUY], being in Control of [CUW], shall be jointly and severally liable for the obligations and liabilities of [CUW] under this [SSA], provided, however, that in the event of any breach by [CUW] and [CUY] or [CUX] under [the SSA], [the respondent] shall first exhaust all legal remedies available to it under Applicable Law against the other Indemnifying Parties and thereafter seek recourse for any unsuccessful unappealable claims against [CUY]

178 The respondent says that it is not disputed that the Indemnifying Parties refer to the claimants. "Indemnifying Parties" was defined in cl 13.2.2 of the SSA as follows:

> The Indemnified Party I and the Indemnified Party III shall, for, the purposes of this Clause 13, collectively be referred to as the **"Indemnified Parties"** and individually as an **"Indemnified Party"**. The Indemnifying Party I, Indemnifying Party II and Indemnifying Party III shall collectively be referred, to as the **"Indemnifying Parties"** and individually an **"Indemnifying Party"**.

179 The Tribunal's findings in respect of the claimants' application for early dismissal and their interpretation of cl 14.1 of the SSA were set out in [216] to [225] of the Partial Award which the respondent summarises as follows:

(a) At [216] of the Partial Award, the Tribunal drew a distinction between the use of the term joint and several liability and the proviso which relates to enforcement against CUW and CUX.

(b) At [217] of the Partial Award, the Tribunal found that the proviso does not introduce a qualification as to when joint and several liability may be ascertained, that is that the proviso does not require claims against CUY to only be decided after liability is established or not established against CUW or CUX.

(c) At [218] to [219] and [221] to [222] of the Partial Award, the Tribunal rationalised its findings.

(d) At [220] of the Partial Award, the Tribunal found that "recourse" in cl 14.1 meant enforcement of any award against CUW and CUX.

(e) At [223] of the Partial Award, the Tribunal highlighted that any interpretation of cl 14.1 of the SSA should not make the "joint and several" liability of CUY meaningless.

(f) At [224] of the Partial Award, the Tribunal found that the proper interpretation of cl 14.1 is that the respondent can sue CUY in the same proceedings as CUW and CUX, but can only enforce any award against CUY after CUW or CUX refuses to comply with such an award.

180 On that basis, the respondent submits that the Tribunal rejected CUY's claim that he only bore secondary liability and expressly sought to give effect to the phrase "jointly and severally liable" in cl 14.1. The Tribunal drew a distinction in its findings that CUY could be liable (jointly and severally) but that any enforcement against him can only be embarked upon after CUW and

CUX refused to comply with any award. The respondent points out that CUY did not seek to challenge the Partial Award.

181 The respondent points out that CUY seeks to overturn the Tribunal's finding that he is jointly and severally liable on the basis that the Partial Award bars such a finding. But, the respondent says, if that were true what would be the possible finding against CUY? It points out that CUY was sued under the Agreements and that the application for early dismissal and for CUY to be removed as a party was dismissed. The Arbitration proceedings therefore continued and CUY actively participated in the proceedings with CUW and CUX with representation from solicitors. CUY was seeking, *inter alia*, a dismissal of the claims against him but as the respondent succeeded in the Arbitration, CUY offers no alternate theory of liability for himself. It cannot be on the basis of specific liability given the terms of cl 14.1 of the SSA and it cannot be on the basis of joint liability given that the Partial Award anticipates that CUY would be liable for any shortfall following enforcement against CUW and CUX. The respondent submits that CUY does not articulate the basis for any liability other than joint and several liability.

182 The respondent submits that there is no contradiction between the Partial Award and the Award.

183 First, it says that it is unclear why CUY contends that joint and several liability is inconsistent with the finding of two-stage enforcement in the Partial Award. It says that joint and several liability simply means that CUY is jointly and severally liable with CUX and CUW for the same amount to the respondent and that the two-stage enforcement just affects the order which the respondent has to follow for enforcement against CUY and against CUW and CUX after liability has been established. This means, the respondent submits, that it has to

try to seek recovery from CUW and CUX first before looking to CUY. It does not in any way curtail, limit or contradict CUY's liability or the nature of CUY's liability to the respondent.

184 The respondent says that the claimants themselves admitted at paragraph 56(i) of their Rebuttal to Reply to Early Dismissal Application dated 5 December 2018 that "the liability of the [claimants] is joint and several". Their argument was simply that cl 14.1 of the SSA meant that the respondent should proceed against CUW and CUX first before proceeding against CUY, rather than proceed against all the claimants at the same time. In other words, they accepted that CUY could be jointly and severally liable to the respondent under cl 14.1 and their case was that, despite that, the respondent had to exhaust legal remedies against CUW and CUX first.

185 Secondly, in so far as CUY claims that Indian law interprets two-stage enforcement as being inconsistent with the concept of joint and several liability, the respondent says that this has not been established by the claimants and the authorities which the claimants relied on in their letters dated 30 September 2022 and 7 October 2022 do not establish that proposition. Instead, they simply say that parties may contract out of joint and several liability, which is the default position for breach of contract claims involving joint promises under Indian law pursuant to s 43 of the Indian Contract Act. Nor, says the respondent, do the authorities say anything about two-stage enforcement being inconsistent with the concept of joint and several liability. Conceptually, the respondent submits that the issue of joint and several liability goes to the legal liability of CUY based on breaches of contractual obligation whilst the two-stage enforcement is simply a separate contractual agreement by which the respondent would forbear to take enforcement action against CUY on his legal liability until CUW and CUX failed to pay. It says that both concepts are

separate and distinct and do not contradict each other and, accordingly, CUY's complaint that the joint and several liability finding in the Award is inconsistent with the two-stage enforcement finding in the Partial Award should be rejected because there is no such inconsistency.

186 In any event, the respondent submits that the Partial Award had already found that CUY might be jointly and severally liable under any award. In the Partial Award, the respondents says that the Tribunal dismissed the claimants' argument that CUY had secondary liability and made clear that the two-stage enforcement provided under cl 14.1 of the SSA did not affect whether the joint and several liability finding could be made. It further anticipated that the claimants bore joint and several liability.

187 The respondent disputes CUY's claim that the Partial Award caused him to think that he would not be held jointly and severally liable in the Award and says that there was never a dispute as to his joint and several liability to the respondent in the application for early dismissal and the Partial Award clearly set out the Tribunal's interpretation of cl 14.1.

188 The respondent says that CUY did not argue that the findings in the Partial Award barred a finding of joint and several liability in the Arbitration. It adds that he had ample opportunity to address the Tribunal on the joint and several liability issue and was well-aware that the respondent was seeking relief against all the claimants, including CUY, on a joint and several basis.

189 Rather, the respondent says that CUY focused his defence in the Arbitration to one of defeating liability by showing there was no breach. He did not argue that if he was found liable, he should not be found liable on a joint and several basis. If the claimants considered that cl 14.1 of the SSA and/or the

two-stage enforcement meant that CUY could not be held jointly and severally liable to the respondent, the respondent submits that the onus was on them to raise it to the Tribunal during the Arbitration.

190 In so far as the claimants are now alleging that Indian law provides for an exception to joint liability and that CUY can somehow rely on due to cl 14.1 of the SSA, the respondent says that this should have been raised at the stage of the early dismissal application stage, but the claimants chose not to do so and did not raise it afterwards at any point in the Arbitration nor did they seek to challenge or set aside the Partial Award.

191 The respondent also says that given the Tribunal's statement in the Partial Award that the claimants could be found jointly and severally liable, any reasonable party in CUY's position would have foreseen the possibility of the Tribunal making the joint and several liability finding in the Award and cannot now complain.

192 By seeking to raise the points he does on this application to set aside the Award, the respondent says that CUY is essentially trying to launch a collateral attack on the Partial Award but cannot do so.

193 Further, in so far as CUY is claiming that the Tribunal wrongly interpreted Indian law and/or cl 14.1 of the SSA, the respondent says that this is an error of law and not a breach of natural justice.

194 In any case, the respondent submits that the claimants did not suffer any prejudice, even if the Tribunal failed to give CUY an opportunity to address it on the points now made, given that the Partial Award was not challenged and/or

set aside, there is no basis on which the Tribunal could have come to a different decision.

My decision

195 The Partial Award dealt with a particular issue raised by CUY. He sought the dismissal of certain claims against him in the Arbitration on the basis, as set out in [210] of the Partial Award, that cl 14.1 of the SHA required the respondent to first exhaust all legal remedies available to it against CUW and CUX before it could claim recourse against CUY.

196 At [213] of the Partial Award, the Tribunal rejected the claimants' interpretation of cl 14.1 of the SHA and, in particular, the final part of that provision. The starting point is therefore the analysis of cl 14.1 of the SSA by the Tribunal in the Partial Award.

197 Clause 14.1 provided as follows:

> [CUY], being in Control of [CUW], shall be jointly and severally liable for the obligations and liabilities of [CUW] under this [SSA], provided, however, that in the event of any breach by [CUW] and [CUY] or [CUX] under [the SSA], the [respondent] shall first exhaust all legal remedies available to it under Applicable Law against the other Indemnifying Parties and thereafter seek recourse for any unsuccessful un-appealable claims against [CUY]

198 It can therefore be seen that cl 14.1 consists of a statement that CUY is "jointly and severally liable for the obligations and liabilities of [CUW]". It then has a proviso that the respondent should first exhaust all legal remedies against the other Indemnifying Parties and then seek recourse against CUY. The Partial Award was concerned with the meaning of the proviso which CUY contended meant that he should not be a party to the Arbitration.

199 In analysing the proviso in cl 14.1, the Tribunal stated, as follows at [216] and [224] of the Partial Award:

> 216. On a plain reading of Clause 14.1, the proviso in it makes a distinction between the joint and several liability of [CUW], [CUX] and [CUY] for the obligations of [CUW] and [CUX] under the SSA, and enforcement of any judgment obtained by the [respondent] in a claim for appropriate remedies for breaches by [CUW] and [CUX] of their SSA obligations.
>
> …
>
> 224. The interpretation of Clause 14.1 which gives it meaning and substance is that the [respondent] may sue [CUY] in the same proceedings instituted against [CUW] and [CUX] but can enforce any award against [CUY] only after [CUW] and [CUX] have failed or refused to comply with it.

200 The Tribunal therefore drew a distinction between joint and several liability in the first part of cl 14.1 and the enforcement of any judgment, dealt with in the proviso. The Tribunal therefore dismissed CUY's application to dismiss the claims against him.

201 In the Award, the Tribunal then dealt with the question of liability. At [626] of the Award, the Tribunal held the claimants jointly and severally liable to the respondent.

202 The claimants submit that this part of the Award is inconsistent with the Partial Award. I do not agree. The Partial Award dealt not with liability but with enforcement, finding that the respondent could not enforce a judgment against CUY until after CUW and CUX have failed or refused to comply with it. That has nothing to do with liability but interpreted the proviso to cl 14.1 of the SHA which CUY had contended meant that the respondent had to proceed against CUW and CUX before proceeding against CUY. The Award then went on and made findings of liability against CUY and held that he was jointly and severally liable with CUW and CUX.

203 There is no inconsistency between the two awards. The effect of the Partial Award is that the respondent cannot enforce the Award against CUY until CUW and CUX have failed to comply with it. It has nothing to do with the issue of whether CUY was jointly and severally liable. That was the subject of the Award.

204 The existence of an inconsistency is a necessary precursor to the claimants' case on natural justice. It is on the basis of that inconsistency that the claimants allege that there was a breach of the fair hearing rule as they were no given the chance to address the Tribunal on the effect of cl 14.1 of the SSA. They say that the Tribunal's decision in the Award departed from the Tribunal's finding in [224] of the Partial Award that CUY only bore secondary liability in respect of any award made in the Arbitration and they were not informed that the Tribunal was considering making an inconsistent ruling. However, on the basis that there is no inconsistency, this argument fails.

205 The claimants also put the point in another way. They say that the Tribunal's finding in [224] of the Partial Award caused them to believe that the Tribunal would not, in the Award, make any ruling that CUY was jointly and severally liable with CUW and/or CUX. I consider that to be unarguable. The Tribunal drew a clear distinction between joint and several liability in the first part of cl 14.1 and the two-stage enforcement in the proviso. There is nothing in the Partial Award which could possibly give the impression that the Tribunal would not make a finding of joint and several liability.

206 Indeed, as recorded at [212] of the Partial Award, the claimants accepted the principle of joint and several liability in its response to the respondent's submissions when they submitted:

> First, the [respondent] has not explained why their claims against [CUW] and [CUX] cannot proceed independent of their claims against [CUY]. Since the liability of the [claimants] is joint and several, the [respondent] can severally proceed against [CUW] and [CUX] before proceeding against [CUY].
>
> In addition, as submitted by the respondent, it is difficult to see what liability [CUY] would have if not joint and several liability and no argument was made prior to the Award or, indeed, now that the liability should be other than joint and several.

207 On that basis, I reject the claimants' application to set aside the Award on the basis of the Inconsistency Ground.

Conclusion

208 For the reasons set out above, the claimants' application to set aside the Award on the four natural justice grounds is dismissed.

Vivian Ramsey IJ
International Judge

Lee Wei Han Shaun and Ng Khim Loong Mark (Bird & Bird ATMD LLP), Nakul Dewan SA (Twenty Essex) (instructed counsel) for the claimants;
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