

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

[2026] SGHC 23

Originating Application No 450 of 2025

Between

(1) DQR
(2) DQS

... Claimants

And

DQT

... Defendant

GROUNDS OF DECISION

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

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DQR and Another

v

DQT

[2026] SGHC 23

General Division of the High Court —Originating Application No 450 of 2025
Vinodh Coomaraswamy J
4 September 2025

28 January 2026

Vinodh Coomaraswamy J:

Introduction

1 The two claimants in this application seek to set aside a final award (“the Award”) dated 21 February 2025 issued in favour of the defendant by a tribunal (“the Tribunal”) in an arbitration (“the Arbitration”) seated in Singapore and conducted under the 2021 Rules of Arbitration of the International Chamber of Commerce.¹ To preserve the confidentiality attached to the Arbitration, the parties have consented² to an order³ under s 23 of the International Arbitration Act 1994 (“the Act”) for the parties’ names and identifying features to be anonymised in these grounds of decision. I shall therefore refer to the

¹ Claimants’ first affidavit filed on 2 May 2025 (“AR1”) at paras 4 to 5; p 66.

² HC/SUM 1827/2025.

³ HC/ORC 4879/2025.

jurisdiction in which the parties' dispute arose as Ruritania. For the same reason, I shall convert all sums of money that are denominated in the local currency of Ruritania into Singapore dollars at the current exchange rate, rounded off for simplicity.

2 The three parties to this application were the only three parties to the Arbitration. The first and second claimants in this application were respectively the first and second respondents in the Arbitration. The defendant in this application was the sole claimant in the Arbitration.⁴

3 One of the unique features of the parties' dispute is that the two claimants in this application – *ie*, the two respondents in the arbitration – have a common holding company ("the Claimants' Holding Company").⁵ The claimants are therefore related corporations (see 6 of the Companies Act 1967).⁶

The parties' dispute

4 The dispute between the parties arose out of their tripartite decision in 2014 to cooperate: (a) in tendering for a major infrastructure project in Ruritania ("the Project");⁷ and (b) after winning the tender, in executing and delivering the Project to the employer ("the Principal"). I shall refer to the period in which the parties cooperated in tendering for the Project as the "Tender Period" and

⁴ AR1 at paras 6–7; p 66.

⁵ Respondent's first affidavit filed on 4 July 2025 ("CAM1") at para 17.

⁶ CAM1 at paras 6 to 7.

⁷ Award at para 14; AR1 at p 78.

the period in which they cooperated in executing and delivering the Project as “the Contract Period”.

5 During both the Tender Period and the Contract Period, the role of the first claimant was to provide design related services for the Project. During the Tender Period, the first claimant provided these services under a contract of retainer with the Claimants’ Holding Company.⁸ During the Contract Period, the first claimant provided these services under a contract with the defendant and the second claimant (see [29]–[36] below).⁹

6 During the Tender Period, the role of the second claimant was to act as a liaison between the defendant and the first claimant and to relay the first claimant’s designs to the defendant.¹⁰

7 During the Tender Period, the role of the defendant was: (a) to prepare costs estimates for the Project based on the first claimant’s designs; (b) to incorporate those costs estimates into the tender; and (c) upon the tender succeeding, to incorporate those costs estimates into the main contract for the Project (see [13] below).¹¹

8 During the Contract Period, the role of both the second claimant and the defendant was to act together as “an unincorporated joint venture” to deliver the Project, as main contractor, to the Principal.¹² To preserve the parties’

⁸ AR1 at para 21; p 1706 at para E33; CAM1 at para 17; Award at paras 18, 104, 127–128, 141–142 and 148–151.

⁹ AR1 at paras 21, 31(a)–31(b); AR1 at p 579–580, Request at para F4.6; AR1 at p 586–587, Request at para F9.1; CAM1 at paras 33 and 35.

¹⁰ CAM1 at paras 19 and 24.

¹¹ 3 CAM1 at paras 10 and 22, RBOD Vol (VI), Tab 7, p 8, p 11–12.

¹² CAM1 at p 2444.

anonymity, I shall refer to this unincorporated joint venture simply as “the JV”. My use of this term is subject to the caveats at [26]–[28] below.

The parties’ suite of contracts

9 To formalise and document the terms of their cooperation, the parties (in various combinations) entered into a suite of contracts in 2014 and 2015. Four contracts within this suite are material for present purposes.

The Tender Teaming Agreement (Unincorporated JV)

10 The first of the four contracts is called the “Tender Teaming Agreement (Unincorporated JV)” (“the Tender Agreement”). The defendant and the second claimant entered into the Tender Agreement in late May 2014.¹³

11 The first claimant is not a party to the Tender Agreement.

12 The Tender Agreement sets out the terms on which the second claimant and the defendant agreed to cooperate: (a) in preparing their tender for the Project and submitting it to the Principal; and (b) if the tender were successful: (i) in negotiating and entering into the main contract for the Project with the Principal; and (ii) in negotiating and entering into a deed with each other to record the terms on which they would work together as “a single, integrated team” to deliver the Project to the Principal.¹⁴

¹³ AR1 at para 20; p 2959.

¹⁴ AR1 at p 2960, Recitals C and D; at p 2961, cll 2.1–2.4 at cl 2.2(a).

The Design & Construct Deed

13 The second of the four contracts is called the “Design and Construct Deed” (“the D&C Contract”).¹⁵ The defendant and the second claimant entered into the D&C Contract with the Principal in early December 2014.

14 The first claimant is not a party to the D&C Contract.

15 The preamble to the D&C Contract establishes that the defendant and the second claimant contracted with the Principal jointly as “the Contractor” and as an “unincorporated joint venture”:¹⁶

Deed made...on 4 12 14

Parties: [The Principal]; and

The...Joint Venture, being an unincorporated joint venture comprising [the second claimant]...and [the defendant]... (“the Contractor”).

16 The D&C Contract obliged the defendant and the second claimant to deliver the Project to the Principal by 22 December 2016 at a fixed price of \$242m for both design and construction.¹⁷ The D&C Contract also obliged the JV to pay the Principal liquidated damages of \$40,000 for every day of delay in delivery up to 21 June 2017 and \$400,000 for every day of delay in delivery beyond that.¹⁸

¹⁵ AR1 at para 23 and p 2444; Award at para 28; CAM1 at para 29.

¹⁶ AR1 at p 2456.

¹⁷ Award at para 28; AR1 at para 23, p 2603 (Schedule 1, Items 2–4), p 2540 (cl 17.9(a)(d)).

¹⁸ AR1 para 23.

The Joint Venture Deed

17 The third of the four contracts is called the “Joint Venture Deed” (“the JV Deed”).¹⁹ The defendant and the second claimant entered into the JV Deed in late August 2015.

18 The first claimant is not a party to the JV Deed.

19 The JV Deed sets out “the basis upon which the Parties [*ie*, the defendant and the second claimant] will work together as a joint venture to perform their obligations pursuant to the [D&C] Contract”.²⁰

20 Clause 2 of the JV Deed is headed “Establishment of Joint Venture”. It records that the defendant and the second claimant “hereby constitute an unincorporated fully integrated joint venture to perform: (i) the work and services required by this Deed; and (ii) the work under the [D&C] Contract”.²¹ Clause 2 goes on to give the JV a name and to oblige the defendant and the second claimant to “use this name in all dealings with any Third Party in so far as it is legally possible to do so”.²²

21 Four provisions of the JV Deed are relevant for present purposes.

22 First, cl 2.3 of the JV Deed²³ read with the definition of “Participating Interest” in cl 1.1 of the JV Deed²⁴ provides that the defendant and the first

¹⁹ Award at para 27; AR1 at para 25, p 2896.

²⁰ AR1 at p 2898, Recital E; CAM1 at para 31.

²¹ AR1 at p 2900, cl 2.1.

²² AR1 at p 2901, cl 2.2.

²³ AR1 at p 2899-2900.

²⁴ AR1 at p 2901.

claimant each have an interest of 50% in the capital of the JV, in the beneficial ownership of the JV, in the profits of the JV and in the losses of the JV, calculated in accordance with and subject to the terms of the JV Deed.²⁵

23 Second, cl 5 of the JV Deed establishes “the JV Board” as a supra-corporate contractual organ with the power and responsibility to exercise “[o]verall control of the [JV], the business of the [JV] and the granting of powers to represent and bind the Parties with respect to the [JV]”²⁶ on a “best for Project” basis.²⁷ The JV Deed stipulates that the JV Board should comprise in the first instance two representatives appointed by the defendant and two representatives appointed by the second claimant.²⁸

24 Third, cl 7.2 of the JV Deed obliges any party to the Deed who receives “any sums in connection with the [JV], whether from the [Principal] or any other Third Party” to hold those sums on trust for the JV and to pay those sums promptly into one of the “Project Account(s)” opened under cl 7.1 of the JV Deed.²⁹ In July 2023, the defendant nominated in correspondence a specific Project Account “as the relevant account where any surplus funds in respect of any arbitral award are to be paid.”³⁰ (see [74] below). I shall refer to this specific account as “the JV Account”.³¹

²⁵ AR1 at para 25(a)–(b).

²⁶ AR1, p 2903, cl 5; p 2917 read with p 2900 definition of “Venture”; Schedule 1, para 1.

²⁷ AR1, para 25(c)–(d), p 2904, cl 5.6.1.

²⁸ AR1, p 2903, cl 5.2.

²⁹ AR1, p 2906 at cl 7.2.

³⁰ Award at para 2033.

³¹ Award at paras 120(16), 2032–2035, 2041.2, 2048.

25 Finally, cl 13.5 of the JV Deed³² requires any dispute under the JV Deed to be resolved by arbitration in Singapore under the ICC Rules.³³

26 My use of the term “the JV” to refer to the unincorporated joint venture between the defendant and the second claimant constituted by the JV Deed is subject to two caveats.

27 The first caveat is that “the JV” is merely a convenient term for referring to the defendant and the second claimant as two distinct legal persons taken together. “The JV” is not, in itself, a legal person who held any rights, owed any duties, earned any profits or suffered any losses in connection with the Project. The intent of the defendant and the second claimant, as formalised and expressly stipulated in the JV Deed, was that their joint venture should be *unincorporated*. In connection with the Project, therefore, each of the defendant and the second claimant held its rights, owed its duties, stood to earn profits and stood to suffer losses in its individual capacity, *ie* directly as two distinct legal persons and not mediated by an incorporated joint venture vehicle. That is so whether those rights, duties, profits or losses arose in contract, at common law or under statute.

28 The second caveat is that, even though the JV Deed has contractual effect only from the date of its execution in August 2015, I shall use the term “the JV” as a convenient term to refer to the defendant and the second claimant as two distinct legal persons taken together also during the Tender Period. I do this for two reasons. First, the evidence and the terms of the JV Deed show that the defendant and the second claimant considered themselves to be operating as an unincorporated joint venture even before they entered into the JV Deed. The express parenthetical reference to the “Unincorporated JV” in the full name of

³² AR1 at p 2911.

³³ AR1 at para 25(e); CAM1 at para 31.

the Tender Agreement (see [10] above) suggests as much. Further, it is common ground that the JV Deed governs, as between the defendant and the second claimant, the disposition of any compensation that one of them may recover for losses that it suffered in connection with the Project before it entered into the JV Deed, *eg* during the Tender Period. Second, as I have pointed out, “the JV” is merely a convenient term for referring to the defendant and the second claimant as two distinct legal persons taken together. Each legal person held its rights, owed its duties, stood to earn its profits and stood to suffer its losses as a distinct legal person just as much before entering into the JV Deed (*ie* broadly during the Tender Period) as it did after entering into the JV Deed (*ie* broadly during the Contract Period). It is therefore not legally inaccurate to use the term “the JV” to refer to the defendant and the second claimant as distinct legal persons taken together even before they entered into the JV Deed so long as it is borne in mind that the parties’ legal rights and obligations at any given time are subject to the JV Deed only in accordance with its terms.

The Services Contract

29 The fourth and final contract is called the “Services Contract”.³⁴ The first claimant (as the service provider) entered into the Services Contract in late July 2015 with the defendant and the second claimant, “trading as [the JV]”³⁵ (as the service recipient).

30 The Services Contract is the only contract underpinning the parties’ cooperation to which all three parties to the arbitration and to this litigation are also contractual parties.

³⁴ Award at para 29, AR1 at para 24, p 2970.

³⁵ AR1, p 2974, under “PARTIES”.

31 Three provisions of the Services Contract are relevant for present purposes.

32 First, the Services Contract obliges the first claimant to provide to the JV during the Contract Period “all design and engineering work required for the D&C Contract Works”³⁶ at a lump sum price of \$2m.³⁷

33 Second, the Services Contract stipulates that the first defendant’s liability to the JV “arising out of” the Services Contract (whether in contract, tort equity or otherwise) is capped at the lump sum price, *ie* at \$2m. I shall refer to this provision as the “Liability Cap”.

34 Finally, the Services Contract is governed by Ruritanian law and requires all disputes “arising out of, or relating to, or in connection with” the Services Contract to be resolved by arbitration in Singapore before a single arbitrator under the Rules of the International Chamber of Commerce.³⁸

35 The Arbitration took place under the arbitration agreement in the Services Contract. It is common ground, as well as a significant point for the case advanced by the claimants in this application, that neither party to the JV Deed has to date invoked the arbitration agreement in the JV Deed (see [21] above).

36 By its terms, the Services Contract governs only the services that the first claimant provided to the JV during the Contract Period and not those that

³⁶ AR1 at para 24; p 3008, cl 2.1.

³⁷ AR1 at para 24; p 2971.

³⁸ Award at paras 30–31, AR1 at p 80.

it provided during the Tender Period.³⁹ As I have mentioned (see [5] above), the first claimant provided its services during the Tender Period under a contractual retainer with the Claimants' Holding Company.⁴⁰ Despite this difference, however, the nature of the services that the first claimant provided during both the Tender Period and the Contract Period are, for present purposes, broadly the same. I shall therefore refer to these services collectively as "the Services", regardless of whether they were provided during the Tender Period (during which the first claimant did not owe any contractual obligations to the JV) or during the Contract Period (during which the claimant did owe contractual obligations to the JV under the Services Contract).

The Ruritanian litigation

37 The JV ultimately delivered the Project to the Principal in February 2018.⁴¹ This was over 14 months late. The JV incurred a substantial loss in delivering the Project. The loss included, but was not limited to, \$2.1m in liquidated damages that the Principal deducted from the final account for the Project as part of a commercial settlement with the JV.⁴²

38 The loss on the Project led to a dispute between the parties as to who had caused the loss. The defendant blamed the first claimant and sought compensation for the losses from the first claimant. The first claimant blamed the JV and denied any liability to compensate the defendant for any loss.

³⁹ AR1 at para 26, CAM1 at paras 12, 19 and 39 to 40; *cf* Award at para 1142.

⁴⁰ Award at paras 127, 149 and 152; CAM1 at paras 17 and 24; para 24; Award at para 19, 24 and 127, AR1 at pp 78–79 and p 105.

⁴¹ AR1 at para 26.

⁴² AR1 at para 26, p 3035.

39 One might have expected the second claimant to align itself with the defendant in this dispute. After all, the second claimant is undoubtedly the defendant's joint promisee with respect to the contractual duties that the first claimant owed to the JV under the Services Contract. And the second claimant is arguably the defendant's co-obligee with respect to any non-contractual duties that the first claimant might have owed to the JV during the Tender Period.

40 Contrary to this expectation, the second claimant refused – and continues to refuse to this day – to join the defendant in its claim against the first claimant.⁴³ The second claimant takes this position, no doubt, because the claimants are related corporations (see [2] above).⁴⁴ As a result of the second claimant's position, the defendant has characterised the second claimant as the defendant's "recalcitrant joint promisee".⁴⁵

41 To resolve the parties' dispute, the defendant commenced litigation against the first claimant in the courts of Ruritania in July 2020.⁴⁶ The second claimant was not a party to the Ruritanian litigation, whether as a plaintiff or as a co-defendant.⁴⁷

42 The defendant sought to recover damages from the first claimant in the Ruritanian litigation for the first claimant's alleged breaches of the non-contractual duties that it owed the defendant in providing the Services during the Tender Period, *ie* for breaches of duty that occurred *before* the first claimant

⁴³ AR1, p 825, para U1.1; CAM1 at para 46.

⁴⁴ 2 CAM1 at paras 6 to 7.

⁴⁵ AR1, p 825, para U1.3(3).

⁴⁶ CAM1 at para 40.

⁴⁷ CAM 1 at para 42.

entered into the Services Contract with the JV.⁴⁸ Part of the defendant's case was that the first claimant's liability to the defendant for breaches of non-contractual duties owed to the defendant during the Tender Period fell outside the scope of the arbitration agreement in the Services Contract.

43 The first claimant applied to the Ruritanian court for an order staying the Ruritanian litigation so that the underlying dispute between the defendant and the first claimant could be referred to arbitration under the arbitration agreement in the Services Contract.⁴⁹ The first claimant argued that the arbitration agreement in the Services Contract was wide enough to cover any breaches of any non-contractual duties that the first claimant might have owed to the defendant in providing the Services even during the Tender Period.⁵⁰

44 In July 2021, the Ruritanian court accepted the first claimant's argument and stayed the Ruritanian litigation in favour of arbitration. It has since been common ground that the arbitration agreement in the Services Contract is wide enough to encompass *both* the defendant's claims against the first claimant for breach of the latter's non-contractual duties during the Tender Period *as well as* the defendant's claims against the first claimant for breach of its contractual duties during the Contract.

⁴⁸ CAM1 at para 40.

⁴⁹ Award at para 2018; CAM 1 at 44.

⁵⁰ RBOD Vol (VII), Tab 8, p 69-70.

The arbitration

45 The defendant commenced the Arbitration within two weeks of the Ruritanian litigation being stayed.⁵¹

46 The second claimant continued to refuse to join the defendant in pursuing a claim against the first claimant, this time in the Arbitration. The defendant therefore joined the second claimant as the second respondent to the Arbitration.⁵²

47 The Tribunal heard the evidence in the Arbitration over two weeks in November 2023.⁵³ The Tribunal declared the proceedings closed in December 2024.⁵⁴ The Tribunal issued the Award in February 2025.⁵⁵

The defendant's case in the Arbitration

48 The defendant's case in the Arbitration was that the first claimant: (a) owed and had breached its non-contractual duties to the defendant under Ruritanian tort law and consumer protection law in providing the Services during the Tender Period; and (b) had breached its contractual duties to the defendant in providing the Services under the Services Contract during the Contract Period.

49 On liability, the defendant advanced two key points against the first claimant. First, the Services provided during the Tender Period were inadequate.

⁵¹ Award at paras 33 and 2018, AR1 at p 80 and p 533.

⁵² CAM1 at para 50; Award at para 2133.

⁵³ Award at para 54 and 58, AR1 at p 82.

⁵⁴ Award at para 69, AR1 at p 83.

⁵⁵ Award at para 74, AR1 at p 83.

The first claimant's designs for the Project had underestimated the required quantity of a key structural material by a factor of almost two. The costings for the Project were therefore grossly inaccurate. This caused the price for the Project in the tender and in the D&C Contract to be a loss-making price. Second, the Services provided during the Contract Period were late and continued to be inadequate. The Services were late because of the time the first claimant needed to correct its inadequate designs from the Tender Period. And the Services continued to be inadequate because even the corrected designs were either unbuildable or were unnecessarily over-engineered.⁵⁶ All of this caused the delay in executing the Project and in delivering it to the Principal.

50 On quantum, the defendant advanced a primary case⁵⁷ and an alternative case.⁵⁸ I shall refer to its primary case as the "No-Contract Case" and to the alternative case as the "Different Contract Case".

(1) Primary case: the No-Contract Case

51 The following were the principal points of the No-Contract Case.

52 But for the first claimant's breaches of its non-contractual duties during the Tender Period, the JV would not have entered the D&C Contract at all, either because the defendant would have known that it should decline to participate in a tender for the Project at a loss-making price or because the Principal would have rejected a tender submitted at a profit-making price.⁵⁹

⁵⁶ CAM1 at para 34–35; AR1 at p 820, para R5; AR1 at p 821, para R7.5; AR1 at p 824, para T1.2(2)(e).

⁵⁷ AR1 at p824, Part IX, para T1.1.

⁵⁸ AR1 at p824, Part IX, para T1.2 and T1.3.

⁵⁹ AR1 at p 732, Section II.2(2); CAM1 at para 57.

53 As a result of entering into the D&C Contract at the loss-making price, the JV had lost a total of \$100m. This figure is calculated by deducting the total cost that the JV incurred in delivering the Project (\$440m) from the total revenue that the JV received in delivering the Project (\$340m).⁶⁰ The defendant's share of the JV's loss⁶¹ on the No-Contract Case calculated in accordance with the JV Deed was therefore 50% of this sum, *ie* \$50m.⁶²

(2) Alternative case: the Different Contract Case

54 The following were the principal points of the Different Contract Case.

55 But for the first claimant's breaches of its *non-contractual* duties during the Tender Period, the JV would have submitted a different tender and would have entered into a different D&C Contract at a lump sum price that was \$17m higher ("the Different Contract Delta") than the loss-making price actually agreed in the D&C Contract.⁶³

56 In addition, but for the first claimant's breaches of its *contractual* duties during the Contract Period, the JV would have delivered the Project to the Principal on time.⁶⁴ The first claimant had thereby caused a loss during the Contract Period ("the Contract Period Loss")⁶⁵ that comprised five heads: (a) additional time-related costs for critical delay; (b) additional task-related

⁶⁰ AR1 at p 736, para I (1.28).

⁶¹ AR1 at p 824, Section T1.1.

⁶² AR1 at p 736, para I1.28–I1.29.

⁶³ AR1, p 737, at Section I (1.3) to I (1.35); AR1, p 824 at Part IX, para T1.2(1); CAM1 at paras 58 to 59.

⁶⁴ RBOD Vol (VI), Tab 7, p 347 *et seq*; RBOD Vol (II), Tab 3, p 14, 92; RBOD Vol (VI), Tab 7, p 267 *et seq*.

⁶⁵ CAM1 at para 34; AR1 at p 825 at para T1.2(2); RBOD Vol (VI), Tab 7, p 16; RBOD Vol (III), Tab 2, p 550-551.

costs caused by working in disrupted conditions; (c) additional direct costs either incurred in paying third parties as a result of the first claimant's breaches or incurred in order to mitigate the effects of those breaches; (d) the agreed liquidated damages deducted by the Principal; and (e) additional direct costs of building unnecessarily over-engineered structures.⁶⁶

57 The defendant quantified the total loss on the Different Contract Case as \$70m, comprising the Different Contract Delta of \$17m plus the Contract Period Loss of \$53m.⁶⁷ The Contract Period Loss of \$53m is \$1m less than the sum of the five separate heads of Contract Period Loss. This is because there was a \$1m overlap embedded in the third and fifth heads of loss.⁶⁸ If the Tribunal saw fit to award the defendant *both* the third *and* the fifth heads of loss, that overlap would have to be eliminated by deducting \$1m from the sum of the five heads of loss.⁶⁹

(3) The defendant's prayer for relief

58 If the Tribunal were to accept the No-Contract Case, the defendant prayed for an award that the first claimant pay directly to the defendant damages of \$50m.⁷⁰

59 If the Tribunal were to accept the Different Contract Case, the defendant prayed for an award that the first claimant pay directly to the defendant damages of \$50m out of the loss of \$70m, with the excess to be paid into the JV Account.

⁶⁶ AR1 at p 824, para T1.2(2).

⁶⁷ CAM1 at para 34; AR1 at p 825 at para T1.2(2); RBOD Vol (VI), Tab 7, p 16. RBOD Vol (III), Tab 2, p 550-551.

⁶⁸ AR1 at p 820, paras R5.7.

⁶⁹ AR1 at p 822 at para R7.5(2).

⁷⁰ AR1 at p 827 at Section V1.1(1); Award at para 110.

The defendant characterised the \$50m as the defendant’s “maximum personal loss on the Project”.⁷¹ For the purposes of this application, the claimants refer to this sum of \$50m in this context as “the Threshold Amount”.⁷²

60 Accordingly, the defendant concluded its Memorial of Claim with the following prayers for relief:

V1.1 For the reasons set forth in the preceding sections, [the defendant] requests the Tribunal to issue an Award in its favour for:

- (1) Monetary damages in the amount of [\$50m], payable directly to [the defendant], representing the direct losses that [the defendant] suffered by entering into a loss-making contract (the D&C Contract) which it would have avoided but for [the first claimant]'s breaches; alternatively
- (2) Monetary damages in the amount of [\$70m], representing the losses suffered on the Project by reason of the breaches set out above, of which:
 - (a) [\$50m] shall be paid directly to [the defendant]. [The defendant] notes that [the second claimant] makes no claim in this arbitration. This [\$50m] represents [the defendant]'s maximum personal loss on the Project;
 - (b) alternatively, if the Tribunal forms the view that the [\$70m] loss is suffered by [the JV], then [the defendant] says that it is entitled to the portion of that loss that is equal to its personal loss ([\$50m]). [The defendant] notes that [the second claimant] makes no claim in this arbitration and has refused to join with [the defendant] in the prosecution of a claim against [the first claimant]. If and to the extent that the Tribunal finds there are any additional proceeds beyond [the defendant]'s total loss of [\$50m], then [the defendant] says that the balance

⁷¹ AR1 at p 827 at Section V1.2(a); Award at para 110.

⁷² Claimants’ Written Submissions (“CWS”) at para 8(b)(iii).

should be paid to the [Project]...Account;
or

- (c) alternatively, [the defendant]'s just and equitable share of the loss that [the first claimant]'s breaches caused to the Project. That just and equitable share not exceeding [the defendant]'s actual loss of [\$50m], to be paid directly to [the defendant]. If and to the extent that the Tribunal finds there are any additional proceeds beyond [the defendant]'s total loss of [\$50m], then [the defendant] says that the balance should be paid to the [Project]...Account;
- (3) interest on all damages awarded at a rate of 5.5% per annum; alternatively 4.10% per annum; from the completion of the Project (February 2018); alternatively from the date that this proceeding was commenced (19 July 2021); alternatively interest awarded at such rates and for such periods as the Tribunal shall think fit;
- (4) [the defendant's] costs of legal representation, including attorneys' and experts' fees and expenses; and
- (5) such other relief as the Tribunal shall so determine.

The first claimant's position in the arbitration

61 The first claimant's position in the arbitration was that it did not owe any non-contractual duties to the defendant or breach any such duties during the Tender Period and that it did not breach its contractual duties to the defendant during the Contract Period.

62 It alleged that the true reason for the delay in delivering the Project was, amongst other things, the JV's "dysfunctional" management and the failures of the JVs other contractors.⁷³

⁷³ Award at paras 112–113.

63 In the event that the Tribunal nevertheless held the first claimant liable to pay damages to the defendant, the first claimant asked the Tribunal to award only 50% of those damages to the defendant, on the basis that the defendant was entitled to recover only 50% of its loss on the Project, with the second claimant being entitled to the remaining 50%.⁷⁴

The second claimant's position in the arbitration

64 Neither the defendant nor the first claimant made any claim whatsoever against the second claimant. So too, the second claimant made no claim whatsoever against either the defendant or the first claimant.⁷⁵ Thus, there was no possibility of the second claimant gaining anything or losing anything by reason of the Arbitration, save only for a potential favourable or adverse award of costs.

65 The second claimant accepted that it occupied an unusual position as the second respondent to the Arbitration.⁷⁶ It was purely a nominal party. The defendant had joined the second claimant to the Arbitration purely to ensure that the second claimant, as a party to the Services Contract: (a) had an opportunity to be heard in an arbitration brought by its joint promisee (the defendant) under that contract; and (b) would be bound by the Tribunal's resolution of the dispute

⁷⁴ Award at para 116.4; AR1, p 999 at para R1.3(c); AR1, p 1018 at para R6.4; AR1, p 1023 at para V1.2; AR1, p 1292 at para M5.2; AR1, p 1548 at para 157; AR1, p 1600 at para 452; AR1, p 1601 at paras 461 and 464(a).

⁷⁵ CAM1, Transcript Day 1, 8 November 2023, lines 8-13, p 65.

⁷⁶ AR1, p 1605, para 3.

between its joint promisee (the defendant) and its promisor (the first claimant) arising out of or in connection with that contract.⁷⁷

66 Despite having nothing to advance or defend in the Arbitration, the second claimant took the opportunity to file two rounds of memorials,⁷⁸ to file a prehearing brief,⁷⁹ to present an oral opening statement,⁸⁰ to lead evidence from three witnesses of fact⁸¹ and to file two rounds of post-hearing written closing submissions.⁸² Its stated reason for doing so was because it “acknowledged its function as being one which seeks to assist the Tribunal by providing it with a more complete factual and documentary record regarding the issues in dispute”⁸³. The defendant submitted to the Tribunal that the second claimant was leading its evidence in the Arbitration “to serve...some collateral purpose that has yet to be revealed”,⁸⁴ thereby suggesting that the second claimant’s real purpose was not to assist the Tribunal but to assist its related corporation, the first claimant. The Tribunal, in making its award on the costs the Arbitration, accepted⁸⁵ that the first claimant’s case had indeed been supported by the second claimant on certain aspects.⁸⁶

⁷⁷ Award at paras 2118, 2133; AR1, p 825, para U1.3(3); AR1, p 1159, para B2.1; AR1, p 2164 at para A1.15(2); CAM1 at para 50.

⁷⁸ AR1 at p 828; AR1 at p 1171.

⁷⁹ AR1 at p 1603.

⁸⁰ CAM1, Transcript Day 1, 8 November 2023, at pp 65 to 80.

⁸¹ AR1 at p 1161, at para B3.1.

⁸² AR1 at p 2045; AR1 at p 2265.

⁸³ AR1 at p 1605, para 3.

⁸⁴ AR1 at p 1161, para B3.2.

⁸⁵ Award at para 2090.

⁸⁶ AR1 at p 1181 at para B3.1; Pre-Hearing Brief Section C (Exhibit AR1 Tab 15).

67 Despite making no claim against any party, the second claimant did pray for relief in the Arbitration. It prayed for this relief only if the Tribunal were to hold the first claimant liable for damages, interest or costs. In that event, the second claimant sought two heads of relief: (a) an order requiring the first claimant to pay any such sums into the JV Account rather than to the defendant directly; and (b) an injunction restraining the defendant from withdrawing half of the sums from any and all of the Project Accounts (*not* simply from the JV Account) pending an arbitration to be commenced under the JV Deed:⁸⁷

The Second [claimant] requests that the Tribunal order that any amounts payable by the First [claimant] on account of damages, costs or interest be paid into the JV Account.

- (a) any award of damages payable by the First [claimant] be ordered to be paid into the JV Account; and
- (b) that the Tribunal enjoin the First [claimant] from withdrawing half of the funds paid into the Project Accounts, pending the resolution of the issue via proceedings under the JV Deed.

The Award

68 The Award is a closely reasoned analysis of the parties' cases running to over 2,150 meticulously detailed paragraphs in 570 pages.

69 The Tribunal accepted large parts of the defendant's case on liability. It therefore found the first claimant liable to the defendant for breach of some of its non-contractual duties during the Tender Period and for breach of some of its contractual duties during the Contract Period.

70 The Tribunal, however, rejected large parts of the defendant's case on quantum. The Tribunal rejected the No-Contract Case, finding as a fact that the

⁸⁷ AR1, p 1620–1621 at para 88; see also p 2057 at para 53; p 2280 at 63.

first claimant's breaches of its non-contractual duties during the Tender Phase gave rise to a variance of only 4.5% from the tender price, and that this variance was sufficiently small, and the defendant was sufficiently keen to participate in the tender, that it would have adjusted the tender price, participated in the tender⁸⁸ and still have won the tender.

71 The Tribunal therefore assessed damages on the Different Contract Case.⁸⁹ Further, even on the Different Contract Case, the tribunal rejected the defendant's case as to the quantum of the Different Contract Delta and of the Contract Period Loss. The Tribunal assessed the Different Contract Delta at \$10m⁹⁰ (instead of the \$17m that the defendant claimed) and the Contract Period Loss at \$28m (instead of the \$53m that the defendant claimed).⁹¹ Further, the Tribunal rejected the defendant's attempt to disapply the Liability Cap in the Services Contract. The Tribunal therefore accepted the first claimant's submission that its liability to the defendant for the Contract Period Loss was capped at \$2m.⁹² Thus, the tribunal ordered the first claimant to pay directly to the defendant the sum of \$12m in damages⁹³ together with interest and costs.

72 The Tribunal concluded by rejecting both the first claimant's case and the second claimant's case on how the first claimant ought to pay the award of damages to the defendant. The Tribunal therefore declined to order either that the first claimant pay only 50% of the damages to the defendant or pay 100%

⁸⁸ Award at para 909–910.

⁸⁹ Award at para 911.

⁹⁰ Award at para 912 and 914.

⁹¹ Award at para 1651.

⁹² Award at para 1652.

⁹³ Award at para 2152.1.

of the damages into the Project Account. Instead, the tribunal accepted the defendant's case and ordered the first claimant to pay 100% of the damages directly to the defendant.⁹⁴

73 The Tribunal's reasoning in arriving at its conclusion on this issue is the critical passage in the Award and is the central target of the submissions of both claimants in this application. The Tribunal began this section of the Award with the heading "Should any amount awarded, or any part of them, be paid into the JV Account?"⁹⁵

74 The Tribunal then set out the second claimant's primary position: that the JV Deed requires the defendant to hold any sums that it receives in the Arbitration on trust for the JV and to pay that sum promptly into the JV Account. I set out this section of the Award verbatim (with footnote omitted).⁹⁶

[The second claimant's] Position

2032. The [defendant] and [second claimant] opened the JV Account pursuant to clause 7.1 of the JV Deed. [The second claimant] states that Clause 7.2 of the JV Deed provides that any sums received by the [the defendant] or [the second claimant] in connection with the [JV], whether from the Principal or any other Third Party, must be held on trust for the benefit of the [JV] and must be promptly paid to the credit of the JV Account. Any profit or amounts remaining following the satisfaction of all the [JV's] obligations and liabilities are to be distributed to the [the defendant] and [the second claimant] in accordance with each of those parties' participating interests, being 50% each.

2033. [The second claimant] refers to a letter dated 19 June 2023, in which the [the defendant] stated that the JV Account was required to remain open until the conclusion of the arbitration for:

⁹⁴ Award at para 2152.1, AR1 at p 584.

⁹⁵ AR1 at p 536.

⁹⁶ AR1 at p 536.

“...delivery and satisfaction of any award. The reason for this is that the [JV] Account has been nominated by [the defendant] as the relevant account where any surplus funds in respect of any arbitral award are to be paid.”

2034. Accordingly, [the second claimant] submits that it appears to be agreed as between the [the defendant] and the [second claimant] that the JV Account is the appropriate account to receive payment of any amounts the Tribunal may award in this arbitration.

2035. [The second claimant] therefore requests that the Tribunal order that any amounts payable by the [the first claimant] on account of damages, costs or interest be paid into the JV Account so that:

2035.1 any award of damages, costs or interest payable by [the first claimant] be ordered to be paid into the JV Account; and

2035.2 the Tribunal should enjoin [the defendant] from withdrawing half of the funds paid into the Project Accounts, pending the resolution of the issue via proceedings under the JV Deed.

75 The Tribunal then summarised the defendant’s position: (a) the defendant was the only claimant in the Arbitration and had expressly sought an award in its favour for, and only for, its personal Project loss, *ie* the loss on the Project that the defendant had itself suffered; (b) the second claimant had not pleaded or proven any loss on the Project that the second claimant had itself suffered by reason of the first claimant’s breaches of duty; (c) it was only if the Tribunal awarded to the defendant a sum that exceeded the defendant’s personal Project loss that the defendant agreed that that surplus should be paid into the JV Account; and (d) issues arising under the JV Deed were beyond the scope of the Arbitration, as the Arbitration had been brought under, and only under, the

Services Contract. I set out this section of the Award verbatim (with footnote omitted).⁹⁷

[The defendant]'s Position

2036. [The defendant] states that [the second claimant] has made no claims and no party makes any claims against it. [The second claimant] seeks a 50% share of any award, but has made no claim in respect of any entitlement. [The defendant] submits that [the second claimant] has actively undermined [the defendant]'s claims, to support inadvertently or otherwise, [the first claimant]'s defence.

2037. [The defendant] states that it is the only claimant in this Arbitration and it only seeks its share of Project loss. [The defendant] submits that [the second claimant] is wrong in asserting that [the defendant] agrees to any award being paid into the Project account. [The defendant]'s prayer for relief is clear: it seeks an award in its name for its Project loss. Should the amount awarded by the Arbitrator exceed the Project losses that are personal to [the defendant], then it says that such surplus should be paid to the Project account. [The defendant] submits that [the second claimant] has made no claim in this Arbitration, nor does it say that has suffered any loss on account of [the first claimant].

2038. [The defendant] submits that issues in respect of the [JV Deed] are outside the terms of this Reference and it says that it has been clear about this matter from the outset of the Arbitration. Moreover, there are no claims before the Tribunal in relation to the application or not of the [JV Deed].

76 The Tribunal then summarised the second claimant's reply to the defendant's position: (a) the loss that the defendant was not only its personal Project loss; (b) the defendant's claims included a claim for the whole of the liquidated damages of \$2.1m that the Principal had deducted (see [37] above); (c) that claim was clearly not a loss that was personal to the defendant but a loss in which the second claimant, as a member of the JV, had a 50% participating interest; and (d) therefore, any award of damages against the first claimant

⁹⁷ AR1 at p 536–537.

should, in its entirety, be paid into the JV Account. I set out this section verbatim:⁹⁸

[The second claimant]'s Position in Reply

2039. [The second claimant] says that [the defendant] claims "the whole of the liquidated damages deducted from the final account with [the Principal], being [\$2.1m], which would have been significantly larger and to [the first claimant]'s account had [the defendant] not negotiated (at a cost) with [the Principal] for liquidated damages relief".

2040. There is no basis, [the second claimant] submits for the [the defendant] to recover amounts in respect of all liquidated damages paid jointly by the [JV] as those damages were to the [JV]'s account, in which [the second claimant] had a 50% share. [The second claimant] says that it has consistently maintained that, as a member of the [JV], it is entitled to a 50% interest in all of the rights and obligations of the [JV]. By contrast, [The defendant] has said that it "only claims its 50% share of the losses from [the first claimant]" and that it "has always been clear that it claims its 50% share of Project loss on account of [the first claimant]". [The second claimant] says that [the defendant]'s belated effort to claim "the whole of the liquidated damages deducted from the final account with [the Principal]" for itself is incompatible with its stated approach. Instead, any award of damages should be paid into the [JV]'s account, as previously submitted by [the second claimant].

77 The Tribunal then summarised the defendant's reply to the second claimant's position: (a) the defendant's claims for losses, both during the Tender Period and the Contract Period, were for losses suffered personally by the defendant; (b) the defendant had joined the second claimant to the Arbitration only as a recalcitrant joint promisee, and only to ensure that the outcome of the Arbitration bound the second claimant; (c) the second claimant's decision to make no claim against the first claimant meant either that the second claimant had itself suffered no personal loss on the Project, or (at the very least) that it did not consider the first claimant to be liable for any such loss; and (d) all

⁹⁸ AR1 at p 537–538.

matters under the JV Deed are outside the scope of the Arbitration. I set out this section verbatim:⁹⁹

[The defendant]'s Position in Reply

2041. [The defendant] submits that [the second claimant]'s contention that any award is to be paid into the [JV Account] is contrary to the relief sought by [the defendant] and also fails to have regard to the following:

2041.1 [The defendant]'s tender period claims arise outside the contractual framework of the Services Contract. The loss and damage suffered by [the defendant] are personal.

2041.2 Insofar as [the second claimant] was joined as a recalcitrant joint promisee to the proceeding, it was in respect of the Services Contract period claims. Again, [the defendant] is the only claimant. It has joined [the second claimant] so that it is bound by the outcome of the Arbitration. [The defendant] has only claimed its own loss. Should the Arbitrator find that there is an award in excess of [the defendant]'s own loss, then such surplus should be paid in to the [JV Account].

2042. [The defendant] says that [the second claimant]'s conduct in this Arbitration has been consistent with that of a party opposed to [the defendant]'s claims and, on any view, [the second claimant] does not and has not considered that its loss arises from [the first claimant]'s conduct. [The defendant] contends that it is not open to it to say so now. In circumstances where it has actively worked against [the defendant]'s claims and served evidence contrary to it, there is no basis for the Arbitrator to form the view that [the second claimant] claims any part of its loss from [the first claimant].

2043. [The defendant] repeats that any matters under the [JV] Deed are outside the Terms of Reference in this Arbitration as it has made clear from the-outset of the Arbitration. It was open to [the second claimant] at any time to commence separate proceedings under the Joint Venture Deed but it chose not to do so. [The defendant] says that the tender period claims are made by [the defendant] outside the framework of the Services Contract. [The defendant] states that it only joined [the second

⁹⁹

AR1 at p 537–538.

claimant] as a "recalcitrant joint promisee" in respect of its Services Contract claims, for procedural reasons.

78 Having considered the primary and responsive submissions from the defendant and the second claimant as to the mode by which the first claimant should pay the damages as assessed by the Tribunal, the Tribunal reached the following conclusions:

(a) The defendant's case was that it had suffered a personal Project loss of \$50m. It asked the Tribunal to assess the damages payable by the first claimant in that amount and, further, asked Tribunal to order the first claimant to pay those damages directly to the defendant, with only the damages awarded that exceeded that sum to be paid into the JV Account.

(b) The damages as assessed by the Tribunal were below \$50m. Therefore, the Tribunal did not have to consider this aspect of the defendant's case. Whatever disputes remained between the defendant and the second claimant over where the damages should be paid were all disputes under the JV Deed. The Tribunal therefore had no jurisdiction over those disputes.

(c) The only claimant in the Arbitration was the defendant. The Tribunal would therefore make an award in the usual form, which does not specify the means of payment, in the defendant's favour.

79 The Tribunal set out its reasoning on this final issue as follows:¹⁰⁰

Decision on the Issue

2044. In this Arbitration I have dealt with the claims made by [the defendant] against [the first claimant] in the Tender Period and in the Contract Period. In making my award in the Tender Period, I have not considered how the loss claimed by [the defendant] based on [the first claimant's non-contractual duties] would be treated under the JV Deed.

2045. In relation to the sums claimed in respect of the Contract Period, I have found that the Liability Cap of [\$2m] applies, that the claim for liquidated damages payable to [the Principal] is Consequential Loss which is excluded and that none of the exceptions apply. On that basis, although I would have awarded [the defendant] [\$28m], the damages claimed by [the defendant] against [the first claimant] under the Services Contract are limited to [\$2m].

2046. I do not have jurisdiction to deal with claims between [the defendant] and [the second claimant] under the JV Deed as those claims are not within the Terms of Reference. The claims under the Terms of Reference are limited to [non-contractual claims] by [the defendant] against [the first claimant] in respect of the Tender Period and those under the Services Contract in respect of the Contract Period.

2047. Given the findings that I have made and the fact that I have no jurisdiction to determine matters between [the defendant] and [the second claimant] under the [JV] Deed, I cannot make a finding on a contested issue between [the defendant] and [the second claimant] under the [JV] Deed.

2048. As set out above, [the defendant] and [the second claimant] do not agree whether the sums payable under this Award should be payable as an award payable to [the defendant], as [the defendant] contends or should be payable to the [JV] Account, as [the second claimant] contends. Although [the defendant] states that in the case of "an award in excess of [the defendant's] own loss", which the defendant pleads is [\$50m], then such surplus should be paid in to the JV [A]ccount, that is not the case here. Otherwise the dispute between [the defendant] and [the second claimant] over where the sums should be paid is not a dispute over which I have jurisdiction. However, as the claimant in this Arbitration is [the defendant] and it seeks an award in its favour from [the first claimant], in the absence of any agreement of where the sums

¹⁰⁰ AR1 at p 538, paras 2047-2049.

payable under this Award are to be paid, I shall adopt the usual form of award which does not specify a means of payment.

2049. The Tribunal therefore determines that any sums under the Award should be paid by [the first claimant] to [the defendant] and not into the [Project] Account.

80 The Tribunal therefore made the following substantive dispositive orders in the penultimate paragraph of the Award:¹⁰¹

- (a) The first claimant shall pay the defendant \$12m, being:
 - (i) damages of \$10m for its Tender Period claims “representing the direct losses that [the defendant] suffered by entering into a loss-making contract (the D&C Contract)”;¹⁰² and
 - (ii) damages of \$2m for the defendant’s Contract Period claims “representing the losses suffered on the Project by reason of the breaches of the Services Contract”.¹⁰³
- (b) The first claimant was to pay this sum of \$12m directly to the defendant.¹⁰⁴

¹⁰¹ Award at para 2152.

¹⁰² Award at para 2152.1.

¹⁰³ Award at para 2152.1.

¹⁰⁴ Award at para 2152.1.

Applicable legal principles

81 The claimants seek to set the Award aside on only one ground: that the Award dealt with a dispute beyond the scope of the submission to arbitration under Art 34(2)(a)(iii) of the Model Law.

82 The parties are on common ground as to the applicable law. Art 34(2)(a)(iii) of the Model Law provides that the court may set aside an award if it “deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration”.

83 The court approaches an application of this nature *de novo* and considers first what was the scope of the submission to arbitration and second whether the tribunal dealt with issues outside that scope (*AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 at [112]; *CBX and another v CBZ and others* [2022] 1 SLR 47 (“*CBX*”) at [11].

84 If a tribunal makes a finding in excess of jurisdiction, any other findings that are linked to the impugned finding or that flow from the impugned finding will also be set aside: *CBX* at [74]; *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd and another matter* [2018] 4 SLR 271 at [72]-[76].

The tribunal did not exceed its jurisdiction

85 The claimants' submission is that the Tribunal made two key findings in the Award that necessarily required a consideration of the terms of the JV Deed and were therefore in excess of its jurisdiction ("the Relevant Findings"):¹⁰⁵

14 On 21 February 2025, the Tribunal issued the Award. In the Award, the Tribunal made two key findings, which we shall refer to as the "Relevant Findings":

(a) the loss suffered in relation to the Tender Period and Contract Period claims were personal to [the respondent] as long as they were less than the Threshold Amount and/or fell outside the JV Project Account; and

(b) therefore, the sums awarded in the Arbitration should be paid to [the respondent] directly and not to the JV Account as long as they were less than the Threshold Amount.

86 This submission proceeds on a fundamental misapprehension of what the Tribunal decided in the Award. The Tribunal made express in its Award that it was acutely aware that all questions arising under the JV Deed were completely outside its jurisdiction. It therefore rejected the attempts of the claimants as well as the attempts of the defendant to have the Tribunal decide issues in dispute between the parties under any provision of the JV Deed.

87 All that the Tribunal did was to make a finding that the damages it awarded for the Tender Period loss and for the Contract Period loss was personal to the defendant on the evidence presented in the Arbitration and for the purposes of the Arbitration. In that context, and *only* in that context, the Tribunal accepted that the defendant had proven that it was entitled to an award in the

¹⁰⁵ CWS at para 14.

sum of \$12m and was entitled to have that sum paid directly to it by the first claimant.

88 The position taken by the second claimant left the Tribunal with no alternative but to make this finding. That is because only the defendant led any evidence in the Arbitration of any loss arising from the first claimant's breaches of duty. The second claimant led no evidence at all in the Arbitration, let alone any evidence that it had suffered any loss, whether caused by the first claimant or otherwise. And the second claimant sought from the Tribunal no award of any damages against the first claimant, or indeed any other party, for any such loss. Its only claim was against the defendant, and even then it was a claim only for any damages that might be awarded in the Arbitration to be paid into the JV Account. That claim was disputed by the defendant. That dispute is clearly a dispute under, and only under, the JV Deed. It is not a dispute under the Services Contract.

89 As a result, the Tribunal had before it an Arbitration in which it had made a finding that: (a) the first claimant was in breach of its duties, both during the Tender Period and the Contract Period; and (b) that the defendant had proven that those breaches of duty had caused \$12m loss on the Project. What was the Tribunal then to do in order to conclude the Arbitration? It could not award that loss jointly to the defendant and the second claimant. That was simply because the second claimant had deliberately chosen to adduce no evidence and to make no claim that it had suffered any loss. The Tribunal could not order the first claimant to pay the damages into the JV Account. That was simply because the dispute between the defendant and the claimants over whether the defendant was obliged to account for the damages or to pay the damages into the JV Account was a dispute under cl 7.2 of the JV Deed and therefore outside the scope of the Tribunal's jurisdiction.

90 It is clear from paragraphs 2044 to 2049 of the Award (see [79] above) that the Tribunal made no finding that the sum that the first claimant was ordered to pay the defendant was compensation to the defendant for the defendant’s “personal loss” in any absolute sense. Quite rightly, the Tribunal considered that any dispute over whether, and if so to what extent, that loss was “personal” to the first claimant in any absolute sense or whether the second claimant had any participating interest in the damages awarded was a dispute to be resolved under the arbitration under the JV Deed and not in an arbitration under the Services Contract.

91 It is true that the defendant argued in the Arbitration that it was entitled to claim any sum below the Threshold Amount as its personal loss on the basis that \$50m represented the defendant’s maximum theoretical loss. It is also true that the defendant argued that the increase in the tender price was a loss that was personal to the defendant because it was a loss incurred outside the JV Project Accounts. But the Tribunal did not order the first claimant to pay the \$12m directly to the defendant because the Tribunal accepted either of these arguments. The Tribunal nowhere ordered the first claimant to pay the \$12m in damages directly to the defendant because the Tribunal accepted that any loss below \$50m was *ipso facto* the defendant’s personal loss. The Tribunal nowhere accepted the defendant’s argument that the increase in the tender price was a loss outside the JV Project Accounts.

92 Instead, the Tribunal made clear that it ordered the first claimant to pay the damages of \$12m directly to the defendant because, and *only* because: (a) there was only one claimant in the Arbitration making a claim for compensation against the first claimant; (b) the second claimant made no claim in the Arbitration for any compensation from anyone; (c) whether the second claimant was entitled to any part of the damages and whether the defendant was

obliged to account to the JV for the damages or to pay the damages into the Project Account were all disputes under, and *entirely* under, the JV Deed; and (d) the usual form of award in an arbitration where only one claimant sought damages for only one respondent was an award requiring that respondent to pay the damages directly to that claimant.

93 It may be that in any future arbitration under the JV Deed, the second claimant will find itself precluded from arguing that the damages that the Tribunal awarded in the Arbitration are not entirely the defendant's personal loss arising from the Project or that the second claimant nevertheless has a participating interest in the damages. But that will not be because the Tribunal made any absolute finding to that effect in the Arbitration sufficient to bind the second claimant in this hypothetical future arbitration. That will be because of the position that the second claimant chose to take in the Arbitration, presumably on legal advice, not to join the defendant in the Arbitration in advancing a positive case, and adducing evidence to support that positive case, against the first claimant in relation to the first claimant's breaches of duty during the Tender Period and the Contract Period as well as in relation to the quantum of loss that those breaches of duty had occasioned to each of the first claimant and the second claimant during each of those periods.

94 For these reasons, I have dismissed the claimants' application with costs.

Vinodh Coomaraswamy
Judge of the High Court

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