EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO. BVIHCM2023/0070

BETWEEN:

[1] GLOBAL MINING DEVELOPMENT L.P.

[2] GERALD METALS LLC

Claimants/Respondents

and

[1] CHINA NATIONAL GOLD GROUP HONG KONG LIMITED

First Defendant/Applicant

[2] SOREMI INVESTMENTS LIMITED

Second Defendant

Appearances:

Mr. Ali Malek, KC, with him Ms. Judy Fu, Mr. Peter Ferrer and Mr. Andrew Thorp for the Claimants/Respondents;

Mr. Vernon Flynn, KC, with him Miss Rosalind Nicholson for the First Defendant/Applicants.

Ms. Grainne Hussey on a watching brief for the Second Defendant

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2024: April 9, 10, 11, 15.

JUDGMENT

1. Introduction

[1] **Wallbank J.:** These are the Court's reasons for its *ex tempore* ruling delivered orally on 15th April 2024 dismissing two applications filed by the First Defendant/Applicant, China National Gold Group Hong Kong Limited ('CNG'). The applications were heard over the greater part of three days on 9th, 10th and 11th April 2024.

[2] The Claimants in these proceedings, Global Mining Development L.P. and Gerald Metals LLC, were the Respondents to CNG's applications. Purely for ease of reference I shall refer to the Respondents as 'Global/Gerald'.

[3] The two applications were brought by way of Notices of Application dated 26th May 2023 and 15th February 2024 respectively.

[4] By these, CNG sought Orders:

(1) setting aside an *ex parte* Order made by this Court on 25th April 2023 ordering *inter alia* that a first final partial arbitral award made in favour of Global/Gerald against CNG on 8th February 2023; and the Addendum thereto dated 31st March 2023 (collectively, the '1st FPA') be registered in the BVI so that it may be enforceable as if it were an Order of the Court (the 'April 2023 Order');

(2) setting aside an *ex parte* Order made by this Court on 20th December 2023 ordering *inter alia* that

a. permission be granted for Global/Gerald to enforce the 1st FPA; and

b. a partial final arbitral award for specific performance made in favour of Global/Gerald against CNG dated 21st November 2023 (the 'SP FPA') be registered in the BVI so that it may be enforceable as if it were an Order of the Court (the December 2023 Order');

(3) staying enforcement of the 1st FPA pending determination of the setting aside application; and

(4) staying enforcement of the SP FPA pending determination of proceedings in Hong Kong to set aside the SP FPA.

[5] The grounds for the application to set aside the 1st FPA were stated in the Notice of Application in summary as follows:

(1) CNG had applied to the Hong Kong Court of First Instance to set aside the 1st FPA, with that challenge pending and not yet determined. On that ground CNG invited this Court to adjourn these proceedings;

(2) This Court should decline to recognise the 1st FPA or refuse permission to Global/Gerald to enforce it on a number of grounds. These included that:

a. The 1st FPA has not yet become binding on the parties (per section 86(2)(f)(i) of the BVI Arbitration Act ('the Act'));

b. Various grounds of alleged serious irregularity;

c. Various grounds of alleged breach of the duty of full and frank disclosure.

[6] The grounds for the application to set aside the 20th December 2023 Order were stated in the Notice of Application in summary *inter alia* as follows:

(1) To the extent that the 20th December 2023 Order permits the Claimants to enforce the 1st FPA:

a. CNG's application of 26th May 2023 to set aside the 1st FPA had not yet been determined;

b. the 1st FPA is not final between the parties;

c. various alleged grounds of alleged breach of the duty of full and frank disclosure.

(2) Concerning the SP FPA:

a. The SP FPA is not final;

b. there was no substantive jurisdiction in the Tribunal to render the SP FPA and CNG has a right to a full rehearing in the Hong Kong Court of First Instance on substantive jurisdiction;

c. CNG is in the course of preparing and will shortly file an application to the Hong Kong Court of First Instance to set-aside the SP FPA on the grounds, *inter alia*, that there was no substantive jurisdiction in the Tribunal to render the SP FPA. CNG has a right to a full rehearing in the Hong Kong Court on substantive jurisdiction. Accordingly, the SP FPA has not yet become binding on the parties;

d. Various grounds of alleged serious irregularity;

e. The SP FPA has not yet become binding upon the parties;

f. It would be contrary to the public policy of the Territory of the Virgin Islands ('BVI') to enforce the SP FPA.

2. Background

[7] The underlying arbitration concerned a dispute between two shareholders in a BVI company (Soremi Investments Ltd ('SIL')), being the Second Defendant herein, which owns and operates a polymetallic copper-lead-zinc mining and processing project (the 'Project') based in the Republic of the Congo ('ROC').

[8] CNG purchased a 65% stake in SIL from Global/Gerald by way of a Share and Purchase Agreement dated 18th December 2013. CNG, Global/Gerald and SIL further entered into a Shareholders' Agreement (the 'SHA') on 17th March 2014.

[9] Insofar as the 1st FPA is concerned, it determined two specific claims (out of a host of others mostly concerning the exploration efforts and operations of the Project), being what the parties refer to as the 'Share Transfer Claim' and the 'Defaulting Shareholder Claim'.

[10] Insofar as the Share Transfer Claim is concerned:

(1) Clauses 5.2 to 5.9 of the SHA provided that any transfer of shares by a shareholder in SIL other than to a 'Permitted Transferee' would mean the non-transferring shareholder gets a 'right of first refusal' ('ROFR'), viz. the intended transferor must first offer the shares for transfer to the other shareholder.

(2) On 2nd March 2020, CNG sent a letter to Global/Gerald about its intended sale of its SIL shares to a company called China Gold International Resources Corp. Ltd ('CGG'), a Canadian company whose shares are dual-listed on the Hong Kong and Toronto Stock Exchanges. As early as 2013 when parties had been discussing the initial sale to CNG, there had been reference to the Project being ultimately 'folded into the listed company [CGG] under [CNG]'. Such letter of 2nd March 2020 stated, *inter alia*, that despite a belief that CNG's control over CGG rendered the latter an 'Affiliate' under the SHA (and therefore a 'Permitted Transferee', which did not engage Clauses 5.2 to 5.9 of the SHA): '…[CNG] is willing to comply with the provisions of [Clauses] 5.2 through 5.9 of the [SHA] as if it were

proposing to offer the Soremi Shares to a non-Permitted Transferee'. The parties refer to this letter as the 'Transfer Notice'.

(3) Thereafter, between 1st and 10th March 2020, there were various communications between CNG and Global/Gerald, culminating in a letter dated 12th March 2020 from CNG stating that the proposed sale to CGG had to be 'put on hold'.

(4) Nevertheless, on 30th March 2020, the 1st Claimant (Global) sent a letter to CNG purporting to exercise the ROFR, albeit on the basis that it agreed to 'put the transactions on hold until the adequate resolution of the SARS-CoV-2 impacts in Global's reasonable opinion'.

(5) Such purported exercise of the ROFR by Global formed the basis of the Share Transfer Claim.

[11] As to the Defaulting Shareholder Claim:

(1) As a result of the COVID-19 pandemic, on 2nd April 2020, a SIL Board meeting was held to discuss the shutdown of the Project and other related issues.

(2) There were disputes about the scope of the shutdown that had been implemented, but in gist, on 12th May 2020, Global issued a letter to CNG purporting to give notice of an Event of Default under Clause 7.1 of the SHA citing lack of unanimous approval on the shutdown decision (claiming that the same was a 'Reserved Matter' under Schedule 2 of the SHA).

(3) On 26th June 2020, Global issued a further notice to CNG purportedly under Clause 7.2(c) of the SHA pursuant to which 'a Transfer Notice [under Clause 5.3 is] deemed to be given', whereby CNG's shares in SIL are to be taken to be offered to Global for sale at the 'Fair Price' defined in Clause 7.3, viz.:

> "…the price which an experienced valuation firm appointed by [SIL] states in writing to be in its opinion the fair value of the Shares on a sale as between a willing seller and a willing purchaser…on the assumption that [SIL] will continue to carry on business as a going concern".

(4) The Defaulting Shareholder Claim was therefore Global/Gerald's alternative basis to seek specific performance requiring CNG to transfer its shares in SIL.

[12] The arbitration in question was and is seated in Hong Kong. It is still on-going. The Tribunal comprises of three arbitrators: Mr. Peter Leaver, KC (President), Dr. Michael Moser, and Dr. Rimsky Yuen GBM SC JP.

[13] In the arbitration, an evidentiary hearing was held on 16th to 27th May 2022, followed by exchange of two rounds of Post-Hearing Briefs and oral closing submissions. The 1st FPA was handed down on 8th February 2023. The 1st FPA dealt only with the Share Transfer and Defaulting Shareholder Claims.

[14] In a nutshell, the Tribunal found against CNG on both claims. In the Dispositive (Section IX of the 1st FPA):

(1) On the Share Transfer Claim, the Tribunal ordered CNG to provide Global/Gerald with details required to enable the latter to effect payment of the purchase price; and then for Global/Gerald to make payment within 28 days thereafter, and for CNG/SIL to provide to Global/Gerald 'all documents and/or information reasonably necessary to complete the purchase and to enable the Claimants to register the transfer of the shares…'.

(2) On the Defaulting Shareholder Claim, the Tribunal held that a Transfer Notice (as defined in the SHA) was deemed to be given in respect of CNG's shares in SIL 'for a Fair Price as defined in Clause 7.3 of the Shareholders' Agreement' – which was accepted by the Tribunal to be USD 86.32 million, on the basis of a valuation relied upon to result in the price offered by CNG initially in the Transfer Notice. However, no order was made on the Defaulting Shareholder Claim.

[15] The effect of the 1st FPA was that the Tribunal recognised that, from 2020, Global has been the rightful owner of 100% of the shares in SIL. That required CNG to transfer to Global its shares in SIL (65%) for a purchase price of USD 86.32 million (the 'Purchase Price').

[16] The Tribunal anticipated voluntary compliance by CNG and thus left the mechanics of transfer to the parties, reserving jurisdiction to issue a further order for specific performance should CNG not comply.

[17] CNG did not comply.

[18] On 26th February 2023, Global/Gerald (by letter from their solicitors) wrote to the Tribunal 'request[ing] an order for specific performance…to supplement/modify paragraphs 4 and 5 of the dispositive'.

[20] On 31st March 2023, an Addendum to the 1st FPA was issued by the Tribunal, but it refused at that point in time to make an order for specific performance.

[21] On 20th April 2023, Global/Gerald applied *ex parte* in the BVI seeking registration of the 1st FPA for the same to be recognised, which resulted in the April 2023 Order of this Court.

[22] On 27th April 2023, CNG applied to the Hong Kong Court of First Instance (Hong Kong being the seat of the arbitration) to set aside the 1st FPA. The application came before Mimmie Chan J on 29th – 30th August 2023. After hearing submissions from the parties, at the end of the hearing the learned judge dismissed CNG's application, with reasons reserved. Such reasons were handed down on 27th February 2024. The period for seeking to appeal that dismissal has elapsed. CNG has confirmed to this Court that it is not appealing Mimmie Chan J's decision.

[23] On 1st May 2023, Global/Gerald reiterated their request to the Tribunal for an order for specific performance (the 'SP Application').

[24] On 9th May 2023, the Tribunal gave directions for a hearing for the SP Application to be held on 23rd June 2023.

[25] On 26th May 2023, CNG issued its Notice of Application to set aside the April 2023 Order.

[26] After hearing parties' submissions, the Tribunal issued the SP FPA on 21st November 2023, essentially acceding to all the requested reliefs for specific performance sought by Global/Gerald.

[27] CNG did not comply with the 1st FPA or with the SP FPA.

[28] On 18th December 2023, Global/Gerald applied *ex parte* in the BVI seeking, *inter alia*, registration of the SP FPA, which then resulted in the December 2023 Order.

[29] On 15th February 2024, CNG issued its Notice of Application to set aside the December 2023 Order.

[30] There was considerable overlap between CNG's application in Hong Kong to set aside the 1st FPA and its application to do so before this Court. In light of the Hong Kong court's decision, CNG did not pursue before this Court those parts of its challenge to the 1st FPA which had thereby become *res judicatae*.

[31] CNG maintained before this Court that there remain important grounds which raise fundamental issues in international arbitration, impeding recognition and enforcement in this jurisdiction, and which warrant the setting aside of this Court's April and December 2023 Orders.

[32] CNG asserted that:

(1) The 1st FPA was not yet a binding award, and thus by section 86(2)(f)(i) of the Act is not liable to be enforced;

(2) Further or alternatively, the Tribunal lacked substantive jurisdiction to make the SP FPA;

(3) In any event, there are set-aside proceedings on foot in Hong Kong in respect of the SP FPA on *inter alia* jurisdictional grounds, which means that this Court should not, on ordinary well-established principles, permit enforcement prior to the determination of the challenge in Hong Kong;

(4) There are also public policy considerations which are uniquely issues for this Court in this jurisdiction; and

(5) Finally, the Claimants failed to discharge their duties of full and frank disclosure in obtaining the *ex parte* orders in so serious a fashion as to warrant those orders being set aside.

3. CNG's main arguments

[33] CNG argued in more detail the following. Nothing in this segment is to be taken as a finding of this Court.

3.1 1st FPA 'not yet binding'

[34] Learned Counsel for CNG, Mr. Vernon Flynn, KC, submitted that:

> **"**In circumstances where Gerald was seeking to change or vary or supplement the First Award, it was obvious that the First Award couldn't have been final and binding in the relevant sense, because it's as if they were seeking to change a judgment in the same court that rendered it."

[35] He explained this by submitting:

> "The question Your Lordship has to ask is, is it yet binding. So is the First Award yet binding? Answer, no, because it isn't an order for specific performance, so far as specific

> performance. So the answer is it's not binding. So the orders they seek for recognition they can't have those, so they should be on that basis set aside."

[36] He continued:

> "… the First Award, it's not a binding award because you have to go back and ask the same Tribunal for variation, supplementation. So it's not binding."

3.1.1 Relevant legal principles

[37] In order for the 1st FPA (or any arbitration award) to give rise to an issue estoppel, three principles must be established, see **Gol Linhas Aereas SA v MatlinPatterson II LP**.[1]:

> "First, the judgment must be entitled to recognition in accordance with the domestic rules on the recognition of foreign judgments. At common law, these rules require the judgment to be (a) given by a court of a foreign country with jurisdiction to give it and (b) final and conclusive on the merits. Second, the parties in the two actions must be the same. Third, the issue decided by the foreign court must be the same as the issue in the domestic proceedings."

[38] Article V(1)(e) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards expressly provides for refusal of recognition and enforcement where the Award has not yet become binding on the parties.

[39] An award is 'binding' if it is no longer open to an appeal on the merits, either internally (that is to say, within the relevant rules of arbitration), or by an application to the Court: **Société Nationale d'Opérations Petrolières de la Côte d'Ivoire-Holding v Keen Lloyd Resources Ltd**,[2] accepting a statement cited by counsel from **Redfern & Hunter, Law and Practice of International Commercial Arbitration** (3rd edn., Sweet & Maxwell 1999) at pp. 467-468; see also **L v B**.[3]

[40] In **Born, International Commercial Arbitration** (3rd edn. Wolters Kluwer, 2020) at §26.05[C][h] (p. 390), it is further explained (in the context of discussing finality of interim awards) that an award

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[1] [2022] UKPC 21, [2023] Bus LR 1305 at paragraph 36 (Lords Hamblen and Leggatt).
[2] [2004] 3 HKC 452 at paragraphs 5-6 (Burrell J.).
[3] [2016] 4 HKC 254 at paragraph 12 (Mimmie Chan J.).

can be final as long as it '[requires] specific action and do[es] not serve as a basis for further decisions by the arbitrators'.

[41] In the context of partial awards, **Born** (supra) at §26.05[C][i] (p. 3971) notes that an award is final as long as it 'resolves the rights and obligations of the parties definitively enough to preclude the need for further adjudication'.

[42] In **Diag Human SE v Czech Republic**,[4] Eder J. also considered the concept of when an award might be 'binding'. Notably:

(1) Eder J. observed at paragraph 17 that it was not correct that the English court would never have regard to the law of the arbitration agreement or the curial law of the seat of the arbitration, after considering the *dicta* of Burton J in **Dowans Holdings SA v Tanzania Electric Supply Co Ltd**.[5]

(2) After considering the distinction in **Dowans** (supra) as to 'ordinary recourse' and 'extraordinary recourse' against an award (paragraphs 19-21), the court did not land on any specific definition for the above terms. However, on the facts of that case, it was held that because 'the [arbitral] review process was validly triggered…on that basis, the Award is subject to 'ordinary recourse' and not binding' (paragraph 87). Such 'review process' was discussed at paragraph 25 of the Judgment, whereby the award could be reviewed by 'other arbitrators whom the parties appoint in the same manner'.

[43] Also relevant is the discussion in **Konkola Copper Mines v U & M Mining Zambia Ltd (No. 2)**,[6] where Cooke J held as follows:

> ""I do not see why, as a matter of principle, whatever the statements in Russell on Arbitration, 23rd ed (2007) are intended to mean, an award cannot be final and conclusive in its terms where it clearly provides for specific relief, including payments of money, which only bites at a point in the future, in the absence of submission and evidence from an absent party to the contrary. The tribunal has made decisions which are final and complete and **<u>are not subject to further decisions on its part or of any other person or body</u>** unless a specified contingency occurs. Such an award is complete and final on its own terms, albeit conditional. Whilst this might present difficulties for enforcement purposes, that is nothing to the point and does not prevent it from being an award which binds the parties. So, here, those parts of the Second Award which contained the 'show cause'

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[4] [2014] EWHC 1639.
[5] [2011] EWHC 1957.
[6] [2014] 2 Lloyd's Rep 649 at paragraph 97 (Cooke J.).

provisions were final, complete and conclusive, as between the parties, albeit conditional" (CNG's emphasis added).

3.1.2 Nature of the 1st FPA

[44] The contents of the 1st FPA, the Tribunal's actions in acceding to Global/Gerald's SP Application subsequently, and the Tribunal's elucidation of the effect and meaning of the 1st FPA in the SP FPA all demonstrate that the 1st FPA cannot have been final or binding – even from Global/Gerald's and the Tribunal's respective perspectives.

[45] As such, and bearing in mind the SP FPA was issued expressly on the request of Global/Gerald on the basis of express representations as to the inadequacy of the 1st FPA as an enforceable award, enforcement of the 1st FPA should be refused pursuant to section 86(2)(f)(i) of the Act as it is not a binding award on the parties.

[46] At paragraphs 87-89 of the 1st FPA, having found against CNG on the Share Transfer Claim, the Tribunal concluded that 'Gerald is entitled to an order for specific performance of the obligation to transfer the Offered Shares…' – but went on to indicate that it:

> "87. …hopes that on reading this Partial Award CNG will provide to Gerald the details of its bank account so that the purchase price can be paid into that account and that **it will not be necessary for the order for specific performance to come into effect**.
>
> 88. …If CNG fails to give details of its bank account so as to enable the Claimants to make the required payment, the Tribunal **will issue** an order for specific performance." (CNG's emphasis added).

[47] The Tribunal also expressly allowed the parties to make submissions about 'this proposal' following receipt of the 1st FPA.

[48] Then, after the handing down of this 1st FPA and despite the enforcement application in the BVI in respect of the same, Global/Gerald then proceeded to make its SP Application for 'an order for specific performance…to supplement / modify paragraphs 4 and 5 of the dispositive of the Share Transfer Claim in the 1st FPA'.

[49] In Global/Gerald's Skeleton Argument for the hearing of such SP Application ('Claimants' SP Application Skeleton') at paragraph 39, they conclude the submissions by asking the Tribunal to 'order specific performance in the terms of the draft Order'.

[50] Having found against CNG, at paragraph 126(2) of the SP FPA (being the Dispositive section), the Tribunal referred back to paragraph 88 of the 1st FPA (in particular the wording about how it 'will issue an order for specific performance' in the event of breach), and then proceeded at paragraph 126(3) to make various orders for specific performance as to CNG's purported obligation to transfer the relevant shares to the Claimants.

[51] Two points are clear from the above:

(1) First, Global/Gerald did not consider the 1st FPA as constituting any order of specific performance. That was why they saw fit to make the SP Application. Even at paragraph 2 of their SP Application Skeleton, it was alleged that the SP Application would not have been necessary had CNG not 'refused to engage with the Claimants' attempt to agree a mechanism for transfer'. In other words, the 1st FPA had left open the actual enforcement of the obligation to transfer.

(2) Second, the 1st FPA was not, and was not intended to be, an order for specific performance. The Tribunal had clearly left that open and intended only to revisit the issue if necessary. In doing so, the Tribunal did not even make any provisions for any order of specific performance which would potentially kick in in the future. Instead, the terms of the actual relief of specific performance were not discussed or considered in the 1st FPA.

[52] In other words, the 1st FPA on its face invited and required further decisions by the Tribunal. Further adjudication on how the transfer would take place and the terms of a possible specific performance order was inevitable. Indeed, the same was expressly foreshadowed at paragraphs 87-88 of the 1st FPA. The Tribunal made it clear that revisiting the substantive merits of the case would be necessary in due course, given that the necessity, scope and terms of any specific performance order were not conclusively addressed or dealt with.

[53] In this sense, the 1st FPA was open to an appeal on the merits, as the dispositive and actual orders made by the Tribunal were liable to be (and indeed were) susceptible to being overturned, rewritten and/or supplemented – as Global/Gerald expressly requested.

[54] Insofar as **Konkola Copper Mines** may be said to be against such position, it is reiterated that, unlike the factual position before Cooke J. was in that case, the 1st FPA did not (simply) make a

‘conditional’ award. Plainly Global/Gerald did not view it in such terms; otherwise they would not have made the SP Application.

[55] On the contrary, the wording in the 1st FPA (e.g. the statement that an order for specific performance will be issued in due course if the existing orders made are not complied with) does not provide for any ‘specific relief…which only bites at a point in the future’ – the 1st FPA itself did not even provide for a proper order for specific performance at all. It merely directed the provision of bank account details as a precursor; the Tribunal had ‘hoped’ this would trigger some sort of autonomous agreement between the parties thereafter to facilitate the transfer without any additional order or direction.

[56] If anything the present scenario is more analogous to the case of **Ronly Holdings Ltd v JSC Zestafoni G Nikoladze Ferroalloy Plant**,[7] where an arbitrator determined that a certain sum was outstanding under the subject agreement but ‘[did] no more than express the hope that parties would ‘resolve by other means any outstanding differences that may remain concerning the contracts and arrangements from which they were derived’’.

[57] Gross J held[8] that this constituted a serious irregularity entitling the award to be set aside (under section 68 of the United Kingdom Arbitration Act 1998), as that constituted a failure to deal with issues put to him. Though the situation before this Court is not an application to set aside for serious irregularity, **Ronly Holdings** illustrates the problems with an award which stops short of making the full swathe of orders following from the factual findings and/or holdings on liability – not dissimilar to the Tribunal’s approach with the 1st FPA.

[58] For completeness, dealing with the case of **YDU v SAB**[9] (as the case was discussed in detail in the SP FPA):

(1) At paragraphs 34-36, Butcher J held that it was ‘too dogmatic and absolutist a position to say that something which is ‘an award’ can never be revisited’. In the context of an award for specific performance, it was open to a tribunal to ‘make an award of specific performance and set out certain terms on which that should take place, but to reserve

[7] [2004] 1 CLC 1168 at paragraph 22 (Gross J.).
[8] [2004] 1 CLC 1168 at paragraph 26 (Gross J.).
[9] [2023] Bus LR 1488.

jurisdiction to revisit whether and how specific performance was to be effected by subsequent awards'.

(2) However, these comments must be properly viewed in factual context. The initial award in that case was summarised at paragraph 9. After finding that the first defendant was entitled to an order of specific performance, the tribunal there made detailed orders about how the transaction would be effected (similar to what was sought by the Claimants herein by way of the SP Application).

(3) Subsequently, the first defendant requested extensions of time to complete certain conditions as set out in the award (see paragraphs 12-14). The tribunal acceded to such applications (see paragraphs 15, 18), resulting in second and third partial final awards. It was on this basis that the claimant in that case argued the award was not final as the tribunal intended to be able to vary the same, and indeed had varied them in certain respects (see paragraphs 20, 32).

(4) In other words, the situation in **YDU** was not involving a wholesale reopening or substitution of what had previously been ordered. All that the tribunal did in that case was to allow extensions of time for compliance; the change is a technical one with no alteration of the substance of the order. That is juxtaposed with the present case. If the Court compares the 1st FPA and the SP FPA it will be apparent the SP FPA does not simply 'revisit whether and how specific performance was to be effected'. As already explained, the 1st FPA did not in fact properly make an order of specific performance – it only foreshadowed the possible need for one in due course.

(5) Additionally, the Tribunal in the 1st FPA purported to reserve to itself the right to make a fresh order (which would no doubt be the most extreme example of revisiting an existing order) not 'in the case of changed circumstances', but generally: 1st FPA at paragraph 88.

(6) All of these show that **YDU** does not assist Global/Gerald in this application.

3.2 Jurisdiction challenge to the SP FPA

[59] As a starting point, given that the SP FPA is parasitic upon the 1st FPA, if the Court agrees that the 1st FPA ought not be recognised and/or the Claimants should not be allowed to enforce the 1st FPA, then the SP FPA should also fall away and also should not be recognised or enforced.

[60] In any event, and regardless of the aforesaid, the SP FPA should not be recognised/enforced (or at least, not recognised/enforced at this stage), in circumstances where there are proceedings to set aside the same on foot in Hong Kong.

3.2.1 Basis of jurisdiction challenge

[61] The Tribunal did not have jurisdiction to issue the SP FPA because it was *functus officio* in respect of the Share Transfer Claim after it issued the 1st FPA.

[62] CNG submits that there is no contradiction or inconsistency between its position as to the 1st FPA and the SP FPA, and it is important to note that there are different meanings of 'finality':

(1) The fact that the 1st FPA was not a 'binding' award rendering it properly recognisable or enforceable does not in itself mean it is not a 'final award' on the Share Transfer Claim (and the Defaulting Shareholder Claim), in the sense of having determined the issues thereunder. As explained in **Russell on Arbitration** (24th edn., Sweet & Maxwell (2015)) at §§6-004 to 6-005, these are two different meanings of the term 'finality'.

(2) Even though the 1st FPA may not have actually sounded in a proper order for specific performance, and instead left open that door for the Tribunal – which is problematic at least for the purpose of establishing a sufficiently binding nature for enforcement (for the reasons set out above) – that does not prevent it from being a (purportedly) final award.

[63] Therefore, proceeding on the basis that the 1st FPA was a 'final award' in the descriptive sense, it is well-established that upon rendering the same the arbitral tribunal then becomes *functus officio*. The arbitrators' mandate is then exhausted: **Sodzawiczny v Smith**;[10] **A v B**;[11] **Xiamen Xinjingdi Group Co Ltd v Eton Properties Ltd**.[12]

[64] What is particularly important to emphasise is that this concept of the tribunal becoming *functus* ties in with the consequences of non-compliance with the award. As **Eton Properties**[13] explains, there are 'split functions of the tribunal and the enforcing court'. Quoting Lord Mustill extra-curially:

> " Ideally, the handling of arbitral disputes should resemble a relay race. In the initial stages, before the arbitrators are seized of the dispute, the baton is in the grasp of the court; for at

[10] [2024] EWHC 231 (Comm) at paragraph 54 (Foxton J.).
[11] [2021] 1 Lloyd's Rep 281 at paragraph 29 (Foxton J.).
[12] (2020) 23 HKCFAR 348 at paragraph 120 (Ribeiro PJ.).
[13] (2020) 23 HKCFAR 348 at paragraphs 118, 120 (Ribeiro PJ.).

> that stage there is no other organisation which could take steps to prevent the arbitration agreement from being ineffectual. When the arbitrators take charge they take over the baton and retain it until they have made an award. At this point, having no longer a function to fulfil, the arbitrators hand back the baton so that the court can in case of need lend its coercive powers to the enforcement of the award".

[65] In other words, common law has long recognised that enforcement lay with the courts, which could grant relief appropriate to the award. For example, 'if it is a non-monetary award which has not been complied with, the court may fashion an apt remedy chosen from the full range of remedies available in an ordinary common law action', including 'decree[ing] specific performance of the award'.[14]

[66] In fact, in **Eton Properties** itself, the Hong Kong Court of Final Appeal held it had power to grant relief in the form of an award of damages after the non-monetary award requiring continued performance of an agreement – 'fashioning an appropriate remedy to give effect to the award'.[15]

[67] In circumstances where the Tribunal had considered the rights and wrongs of both sides as to the Share Transfer Claim (and the Defaulting Shareholder Claim), had it rendered its 1st FPA, including, *inter alia*, the express finding that 'Gerald is entitled to an order for specific performance of the obligation to transfer the Offered Shares…' (at paragraph 86), the correct – and only – approach if there was non-compliance with the 1st FPA would have been for the Claimants to seek enforcement of the 1st FPA. Such course would be entirely orthodox. The BVI (or other enforcing) court would then have requisite jurisdiction to give effect to the award as appropriate.

[68] But that was not what was done. Instead, the Tribunal somehow left open for itself and foreshadowed its return to the same issues later on, thereby creating problems with whether the 1st FPA was properly 'binding'. The Claimants strengthened any argument the 1st FPA was not so 'binding' by their own actions in making the SP Application and asking for new orders supplanting the original ones.

[14] (2020) 23 HKCFAR 348 at paragraphs 122, 1230 (Ribeiro PJ.).
[15] (2020) 23 HKCFAR 348 at paragraph 126 (Ribeiro PJ.).

[69] What the Tribunal did with the SP FPA was outside of its jurisdiction because after issuing the 1st FPA, it was already *functus* as regards the Share Transfer Claim and had no power to revisit, vary or otherwise modify the terms of its order:

(1) That the Tribunal may have inadvertently or otherwise 'fallen short' of going the full mile in the orders made in the 1st FPA is neither here nor there. Global/Gerald (and the Tribunal) may well find it lamentable. However, that does not and cannot change the fact that the Tribunal had pronounced on the Share Transfer Claim and had opted to give more limited directions for one reason or the other.

(2) Nor is it relevant the Tribunal sought to reserve power to give such further or other directions as may be necessary. Although there are authorities confirming that an arbitral tribunal may reserve to itself the right to make an award of damages after the breakdown of a specific performance order, or to 'revisit whether and how specific performance was to be effected by subsequent awards',[16] as CNG also contended before the Tribunal in the SP Application, this was not such a situation.

(3) Global/Gerald were not asking the Tribunal to give effect to an award of specific performance already made or to deal with the breakdown of such an award of specific performance. As emphasised above, the reality of the 1st FPA was that no order of specific performance was actually made; the Tribunal merely gave various preliminary directions, and indicated it 'will issue' the relevant order of specific performance if necessary later on.

(4) Therefore, the cases on reservation of right are distinguishable. The Tribunal cannot by a mere recitation vest in itself jurisdiction that it does not have.

3.2.2 Set aside proceedings for the SP FPA

[70] In addition, there are set-aside proceedings on foot in the courts of the seat (Hong Kong) for the SP FPA.

[71] As a matter of Hong Kong law, the courts review 'true question[s] of jurisdiction' on a *de novo* basis.[17]

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[16] YDU v SAB [2023] Bus LR 1488 at paragraphs 35-36 (Butcher J.).
[17] T v B [2022] 2 HKC 84 at paragraph 56(4) (per Coleman J.).

[72] Here, CNG's challenge in Hong Kong is jurisdictional in nature.

[73] In the premises, the Hong Kong courts are due to look at these arguments afresh on a *de novo* basis, regardless of what the Tribunal found in the SP FPA as to its own jurisdiction and on the relevant arguments of *functus*.

[74] This is different from other grounds relied upon for setting aside, which do not involve *de novo* review, but instead require establishing 'serious irregularity…or an egregious denial of due process' and/or problems with 'significant or crucial effect on the Arbitrator's decision': **N v C**.[18]

[75] By reason of the aforesaid, CNG submits it also has a further ground for the setting aside of the December 2023 Order recognising the SP FPA (or at least for a stay of any such recognition/enforcement), in that enforcement of an award ought to be refused when there are pending setting-aside proceedings. In **Socadec SA v Pan Afric Impex Company Limited**,[19] Mackay J. at paragraph 7 laid down various principles for when it would be appropriate to set aside or suspend an enforcement order in relation to an arbitral award:

(1) The Court should consider the strength of the argument that the award in question was invalid, assessed on a 'brief consideration' only without any 'mini-trial on the merits'.

(2) The Court should also consider the ease or difficulty of the enforcement of the award.

[76] The preceding section has set out CNG's case on the jurisdictional challenge. CNG submitted the same is at least *prima facie* arguable, and there are real questions about the Tribunal's jurisdiction. Pending the *de novo* review that should take place in Hong Kong, the enforcement Court ought not to short-circuit the process, which could potentially seriously prejudice CNG's interests (not to mention its entitlement to apply to set aside the SP FPA given the jurisdictional and other challenges).

[77] Therefore, CNG submitted that for the SP FPA there is all the more reason why recognition/enforcement should not be ordered at this juncture. The December 2023 Order should be set aside, or at the very least stayed, pending resolution of the Hong Kong set-aside application.

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[18] [2019] HKCFI 2292 at paragraphs 29, 36-37 (Mimmie Chan J.).
[19] [2003] EWHC 2086 (QB).

3.3 Other grounds for setting aside

3.3.1 Public Policy

[78] Under Article V(2)(b) of the New York Convention, this Honourable Court is required to apply its own public policy to the issues above. The issues raised are of such fundamental significance that the public policy of this jurisdiction would not be to permit recognition or enforcement.

[79] CNG further relies on section 86(3)(b) of the Act to resist enforcement of the 1st FPA (and the SP FPA given that it purports to give effect to the 1st FPA) on the basis that it involves a breach of its constitutional right to protection from deprivation of property otherwise than on payment of fair compensation and of its right to have the Court determine the amount of compensation to which it is entitled.

[80] Section 25 of the Constitution of the Virgin Islands Constitution Order 2007[20] (the 'Constitution') provides, *inter alia*, that:

> "No property of any description shall be compulsorily taken possession of, and no interest in or right to or over property of any description shall be compulsorily acquired, except in accordance with law and…provision is made by a law applicable to the taking of possession or acquisition (i) for the prompt payment of adequate compensation; and (ii) securing to any person having an interest in or right to or over the property a right of access to the High Court…for the determination of his or her interest or right, the legality of the taking of possession or acquisition and the amount of compensation to which he or she is entitled…"

[81] The provisions of the Constitution are, of course, binding on this Court and the Court is bound to give effect to those provisions according to their terms. Self-evidently, the provisions of the Constitution reflect the public policy of the Virgin Islands with respect to the fundamentals rights and freedoms which are embodied in the Constitution and, in considering issues of the public policy of the BVI which arise, and in applying those considerations to any case before it, this Court must, CNG submitted, uphold the Constitution and give effect to those rights.

[82] However, the Tribunal has both purported to fix the amount of compensation to which CNG is entitled in respect of its shares in SIL (the 'SIL Shares') and has, in the 1st FPA and/or the SP FPA, ordered that CNG transfer the SIL Shares at a price of USD 86.32 million.

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[20] SI No. 1678 of 2007.

[83] However, on Global/Gerald's own valuation of CNG's 65% stake in SIL, such stake is worth approximately USD 510 million.[21]

[84] The price fixed by the Tribunal is therefore plainly, and on Global/Gerald's own valuation, a very significant undervalue which cannot constitute any 'adequate' or 'fair' compensation which the Constitution requires.

[85] The fact that USD 86.32 million was initially the price stated in the Transfer Notice by CNG is not material in this context. That represented an offer – which CNG maintains was retracted – as of 2020. Most importantly, the transfer in question is not based on CNG's offer set out in the Transfer Notice at all; it is being mandated on the basis of a coercive order stemming from enforcement of the 1st FPA. CNG contends that that Tribunal was wrong in fixing the transfer by reference to the price stated in the Transfer Notice. In selecting the price stated in the Transfer Notice as the 'Fair Price' for the SIL Shares, the Tribunal was acting purely arbitrarily. It was not conducting a principled valuation exercise or the exercise which the BVI Constitution affords to CNG:

(1) The Tribunal equated the 'Fair Price' defined at Clause 7.3 with the price of USD 86.32 million put forward in the Notice Letter. That price was put forward following a valuation by PricewaterhouseCoopers ('PwC'), which had been appointed by CGG to provide an audit report on SIL for the originally intended acquisition, which had been intended for an internal restructuring within the CGG/CNG group). It goes without saying that, as PwC's valuation had been for the purpose of facilitating CGG's acquisition, it was not (and not intended to be) a valuation of 'Fair Price' under the contractual mechanism.

(2) Further, the exercise conducted by PWC was not equivalent to a valuation of a 'Fair Price' under Clause 7.3 – given that the latter involved valuation by a firm appointed by SIL nor, given the Claimants' own valuation of CNG's 65% stake in SIL, was it fair within the ordinary meaning of that word as it appears in the BVI Constitution.

[86] However, in any event, and whether or not the Tribunal was right or wrong in fixing the price at USD 86.32 million, this Court must, consistent with the Constitution and the Act, and must independently, consider whether it is consistent with BVI public policy, and CNG's constitutional rights, to recognise or permit enforcement of the Award and the transfer of the SIL Shares at the

[21] See the First Affirmation of Mr Tong Junhu, paragraph 47.

price which the Tribunal has fixed and in the absence of a determination by the Court itself of the amount of compensation which would be fair compensation to which CNG is entitled.

[87] CNG submits that any Order permitting enforcement of the 1st FPA and/or the SP FPA would breach its constitutional rights because the price fixed by the Tribunal is neither fair nor adequate compensation for the SIL Shares and because CNG is entitled under the Constitution to require an independent determination by this Court of the amount of compensation to which CNG is entitled before it is obliged to transfer the SIL Shares.

[88] In the circumstances, this Court ought not to allow the enforcement of the 1st FPA and/or the SP FPA as constituting an infringement of CNG's constitutional rights or, alternatively, without first itself determining the compensation to which CNG is entitled in respect of the SIL Shares in accordance with its right to fair and adequate compensation.

3.3.2 Material non-disclosure

[89] Finally, CNG submits the April and December 2023 Orders, which were obtained *ex parte*, were obtained by the Claimants without having made full and frank disclosure, which renders those orders liable to be set aside.

[90] CNG's Notice of Application dated 26th May 2023 and its Notice of Application dated 15th February 2024 set out a detailed list of material non-disclosure. CNG highlights the following objections:

(1) It was inappropriate for Global/Gerald to make an application seeking recognition of the 1st FPA at the same time as their SP Application was before the Tribunal. In their application for recognition of 1st FPA, the Applicants represented to the Court, by necessary implication, that they believed, *inter alia*, that the 1st FPA was binding and an award which could be recognised and enforced – when in fact this could not have been further from the truth. Had the Claimants truly believed the 1st FPA to be binding, there would have been no need for them to make the SP Application.

(2) In the Second Affidavit of Mr. Craig Dean at paragraph 18, Global/Gerald tried to backtrack, claiming that the April 2023 Order was 'applied for and obtained as a precautionary measure…'. But Mr. Dean deposed, in his First Affidavit in support of the *ex parte* application for recognition at paragraph 20, that Global/Gerald did not believe there

were any grounds preventing registration of the 1st FPA or that there were any defences likely to be raised by CNG.

(3) At no point did Global/Gerald make clear that they were seeking to have their cake and eat it, by having on one hand a recognition order for the 1st FPA in the BVI whilst also pursuing the SP Application before the Tribunal.

(4) Second, against the above context and Global/Gerald's appreciation that CNG had made reference to the SP Application as part of its arguments that the 1st FPA was not binding, the Claimants represented to the Court when obtaining the December 2023 Order that the grounds of CNG's application to set aside the April 2023 Order were the same as those relied upon to set aside the 1st FPA in Hong Kong, and thus were bound to fail in light of the Hong Kong court's decision on 30th August 2023.

(5) This was not, and was clearly not, the case. Although there were overlapping grounds, there were distinct bases advanced by CNG in these proceedings, and those only available to it in these proceedings, as to why the April 2023 Order should not stand, including, *inter alia*, the finality point discussed above as well as the public policy concerns specific to the BVI.

(6) These should properly have been drawn to the attention of this Court but were not.

4. Global/Gerald's position

[91] Global/Gerald strongly resisted the applications. Global/Gerald submitted that CNG's applications had been brought for entirely cynical reasons, to manufacture delay, to put off as long as possible the result that CNG had already acknowledged would happen, namely that Global/Gerald would obtain legal title to the SIL Shares.

5. Discussion

5.1 Whether the 1st FPA had become binding upon the parties

[92] It is apt first to consider the scheme of the 1st FPA, because it is important to see what the Tribunal was, and was not, doing.

[93] The 1st FPA comprises an arbitral award entitled 'First Partial Award' dated 8th February 2023 and an 'Addendum to First Partial Award' dated 31st March 2023.

[94] In the First Partial Award at paragraphs 83 to 86, the Tribunal made a number of findings and concluded that Global/Gerald is entitled to an order for specific performance. Thus (without footnotes):

> "83. In these circumstances, **the Tribunal concludes that** the mutual binding obligations to which reference has been made came into existence on 30 March 2020, and **CNG became liable to transfer the shares to Gerald upon payment of the purchase price**.
>
> 84. CNG submits that Gerald is not entitled to an order for specific performance because damages are neither an inadequate remedy nor unquantifiable given that Gerald is planning to sell CNG's stake. Global denies that it has or had such an intention.
>
> 85. The Tribunal rejects CNG's submission. There is no convincing reason in the Tribunal's view for departing from the general rule that the breach of an obligation to transfer shares in an unquoted company is a breach for which damages are not an adequate remedy.
>
> 86. **The Tribunal therefore concludes that Gerald is entitled to an order for specific performance of the obligation to transfer the Offered Shares** and that CNG is obliged to transfer its 65% shareholding in Soremi in consideration for the purchase price of US$86.32 million." (Emphasis added.)

[95] It had been part of Global/Gerald's claim in the arbitration to ask for an order for specific performance. But, having pronounced upon Global/Gerald's entitlement to an order for specific performance, the Tribunal did not immediately go on to make such an order. Instead, the Tribunal made what it called a 'proposal'. Thus:

> "87. The Tribunal hopes that on reading this Partial Award CNG will provide to Gerlad the details of its bank account so that the purchase price can be paid into that account and that it will not be necessary for the order for specific performance to come into effect.
>
> 88. **The Tribunal, therefore, proposes** to give CNG 28 days from the date of this Award to provide those details to Gerald and Gerald a further 28 days after it has been provided with CNG's bank account details to make payment of the purchase price. If CNG fails to give details of its bank account so as to enable the Claimants to make the required payment, the Tribunal will issue an order for specific performance. If Gerald fails to pay within the permitted 28-day period, the contractual consequence will follow.
>
> 89. **The Tribunal proposes** to make this order notwithstanding the suggestion in Gerald's submissions that payment should be made into an escrow account. In the Tribunal's view

the proposed order provides a more efficient and neater method of achieving finality on this claim. However, each party will have the opportunity of making submissions about this proposal within 14 days of receipt of this Partial Award." (Emphasis added.)

[96] The Tribunal then went on to make the following award:

"**IX. AWARD**

For all of the above reasons, we, Dr. Michael Moser, Rimsky Yuen SC and Peter Leaver KC, **AWARD, DECLARE, ADJUDGE AND ORDER**:

SHARE TRANSFER CLAIM

1. The notice sent to the Claimants on 2nd March 2020 was a Transfer Notice … offering all of the shares in [SIL] then held by the Respondents for purchase by the Claimants for the sum of US$86.32 million ("**purchase price**").

2. On 30th March 2020, within the 30-day time limit stated in the Transfer Notice for acceptance of the offer, the Claimants notified the Respondents that they elected to exercise the right to purchase the shares for the purchase price and accepted the Respondents' offer.

3. The Claimants thereupon became bound to pay to and shall pay to the Respondents the purchase price, and the Respondents became bound to effect the sale of the aforesaid shares to the Claimants according to the provisions in the aforesaid Clause 5.

4. Within 14 days of the date of this Partial Award, the Respondents must provide to the Claimants in writing all the details reasonably required to enable the Claimants to effect the transfer of the purchase price to the Respondents' account.

5. Within 28 days of the Respondents' providing such details:

   a. The Claimants shall transfer the purchase price to the account(s) designated by the Respondents; and

   b. The Respondents shall provide to the Claimants all documents and/or information reasonably necessary to complete the purchase and to enable the Claimants to register the transfer of the shares with such authority or authorities as may be required in law."

[97] We see in this dispositive section of the First Partial Award that paragraphs 1, 2 and 3 reflect the Tribunal's findings and pronouncements in paragraphs 83 to 86.

[98] Paragraphs 4 and 5 set out what the Tribunal required the parties to do. These steps were framed in mandatory terms. It can immediately be seen that the time limit set in paragraph 4 (14 days) for CNG to notify Global/Gerald of CNG's bank account details was inconsistent with the 28 days proposed in paragraph 88. Also, the mandatory terms of paragraphs 4 and 5 could also be read as being inconsistent with paragraph 88, which said that this was a proposal, with the parties being accorded a 14-day opportunity to make submissions on the proposal following publication of the award. We will return to these two points.

[99] The First Partial Award also included findings concerning Global/Gerald's secondary claim, referred to as the 'Defaulting Shareholder Claim'.

[100] This concerned a claim that CNG (or parties controlled by CNG) took a decision to shut down the mine without the unanimous approval of the directors of SIL, as required by certain provisions of the SHA, and without the approval of Global/Gerald's nominated directors on SIL's Board of Directors, thus triggering an event of default under the SHA.

[101] The Tribunal found in Global/Gerald's favour on each of these points. The Tribunal then stated:

> "4. Pursuant to Clause 7.2(c) of the Shareholders' Agreement the Claimants required that a Transfer Notice be deemed to be given in respect of the shares held by the Respondents for a Fair Price as defined in Clause 7.3 of the Shareholder Agreement."

[102] I have used the word 'stated' because this paragraph 4 contains nothing more than a statement – not an award, nor a declaration, nor an order, nor, even, a 'proposal'.

[103] The next paragraph, though, is of the utmost significance:

> "5. The Tribunal reserves the power to give further or other directions as may be necessary in respect of both the Share Transfer Claim and the Defaulting Shareholder Claim."

We will return to this.

[104] Both sides applied to the Tribunal for various corrections to be made. Most of these concerned clerical slips. On 16th February 2023 Global/Gerald filed an application which included an invitation

to the Tribunal to indicate whether Global/Gerald's interpretation of the operative section of the First Partial Award was correct. Basically, Global/Gerald considered that this required the parties to take the steps there laid down, whereas CNG considered that this merely embodied a proposal which did not need to be complied with, at least yet. The parties disagreed, in terms, whether the First Partial Award was final and binding. Global/Gerald maintained that it was. CNG maintained that it was not.

[105] On 26th February 2023, Global/Gerald requested an order for specific performance and clarification/supplementation of paragraphs 4 and 5 of the Dispositive in the Share Transfer Claim section of the First Partial Award. Global/Gerald did so because CNG failed to respond to Global/Gerald's requests regarding documentation or processes for the share transfer. It can be readily appreciated that obtaining an order for specific performance would resolve the controversy between the parties as to whether or not the provisions in paragraphs 4 and 5 of the First Partial Award required compliance or whether they were, at that point, merely a proposal. CNG resisted the request for an order for specific performance on substantive grounds (that the order sought did not track agreed contractual mechanisms) and that it was premature, since the Tribunal had not yet issued its correction to and interpretation of the First Partial Award.

[106] The Tribunal ruled on these matters. It accepted the clerical corrections observed by the parties. At paragraph 3.16 of the Addendum, the Tribunal resolved the inconsistency as to the 28/14-day time limit between paragraph 88 of the reasoning segment and paragraph 4 of the Dispositive section by ruling:

> "3.16 The Tribunal therefore finds that the 28-day time limit should run from the date of this Addendum to the FPA."

[107] In respect of Global/Gerald's request for an order for specific performance, the Tribunal rejected this in the following terms:

> "3.17 Given the Tribunal's findings above, the Tribunal dismisses the Claimants' request for specific performance as being premature."

[108] It warrants observation that neither the parties nor the Tribunal sought any amendment to, or cancellation of, the Tribunal's reservation of 'power to give further or other directions' in respect of the Share Transfer Claim and the Defaulting Shareholder Claim.

[109] Where this left the matter upon the issuance of the Addendum, was that:

(1) the Tribunal's findings in respect of the Share Transfer Claim and the Defaulting Shareholder Claim remained unchanged;

(2) the Tribunal's proposal at paragraph 88 of the First Partial Award reasoning section remained unchanged;

(3) the deadline for submissions on the proposal contained in paragraph 89 would now run from the date of the Addendum, 31st March 23;

(4) the steps mandated at paragraphs 4 and 5 of the Dispositive section in respect of the Share Transfer Claim were confirmed to be a proposal, and subject to such further submissions as the parties might wish to make within the set time period;

(5) the timetable in those proposed steps was made consistent with the proposal contained in paragraph 88 of the First Partial Award reasoning;

(6) the Tribunal's reservation of power to give further or other directions in respect of the Share Transfer Claim and the Defaulting Shareholder Claim remained unaltered.

[110] No further challenge to the First Partial Award and the Addendum thereto was made to the Tribunal.

[111] The next material events were as follows:

(1) Global/Gerald applied *ex parte* on 20th April 2023 to this Court for registration of the 1st FPA so that it would be amenable to enforcement in this jurisdiction. Global/Gerald explained to the Court in their Skeleton Argument (see e.g. at paragraph 3), that they wished to be in a position to take 'immediate steps' if CNG would not do certain things by 28th April 2023, including that '[s]uch steps could potentially include obtaining an order allowing the execution of the necessary share transfer documents'. This was a reference to a process whereby the Court can order the transfer of shares to be registered in the name of a new owner where the thitherto registered owner does not cooperate in effecting the transfer. This Court acceded to the application to register the 1st FPA on 25th April 2023.

(2) CNG, for its part, commenced proceedings before the Hong Kong court pursuant to the Hong Kong Arbitration Ordinance, Cap. 609, section 81. That section incorporated Article 34 of the UNCITRAL Model Law ('Application for setting aside as exclusive recourse against arbitral award') into Hong Kong law.

(3) On 1st May 2023, Global/Gerald applied to the Tribunal for further orders in relation to the 1st FPA, for a mechanism to be ordered for specific performance, because CNG had not taken the steps that the Tribunal had proposed should be taken.

[112] I have used the words 'further orders' carefully. Indeed, that is how the Tribunal identified them at paragraph 5 of the Introduction to the Specific Performance Partial Award (the 'SP FPA') which it went on to make on 21st November 2023.

[113] CNG resisted that application on numerous grounds, including that the Tribunal was already *functus officio*. We will return to this aspect.

[114] For immediate purposes, it warrants observation that the Tribunal adverted[22] to its earlier reservation of power to make further or other directions in respect of the Share Transfer Claim and the Defaulting Shareholder Claim as one of the bases upon which the Tribunal was empowered to determine the specific performance application. I observe this, because it is important to see what the Tribunal thought it was doing in considering and determining the specific performance application. The Tribunal considered that it was making 'further orders'. In contrast, the Tribunal did not think any of its substantive findings set out at paragraphs 1 to 3 of the Dispositive section of the 1st FPA were being challenged and it made no orders changing those.

[115] I mention these matters to set the context for consideration of the issue whether or not the 1st FPA was 'not yet binding' when Global/Gerald applied for and obtained the Order of 25th April 2023 registering the 1st FPA in this jurisdiction.

5.2 Burden of proof

[116] Before turning to the law in more detail, it warrants observation that the burden is firmly on a party who submits that an award 'is not yet binding' to prove this.[23] It is not for Global/Gerald to prove that

[22] At paragraph 88 of the SP FPA.
[23] See e.g. Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Govt. of Pakistan [2011] 1 AC 763 at paragraph [101] (Lord Collins); Dowans Holdings SA et al. v Tanzania Electric Supply Co Ltd [2011] EWHC

the 1st FPA was binding. I apprehend that this is not in dispute between the parties. As Eder J. explained in the English High Court case of **Diag Human SE v Czech Republic**,[24] this reflects the 'pro-enforcement bias' of the New York Convention.

5.3 Other factors

[117] There are other relevant factors:

(1) The SHA dated 17th March 2014 between the parties provided that:

> "13.16 This Agreement shall be governed by and construed in accordance with **the laws of Hong Kong.**
>
> 13.17 Arbitration
>
> (a) **Any dispute**, controversy or claim arising out of or relating to this Agreement, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it **shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre under the Hong Kong International Arbitration Centre Administered Arbitration rules** in force when the Notice of Arbitration is submitted.
> (b) The **seat** of arbitration shall be **Hong Kong**.
> (c) The number of arbitrators shall be three. The arbitration proceedings shall be conducted in English." (Emphasis added.)

(2) The Hong Kong International Arbitration Centre Administered Arbitration rules ('HKIAC Rules'), that the parties had contractually bound themselves to, materially provided the following at Article 35:

> "Article 35 – Form and Effect of the Award
>
> 35.1 The arbitral tribunal may make a single award or separate awards regarding different issues at different times and in respect of all parties involved in the arbitration in the form of interim, interlocutory, partial or final awards. If appropriate, the arbitral tribunal may also issue interim awards on costs and any awards pursuant to Article 41.5.

1957 (Comm) at paragraph 10 (Burton J.); and Diag Human SE v Czech Republic [2014] EWHC 1639 (Comm) at paragraph 13 (Eder J.).

[24] [2014] EWHC 1639 (Comm) at paragraph 13 (Eder J.).

35.2 **Awards** shall be made in writing and **shall be final and binding on the parties** and any person claiming through or under any of the parties. The parties and any such person waive their rights to any form of recourse or defence in respect of the setting-aside, enforcement and execution of any award, in so far as such waiver can validly be made.

35.3 **The parties undertake to comply without delay with any order or award** made by the arbitral tribunal or any emergency arbitrator, including any order or award made in any proceedings under Articles 27, 28, 29, 30 or 43." (Emphasis added.)

(3) Hong Kong Arbitration Ordinance materially provides at section 73:

"73. Effect of award

(1) Unless otherwise agreed by the parties, **an award made by an arbitral tribunal pursuant to an arbitration agreement is final and binding** both **on—**

(a) the parties; and

(b) any person claiming through or under any of the parties.

(2) Subsection (1) does not affect the right of a person to challenge the award—

(a) as provided for in section 26 or 81, section 4 or 5 of Schedule 2, or any other provision of this Ordinance; or

(b) otherwise by any available arbitral process of appeal or review." (Emphasis added.)

[118] We see from this that what CNG has to prove to this Court is that:

(1) despite CNG agreeing that the 1st FPA was and is final and binding upon the parties (per Article 35.2 of the HKIAC Rules); and

(2) despite CNG agreeing to undertake to comply without delay with the 1st FPA (per Article 35.3 of the HKIAC Rules, underlining the binding nature of awards); and

(3) despite CNG agreeing to the application of Hong Kong law, which includes section 73 of the Hong Kong Arbitration Ordinance providing that 'an award made by an arbitral tribunal pursuant to an arbitration agreement is final and binding'

for some reason(s) the 1st FPA was 'not yet binding' when Global/Gerald applied to this Court for the 1st FPA's registration in April 2023.

[119] A fourth 'despite' should be added to the list: as we shall see, CNG's advocate in the Arbitration, Mr. Flynn, took an unqualified position in the Arbitration that the Tribunal had made a 'final and binding

award' when it made the 1st FPA. Now, before this Court, CNG, through Mr. Flynn, argues the exact opposite. The fact that CNG, through Mr. Flynn, made that unqualified submission to the Tribunal is not an attractive starting point for CNG for its application before this Court.

5.4 'Not yet binding' – the legal test.

[120] The parties referred this Court to two English High Court cases for the relevant legal principles: **Dowans Holdings SA et al. v Tanzania Electric Supply Co Ltd**[25] and **Diag Human SE v Czech Republic**.[26]

[121] For present purposes, the first principle to be borne in mind is that the issue of whether an award is binding on the parties is a question for the enforcing court, here this Court: see **Dowans** at paragraph 24 and **Diag Human** at paragraph 14.

[122] Those cases then found that the question whether an award is 'not yet binding' is to be answered by considering whether the award in issue is still subject to so-called 'ordinary recourse'. Eder J. in **Diag Human** explained the position as follows:

> "17. … In particular, I do not consider that Burton J [in **Dowans**] intended to say that in reaching its own decision as to whether an award is binding, the English Court will never have regard to the law of the arbitration agreement or the curial law of the seat of the arbitration. This seems tolerably clear from what appears in paragraphs [17]-[18] of the Judgment in Dowans:
>
> > "The VDB view that there was and should be an autonomous interpretation of binding, is best analysed by differentiating between ordinary recourse and extraordinary recourse. The former, which may not be permitted by the terms of the relevant agreement between the parties or the law governing the arbitration, would ordinarily be subject to a time limit, after which no such ordinary recourse (if otherwise available) would be permitted. Then there is the possibility of extraordinary recourse, which would be some limited challenge to the award, in the courts of its home jurisdiction, by reference to the restrictive terms of the New York Convention. Once ordinary recourse is excluded, the possible availability of extraordinary recourse does not prevent an award from being, or having become, binding. Mr Diwan submits that, although it is clear that there was sufficient discussion before the finalisation of the terms of the New York Convention to prevent

[25] [2011] EWHC 1957 (Comm).
[26] [2014] EWHC 1639 (Comm).

> any such agreed definition being included in the Convention, Article 31 of the Vienna Convention allows for such commonsense and logical interpretation of the Convention notwithstanding.
>
> Such autonomous interpretation is entirely consistent with the admitted purpose of ending the need for a double exequatur, and is inconsistent with any extension of the idea that an award is "lifeless", as per paragraph 14 of ONGC, until enforced by its country of origin, except insofar as that can be interpreted as simply referring to enforcement within that country." (Emphasis added)

> 18. As it seems to me, Burton J was there espousing the view expressed by VDB that there was an important distinction between "ordinary recourse" and "extraordinary recourse"; and recognising that although the possibility of the latter does not prevent an award being binding under the Convention (and also s103(2)(f) of the 1996 Act) that is not so (or at least not necessarily so) with regard to the former. Of particular importance, in my view, is the conclusion reached by Burton J in [26] when he states: "**As I conclude, the binding effect of an award depends upon whether it is or remains subject to ordinary recourse**. Once it is binding, it does not cease to be so as a result of some event in the home jurisdiction; and the absence of such impediment does not make it so." As I read the Judgment in Dowans, the proceedings before the Tanzanian Court to set aside or to remit the ICC award were, in effect, treated by Burton J as "extraordinary recourse" and it was for that reason that he concluded that such proceedings were irrelevant for the purposes of enforcement as a matter of English law under s103 of the 1996 Act. In my view, the result is that if an award is subject to "ordinary recourse", it will not be binding." (Emphasis added.)

[123] Eder J. recognised at paragraph 19 that 'I fully recognise that there may be a problem of definition i.e. what constitutes "ordinary recourse" as opposed to "extraordinary recourse"'. Whilst he ultimately (at paragraph 21) held back from attempting a definition of 'ordinary recourse', Eder J. helpfully narrated the following commentary/guidance:

> "In the present case, Mr Cox submitted that the term "ordinary recourse" refers to "a genuine appeal on the merits" (Wolff, Article V, para 361; and see Redfern & Hunter at 11.85); and that such term is to be contrasted with "extraordinary recourse", which refers to an application to a court to set aside (also called "annulment" or "vacatur") usually on procedural irregularity grounds (for example, under s68 of the 1996 Act). In further support of such submission, he relied in particular on a decision of the High Court of Hong Kong in Soc Nationale d'Operations Petrolieres de la Cote d'Ivoire v Keen Lloyd Resources Ltd [2004] 3 HKC 452 and a commentary by VDB where he says:
>
> > "… it should be observed that the distinction between ordinary and extraordinary means of recourse, as introduced by the Dutch delegate to distinguish between non-final and final awards, is typical for several Civil Law countries, but is unknown in many Common Law countries. Although varying from country to country in the Civil Law world, it can generally be said that ordinary means of recourse connote a genuine appeal on the merits, whilst extraordinary means of recourse are reserved for certain irregularities, especially the procedural ones, tainting a final decision."
> > (van den Berg, NYC, pp334-335)

At the New York Conference of 1958, the distinction between ordinary and extraordinary means of recourse was proposed for the term binding: **the ordinary means of recourse were used for denoting a genuine appeal on the merits of the arbitral award to a second arbitral instance or to a court. Extraordinary means of recourse were reserved for other irregularities, and especially the procedural ones, tainting a final decision.**

The latter means of recourse were meant to correspond to setting aside or equivalent proceedings. The distinction was proposed in order to make clear that if the award was still open to the possibility of another decision, it was not to be considered "binding", whereas if it was open to the possibility of <u>other means</u> of recourse, this would not prevent the award from becoming binding. The expression "has not become binding in the sense that the award is still open to ordinary means of recourse" was finally not inserted. This must be deemed, however, not to be due to a rejection of the distinction as such. Rather, the expression was rejected because, in various countries, the distinction between ordinary and extraordinary means of recourse did not exist, or existed with different meanings. The essence of the distinction may be deemed to have been retained. This can also be inferred from the text of Article V(l) (e) as the concept behind extraordinary means of recourse is covered by the second part of Article V(l) (e) and Article VI which refer to the setting aside of the award. The idea behind the ordinary means of recourse, i.e., the appeal on the merits to a second arbitral instance or to a court, can then be deemed to be covered by the first part of Article V(1) (e), viz., the term "binding". This distinction has the advantage that it dispenses with the sometimes difficult inquiries under the law governing the award, such as, at which moment it is ready for enforcement under that law, or what may be the equivalent of the term "binding" under that law. It is true that the law governing the award is still to be consulted in order to find out whether it is still open to a genuine appeal on the merits to a court (which is exceptional). However, technically speaking, this is not an inquiry to find out whether the award has become binding under the applicable law, but an inquiry only for the purpose of the term "binding" of Article V(1)(e)."
(van den Berg, NYC, pp342-343)" (Emphasis added.)

[124] In **Dowans**, Burton J. at paragraph 8 averted to the fact that the New York Convention superseded the Geneva Convention, to track the history of ordinary recourse to the concept of 'opposition, *appel or pourvoi en cassation*' or validity challenges:

"The New York Convention (on the Recognition of Enforcement of Foreign Arbitral Awards) 1958 superseded the Geneva Convention (on the Execution of Foreign Arbitral Awards) 1927, which provided in Article 1 that a relevant Convention award would "be recognised as binding and … be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the … award [had] been made in a [Convention] territory" but: "To obtain such recognition or enforcement, it shall, further, be necessary: … (d) **that the award has become final** in the country in which it has been made, **in the sense that it will not be considered as such if it is open to opposition,**

appel or pourvoi en cassation (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of testing the validity of the award are pending. " (Emphasis added.)

[125] Under the New York Convention, the requirement for an award to have become final was abolished. That requirement had led to a procedural requirement to show a 'double exequatur' which was perceived to represent a significant impediment towards international enforcement of arbitration awards. The framers of the New York Convention abolished the need for double exequatur by dropping finality as a requirement, in favour of the (theoretically) lower threshold of being 'binding'. To lower the bar even further, the framers of the New York Convention reversed the burden of proof – from requiring a **claimant** to prove **finality** to placing the burden on a **respondent** to an arbitration award to prove an award is '**not yet binding**'.

5.5 CNG's arguments on 'not yet binding'.

[126] CNG argued that the 1st FPA was and is not a binding award, and thus by section 86(2)(f)(i) of the Act is not liable to be enforced.

[127] Section 86(2)(f)(i) of the Act materially provides as follows:

> "86. (2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves:
> …
> (f) that the award (i) has not yet become binding on the parties;"

[128] The essence of CNG's argument that the 1st FPA 'has not yet becoming binding' was summarized by CNG's learned Counsel Mr. Flynn as follows:[27]

> "MR. FLYNN: Yes. Except,
>
> 20 My Lord, this is what is very odd about this case and
>
> 21 that's why these points are taken against me, you said
>
> 22 this, you said that. In the ordinary case, you

[27] Official Transcript for 10th April 2024 page 20 to page 21.

23 wouldn't have a party seeking to reopen, vary,

24 supplement an award. The winning party usually accepts

25 the award as it is and says it is final. They didn't

21

1 do that.

2 Now, it can't lie in their mouth to say,

3 hold on, once they have done that, not only did they

4 apply, they succeeded. In other words they were,

5 according to the Tribunal right that it could be varied

6 or supplemented.

7 Now, Your Lordship is right objectively,

8 it should be purely objective, but in this case you've

9 actually got actual behaviour which happened

10 subsequently. Now, the tribunal could have said, no,

11 you can't have another award because we are functus on

12 that issue, but they didn't do that, they gave them a

13 second award. And so Your Lordship is absolutely right

14 it has got to be objective, an objective analysis, but

15 here what's very odd is they asked for something very

16 unusual and they actually obtained it. And so,

17 therefore, they were saying by reason of their

18 application that you could vary or amend or supplement

19 the first award. And, in my submission, having done

20 that and indeed having succeeded, that shows it

21 couldn't have been final and binding in a material

22 sense because of what they did."

[129] It can be seen from this that CNG's position is that if it remained open to 'vary, or amend, or supplement' an award, then that award is 'not yet binding'.

[130] This explanation by Mr. Flynn was given in response to a question I asked, seeking CNG's Counsel's reaction to the following thought:[28]

"…that

14 the effect of an award cannot depend upon one party's

15 view of it. It has got to be objectively ascertainable

16 as whether it is binding or whether it is not binding

17 and you, therefore, have to look at what the tribunal

18 intended to do."

[131] The discussion concerned the effect, such as it might or might not be, of the Dispositive section of the 1st FPA.

[132] Mr. Flynn accepted that this section was telling the parties where liability lies and what the parties had to do.[29]

[133] Mr. Flynn submitted that this was not a specific performance award. Mr. Flynn submitted that the form of order made by the Tribunal in the 1st FPA was not sufficient for Global/Gerald as they went on to apply to the Tribunal, and obtain from the Tribunal an order for specific performance in the form of the SP FPA.

[134] Mr. Flynn stressed that the 1st FPA could not be final and binding if a party could go back to the Tribunal to amend or supplement an earlier award.

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[28] Official transcript for 10th April 2024 page 20.
[29] Official transcript 9th April 2024 page 124 lines 16 to 19.

[135] To test this proposition I asked Mr. Flynn whether he was saying the following pronouncement in paragraph 3 of the Dispositive section in the 1st FPA was non-binding:

> "The Claimants thereupon became bound to pay to and shall pay to the Respondents the purchase price, and the Respondents became bound to effect the sale of the aforesaid shares to the Claimants according to the provisions in the aforesaid Clause 5."

[136] He responded saying:

> "Yes, it's absolutely non-binding…"[30]

[137] I sought clarification, specifically tracking the words of that paragraph:[31]

> " In terms of non-binding,…, do you mean to say that the Respondents didn't become bound to effect the sale of the aforesaid shares?"

[138] Mr. Flynn hesitated (as reflected in the transcript[32]). He did not answer this question. He did not point to any fact or law to show why this statement of the parties' legal obligations in the 1st FPA did not mean exactly what it said. He did not explain why CNG had not become bound to effect the sale of the SIL Shares to Global/Gerald as expressly stated by the Tribunal's Award.

[139] He simply fell back to rely upon his argument that the actions of Global/Gerald in applying for the SP FPA and the Tribunal's acceding to this demonstrated that the 1st FPA had not been binding.

[140] Simply put, learned Counsel for CNG **<u>could not answer the question</u>** asked.

[141] Moreover, Mr. Flynn did not attempt any analysis of the 1st FPA (or, for that matter, the SP FPA) to show what had been the purpose and effect of Global/Gerald's application for the SP FPA. He took himself no closer to this subject than to postulate conceptually that an application to the same tribunal to vary or amend or supplement an award means that the earlier award is not yet binding.

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[30] Official transcript 9th April 2024 page 129 lines 10 to 11.
[31] Official transcript 9th April 2024 page 129 lines 17 to 20.
[32] Official transcript 9th April 2024 page 129 line 22.

[142] Mr. Flynn did not submit that any time-limit for any appeal against the 1st FPA remained open.

[143] Moreover, Mr. Flynn did not attempt to apply the test postulated in **Dowans** and **Diag Human** of whether the 1st FPA was still open to 'ordinary recourse'. Mr. Flynn did not venture to approach that test. This warrants observation, as it was CNG's legal team, headed by Mr. Flynn, that had placed those authorities before the Court.

[144] Had he done so, what would immediately have become apparent was the following:

(1) The parties' applications for the Tribunal **to correct and interpret** the First Partial Award had been a form of 'ordinary recourse', in the sense of applications to the same Tribunal to review and change matters stated in the First Partial Award. Those applications yielded the Addendum.

(2) CNG's claim in the Hong Kong court for the 1st FPA to be set aside on grounds of alleged serious irregularity was a form of 'extraordinary recourse', which does not affect whether or not an award is 'not yet binding'.

(3) Global/Gerald's application, subsequent to the Addendum, for a specific performance award was **not a form of appeal, nor a request for review against findings or orders** made by the Tribunal, on the basis that such findings or orders should not have been made, at all or in the terms they had been.

(4) Global/Gerald's application for specific performance was, rather, made pursuant to the Tribunal's express reservation of power to make further orders or directions in respect of the Share Transfer Claim and Defaulting Shareholder Claim to enable the substantive findings by the Tribunal to be reduced from the conceptual to practical effect.

[145] It is apparent that an application for specific performance pursuant to a reserved power is conceptually different from some kind of 'ordinary recourse' challenge. It does not involve any challenge, nor, to put it at its most basic, any request for correction at all.

[146] We have to ask ourselves what an application for specific performance in law does. The Tribunal were alive to this. At paragraph 84 of the SP FPA, the Tribunal referred to the following explanation given in **Snell's Equity** (34th edn., Sweet & Maxwell, 2019) (emphasis in the SP FPA):

> "84. In Snell's Equity (34th edn.), the learned authors expounded as follows (at para. 17 – 053):
>
> > "After specific performance has been decreed the contract continues to exist and is not merged in the order, but the parties' contractual rights are displaced so it is not open to the innocent party, where the other has failed to complete, automatically to terminate the contract even where time has become of the essence. **Although the contract remains in full effect, the innocent party has placed the supervision of its performance into the hands of the court.** The recission or the cancellation of the contract is therefore a matter for the courts and can only be achieved by an order of the court dissolving the contract. **Working out of the order (and hence the contract) is subject to the discretion and control of the court.** …" [emphasis added]"

[147] The Tribunal were applying this explanation to themselves. We will return to this in the context of whether the Tribunal had been *functus officio*. For present purposes, we can see that what the Tribunal considered they were doing in making the SP FPA was to accept control, from the innocent party Global/Gerald, of the supervision of the performance of CNG's persisting contractual obligations, working out the appropriate order, in the exercise of the discretion the Tribunal had to do so. **This on-going performance supervision is far removed from the concept of an appeal or a review to change matters ruled upon and orders already made**, such as one would expect to be included in the notion of 'ordinary recourse'.

[148] It can be seen that if Mr. Flynn is correct that any award which it is possible to 'vary, or amend, or supplement' is 'not yet binding', this would mean that an award in which the Tribunal takes on-going contractual performance supervision would never become binding. That cannot be right.

[149] Indeed, the whole essence of the rule of law that enforcement may be refused if an award 'is not yet binding' is **to discourage premature enforcement of arbitration awards**. It can readily be understood that it would generally be unfair and unjust to allow a claimant to enforce an award which is not yet definitive in its terms, or whether it remains unsettled whether the claimant should have an award in its favour at all. At risk of stating the obvious, this is so because the claimant might ultimately not obtain an award, or if he does, the definitive form might be different from the

version that he would like to enforce. I use the word definitive here in the simple sense of 'not provisional', to avoid confusion with the legal terms, 'final', 'conclusive' or of 'binding', which are complex legal concepts.

[150] The essence, therefore, of 'ordinary recourse' is that it is part of the arbitral and/or legal process that leads to a definitive award.

[151] By contrast, the essence, in general terms, of 'extraordinary recourse' is that a different tribunal, whether it be another arbitration tribunal or a court, considers whether the definitive award should be set aside in whole or part. Extraordinary recourse is not part of the process that produces a definitive award. Extraordinary recourse is external to that process.

[152] We can see that the 1st FPA, comprising the First Partial Award and its Addendum, were the result of 'ordinary recourse'.

[153] On the other hand, the SP FPA was the result of a different process. The SP FPA was not a later version of the 1st FPA. The SP FPA was a separate, further award. As such, it was potentially subject it its own 'ordinary recourse' and 'extraordinary recourse'. The SP FPA was the result of an application made and determined pursuant to the Tribunal's reservation of power to do so, and the Tribunal's jurisdiction to make orders for specific performance; that is to say, to assume the task of on-going performance supervision of CNG's contractual obligations.

[154] Thus, we can see that the 1st FPA was **<u>not</u>** the subject of 'ordinary recourse' when Global/Gerald applied for the SP FPA.

[155] CNG has not shown that the 1st FPA was subject to 'ordinary recourse'. That is the same as saying that CNG has not shown that the 1st FPA was 'not yet binding'.

[156] So much for principle. But the Court must also have regard to the evidence in support of CNG's application, since the Court is dealing with issues of proof.

[157] CNG's evidence was set out in the First Affirmation of Mr. Tong Junhu dated 29th May 2023. At paragraph 10 (a), Mr. Tong states that CNG is advancing a case that 'the FPA has not yet become binding on the parties - pursuant to section 86(2)(f)(i) of the Act'. One then reads on, and comes upon the following heading: 'A. Section 86(2)(f)(i) of the Act – the FPA has not yet become binding on the parties'. Reading on in expectation, one encounters the following brief assertion by Mr. Tong:

> "The FPA is not "final" since CNG has made an application to set aside the FPA to the CFI as described in paragraph 11 above."

[158] That paragraph 11 stated as follows:

> "11. On 27 April 2023, an application was made by CNG to set aside the FPA (the "HK FPA Set Aside Application") to the Court of First Instance of Hong Kong (the "CFI"), the place where the FPA was rendered. At the date of this Affirmation, the HK FPA Set Aside Application is pending before the CFI and has not yet been determined. The HK FPA Set Aside Application is presently listed for a hearing before the CFI on 28 June 2023. However, the Honourable Madam Justice Mimmie Chan has indicated that it does not appear that this case can be determined during the first short hearing and, as such, the parties have been invited to liaise with a view to agreeing sensible directions."

[159] We can see that despite having correctly identified the issue (whether the 1st FPA was 'not yet binding'), the evidence misses the point: 'finality' is not the factor the New York Convention is concerned with.

[160] Mr. Tong's evidence does not go on to show that the set aside application in Hong Kong was some form of 'ordinary recourse'.

[161] Learned Counsel for Global/Gerald, Mr. Ali Malek, KC, submitted that this sole evidential ground relied upon by CNG for saying that the 1st FPA was 'not yet binding' has in any event fallen away, with the Hong Kong court's judgment of 30th August 2023 dismissing the Hong Kong set aside application.

[162] Moreover, Mr. Malek pointed out that Mr. Flynn had himself informed the Tribunal that with the 1st FPA, it had made a final and binding award, flatly contradicting the position CNG is taking now before this Court. Mr. Malek adverted to what Mr. Flynn submitted to the Tribunal on 23rd June 2023 in respect of the 1st FPA:

> "In my submission, what you have done in the award is exactly what they said to the BVI court. … **You have ruled on it, you have made a final and binding award and they want to enforce it.** …."[33] (Emphasis added.)

[163] In these circumstances, in my respectful judgment, CNG has not discharged its burden of proving that the 1st FPA was 'not yet binding'.

[164] Indeed, CNG did not engage properly with the test for when an award is 'not yet binding', and, moreover, CNG did not engage properly with its burden of proof. This part of CNG's application must therefore fail. The 1st FPA is

(1) clearly final; and

(2) not 'not yet binding'.

5.6 Jurisdiction challenge to the SP FPA

[165] CNG argued that the Tribunal did not have jurisdiction to issue the SP FPA because it was *functus officio* in respect of the Share Transfer Claim after it issued the 1st FPA.

[166] Global/Gerald submitted that CNG was arguing that although in the 1st FPA the Tribunal expressly reserved its jurisdiction and specifically foreshadowed the SP FPA, it had inadvertently disabled itself from making an order for specific performance. Global/Gerald submitted that this argument is hopeless and should be rejected.

[167] Global/Gerald submitted that as a matter of legal principle, it was open to the Tribunal to reserve power to itself to make further orders for specific performance.

[168] Global/Gerald pointed out that in **YDU v SAB**,[34] the arbitral tribunal had made an order for specific performance and then reserved jurisdiction for itself in respect of all other issues. Butcher J reasoned at [35], with regard to English law:

> "…under s. 48(5) of the 1996 Act, unless the parties agree otherwise, an arbitral tribunal has the same power to order specific performance of a contract (other than a contract relating to land) as the court. I regard it as consonant with that, and with the general principles in s. 1 of the 1996 Act, that the court should give effect to procedures and

[33] See Official transcript for 10th April 2024 page 54 line 25 to page 55 line 9.
[34] [2022] EWHC 3304 (Comm).

decisions adopted by a tribunal which seek to make effective and to provide supervision over an order for specific performance which it has made. **The course adopted by the tribunal in the present case was to make an award of specific performance and set out certain terms on which that should take place, but to reserve jurisdiction to revisit whether and how specific performance was to be effected by subsequent awards**. **It seems to me that the court should be very slow to conclude that that course was not one which was open to the tribunal**, nor that what the tribunal considered it was doing was not in fact what it was doing." (Emphasis added.)

[169] Global/Gerald argued that other cases are to similar effect: see Foxton J's reasoning in **A v B**,[35] which has been followed in Hong Kong (see in **Xu Hongbiao v Oasis**[36]).

[170] Global/Gerald observed that in **A v B** at [32]:

> "There will be cases in which, although it has issued a final award, the tribunal nonetheless retains jurisdiction in relation to certain issues arising as to its implementation (for example when the award grants specific performance in favour of the claimant conditional upon the reciprocal performance of the claimant's obligations, and when the tribunal expressly retains jurisdiction over any issues arising from the carrying of its order into effect, which might include whether the claimant has performed its part of the bargain). This might be a context, therefore, in which both the court (when asked to enforce a final award) and the extant arbitral tribunal have jurisdiction. If the claimant brought a s.66 application to enforce an order contained in the award which was conditional in this sense, and issues arose as to whether the condition had been satisfied, there would be a very compelling case for the court to refuse an order under s.66 on discretionary grounds, as it is entitled to do (West Tankers Inc v Allianz SpA [2012] EWCA Civ 27, [38]). Similarly, in the event that an action was brought on the award in these circumstances, there would appear to be a strong case for the court to stay proceedings under its inherent jurisdiction."

[171] Global/Gerald argued that this is precisely what the Tribunal has done. Having determined Global/Gerald's entitlement to the shares in the 1st FPA and proposed a form of order for transfer of the SIL Shares, it reserved for itself the jurisdiction to make effective and provide supervision for the transfer, which are matters falling within its discretion and control as a matter of Hong Kong law (the Tribunal having the same powers as any Court): see the SP FPA at paragraph 102.

[172] Global/Gerald also adopted the Tribunal's own analysis and reasoning at paragraphs 93 to 103 of the SP FPA. This was to the following effect:

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[35] [2020] EWHC 2790 (Comm).
[36] [2023] HKCFI 860.

(1) Section 70 of the Hong Kong Arbitration Ordinance is materially the same as section 48 of the English Arbitration Act 1996, such that the same analysis as in **YDU v SAB.**[37] applies. Section 70 of the Hong Kong Arbitration Ordinance is written in English and provides:

> "Award of remedy or relief
> (1) Subject to subsection (2) and section 103D(6), an arbitral tribunal may, in deciding a dispute, award any remedy or relief that could have been ordered by the Court if the dispute had been the subject of civil proceedings in the Court. (Amended 5 of 2017 s. 4)
>
> (2) Unless otherwise agreed by the parties, the arbitral tribunal has the same power as the Court to order specific performance of any contract, other than a contract relating to land or any interest in land."

(2) As the Tribunal stated at paragraph 102 of the SP FPA:

> "The grant of specific performance here relates to the reciprocal performance of obligations, namely CNG's obligation to provide bank details and the Global's obligation to transfer the purchase price. The Tribunal expressly retained jurisdiction over any issues arising from the carrying of its order into effect, including whether one or both of the Parties have upheld their end of the bargain. The change in circumstances contemplated by the order, read alongside paragraph 87 of the FPA, is that CNG will fail to provide the details of its bank account, or otherwise that Global will fail to tender the purchase price. The former of these scenarios has indeed occurred. **In any event, matters such as the provision of bank account details are matters which concern the working out of the order. Hence, as noted in paragraphs 67 to 69 above, such matters remain subject to the discretion and control of the Tribunal (as in the case of a court) by reason of section 70 AO [the Hong Kong Arbitration Ordinance]**."
> (Emphasis added.)

(3) The Tribunal thus found that:

> "…is not *functus officio* in respect of whether and how specific performance is to be effected by subsequent awards, and the Tribunal accordingly does have jurisdiction to grant further orders to support the implementation of the FPA."

[173] Mr. Flynn, for CNG, argued that the Tribunal's own reasoning has no legal or evidential value at all; it is irrelevant; and no deference can be given to it; this Court cannot look at the reasons and give them any weight at all, and indeed the Court should not look at the Tribunal's reasoning.

[37] [2022] EWHC 3304 (Comm).

[174] Mr. Flynn argued that the Tribunal did not make an order for specific performance in the 1st FPA; rather it produced a hybrid, and that rendered the Tribunal *functus officio*.

[175] In my respectful judgment, both these arguments on behalf of CNG are misconceived:

(1) Whilst Mr. Flynn is correct that the Tribunal's own decision on its own jurisdiction has no legal or evidential value before this Court, that does not mean that the Tribunal's analysis does not exist. It does exist and Global/Gerald adopted it. This Court must consider this analysis as proffered by Global/Gerald itself.

(2) Equally, just because the Tribunal's analysis has no legal or evidential value before this Court does not mean that the Tribunal's analysis was wrong.

(3) Whilst Mr. Flynn is correct that the Tribunal did not make an **order** for specific performance in the 1st FPA, the Tribunal did make an **award** of specific performance in the 1st FPA against CNG in favour of Global/Gerald. We see this from the Dispositive section of the 1st FPA. The Tribunal stated in terms, so far as is material:

> "**IX. AWARD**
> …we … **AWARD, DECLARE, ADJUDGE AND ORDER**:
>
> **<u>SHARE TRANSFER CLAIM</u>**
>
> 1. …
>
> 2. …
>
> 3. The Claimants thereupon became bound to pay to and shall pay to the Respondents the purchase price, and **the Respondents became bound to effect the sale of the aforesaid shares to the Claimants** according to the provisions in the aforesaid Clause 5.
>
> 4. …
> 5. …" (Emphasis added.)

[176] We see here that in paragraph 3, the Tribunal was making an **<u>award</u>** reflecting its finding at paragraph 86 of the reasoning in the 1st FPA, which in terms stated:

> "86. The Tribunal therefore concludes that **Gerald is entitled to an order for specific performance** of the obligation to transfer the Offered Shares and that CNG is obliged to transfer its 65% shareholding in Soremi in consideration for the purchase price of US$86.32 million.""

[177] Paragraph 3 was accordingly, in my respectful judgment, an **award** of specific performance.

[178] Now, Mr. Flynn was correct that the 1st FPA did not contain an **order** for specific performance against CNG. Paragraph 3 did contain an order for specific performance **against Global/Gerald** in terms that Global/Gerald 'shall pay to [CNG] the purchase price', but no order for specific performance against CNG. The distinction between an award and an order is important. It is to be recalled that in **YDU v SAB**,[38] Butcher J. stated at paragraph 35:

> "…The course adopted by the tribunal in the present case was to make **an award** of specific performance and set out certain terms on which that should take place, but to reserve jurisdiction to revisit whether and how specific performance was to be effected by subsequent awards." (Emphasis added.)

To the extent that this case represents the law, as I apprehend that it does, the present case is entirely congruent with that factual matrix, as summarised in that sentence in **YDU v SAB.** Here we have precisely the same elements. There is no need for the Tribunal to have made an **order** for specific performance against CNG: it is enough that the Tribunal reserved its power to do so, having laid the basis for doing so with its award of specific performance.

[179] In **YDU v SAB** the English High Court saw no good reason why, as a matter of principle, a reservation by a tribunal of jurisdiction to make further orders to give effect to an award of specific performance should be invalid or ineffective, particularly since the tribunal in question (as here) had been given statutory jurisdiction to make orders for specific performance, which inherently entails on-going supervision of contractual performance. I can see no good reason either why the Tribunal's reservation of power in this case should not have been valid or effective.

[180] I concur with the Tribunal's analysis, proffered as Global/Gerald's own. It is, in my respectful judgment, correct. I agree with Global/Gerald that CNG's argument was wrong that the Tribunal had rendered itself *functus officio* in making the 1st FPA. This ground of CNG's application thus also fails.

[38] [2022] EWHC 3304 (Comm).

5.7 Public policy – Section 25 of the Constitution

[181] As Mr. Flynn, for CNG, explained, CNG argued that the public policy exception of the New York Convention reflected at section 86(3)(b) of the Arbitration Act should be applied by this Court, as a public policy of this Court, because there was a vast disparity between the compensation of USD 86.32 ordered by the Tribunal for CNG to transfer its SIL Shares to Global/Gerald, and Global/Gerald's figures which produce a valuation of USD 510 million. The disparity is so vast, said Mr. Flynn, that the Court is called upon to intervene as a matter of public policy.

[182] Mr. Flynn argued that there is another public policy consideration, not of this Court, but of the BVI more generally. This, he argued, is that there is a fundamental principle in this jurisdiction that there must be fair compensation in cases where private property is being expropriated, pursuant to section 25 of the Constitution.

[183] Mr. Fynn prayed in aid a decision of the Cayman Islands Court of Appeal, **Changyou.com Limited v Fourworld Global Opportunity Fund, Ltd et al.**[39]

[184] Mr. Flynn accepted that **Changyou** 'is not on all fours with the present case' but he urged that 'it is illustrative and it is helpful, because first it emphasizes the importance of the fundamental right to fair compensation.'

[185] He argued further that other legislation, in this case the Arbitration Act, has to be understood and interpreted in the light of the fundamental right of compensation, which certainly cannot be ignored. He urged that **Changyou** shows that this fundamental right is sufficiently powerful that it can otherwise override clear legislation.

[186] It warrants observation here what the Tribunal had found in relation to the price for the transfer of SIL Shares, merely to understand the factual matrix in issue here.

[39] CICA (Civil) Appeal No 6 of 2021.

[187] At paragraphs 161 and 162 of the 1st FPA, the Tribunal narrated that in the event of a default under the SHA, Global/Gerald were allowed to serve a notice in writing to require that a Transfer Notice be deemed to be given in respect of the SIL Shares, and the price at which such shares were to be offered. The Tribunal adverted to the fact that pursuant to Article 7.2(c) of the SHA that price was referred to as the 'Fair Price'. The Tribunal likewise adverted to the fact that Article 7.3 defined the 'Fair Price' as one which 'an experienced valuation firm' appointed by SIL would assess on a certain (essentially going concern) basis, and that firm's decision was agreed to be final and binding between the parties. The Tribunal narrated at paragraph 162:

> "PwC valued the Fair Price at US$86.32 million, which is the price that CNG offered the shares in its Transfer Notice."

[188] The Tribunal continued at paragraph 163 that as regards the Defaulting Shareholder Claim:

> "If necessary because CNG fails to comply with the Tribunal's order in respect of the [Share Transfer Claim], the Tribunal will accept that figure as the Fair Price and make an order to that effect."

[189] We have also seen that the parties had agreed to have disputes between them resolved through arbitration, and that they had agreed that awards made by the Tribunal would be final and binding.

[190] It can first be stated uncontroversially that Mr. Flynn was right to say the present case is not 'on all fours' with **Changyou**. **Changyou** concerned a **statutory** merger scheme. The Cayman Islands Court of Appeal explained that the fundamental right to fair compensation arose in that case precisely because it was a **statutory** scheme. It carefully distinguished this from a situation where the parties' rights derive from a **contractual** scheme. We see this most clearly at paragraph 60, where the Court of Appeal stated:

> " … in my judgment it cannot be said that dispossession in a short-form merger occurs as an incident of the contract between the shareholders. As I have said, it is solely a consequence of legislative intervention."

[191] In the present case we are not dealing with any form of statutory dispossession. We are concerned with a contractual arrangement. That contractual arrangement entailed that one party – CNG – had agreed that in certain contractually specified circumstances it would transfer its SIL Shares to

Global/Gerald, in exchange for Global/Gerald paying CNG a fair price. The parties had contractually agreed how the requested purchase price or 'fair price' would be established.

[192] This is not a case of dispossession at all. It is a case of a contractual exchange of value.

[193] This case could not be further from a case where the State legislates or requires someone to give up ownership or possession of his property against his will. It is understandable that in such a case, constitutionally protected fundamental rights to fair compensation should be applied.

[194] Mr. Flynn is also correct that public policy considerations apply in the present case. In particular, of extremely great importance, is the public policy that *pacta sunt servanda*: agreements must be kept. This principle applies to all parties who contract, including state-owned entities. This principle takes precedence over whatever might be the political, ideological or materialistic goals and/or expediencies of those who direct the affairs of state-owned entities.

[195] The principle *pact sunt servanda* is of such importance that countries around the world invest taxpayers' monies into the establishment and maintenance of courts of law to enable contractual rights to be vindicated.

[196] The principle reflects what is often referred to as the 'sanctity of contracts'.

[197] Another principle of public policy is the promotion of dispute resolution through arbitration. This gives rise to a strong public policy in favour of enforcing arbitral awards.[40] That principle gives effect to the contractual agreement between parties to have their differences determined by way of arbitration. That is their free choice. It is of no moment to the Court that either side might be dissatisfied with the result.

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[40] See e.g. Process & Industrial Developments Limited v Federal Republic of Nigeria [2019] EWHC 2241 (Comm) at paragraph 100 (Butcher J.).

[198] Promotion of dispute resolution through arbitration also furthers a third public policy principle, that *interest reipublicae ut sit finis litium*: it is in the interest of the state that there should be an end to litigation.

[199] In my respectful judgment, if this Court was to do as CNG, through Mr. Flynn, advocates, namely to reopen the issue of what constituted a 'fair price', this Court would be:

(1) acting directly against the sanctity of the contractual scheme appertaining to the parties, both in terms of their SHA and their Arbitration Agreement;

(2) acting contrary to the principle that it is in the interest of the State that there should be an end to litigation;

(3) applying fundamental principles of fair compensation to a contractual, not statutory, matrix, ignoring that the law basically permits parties to contract upon what they want, as long as it is lawful.

[200] I am satisfied that transposing fundamental principles of fair compensation from statutory, or executive, dispossession cases to a contractual scheme is intrinsically and conceptually wrong.

[201] Even if such transposition might be possible, there is here no grave disparity between the parties, as there might be, say, between an individual of small means and a commercial money-lending business that might have obtained disproportionate contractual foreclosure rights against the individual's property. Here, the parties are commercial corporations, with CNG even being a state-owned entity, and fully represented by pre-eminent legal teams both in the arbitration and before this Court.

[202] In other words, what the Court needs to do is to weigh a number of public policy factors. Even if the Court does have power to intervene to adjudicate upon the fairness of contractual consideration after that issue has already been decided in arbitration, there are other important public policy factors which the Court must take into account.

[203] I am satisfied that it would be wholly inappropriate to apply the alleged public policy factors that CNG urges upon this Court in the present case.

[204] I am moreover satisfied that there is nothing contrary to BVI public policy or public morals to allow either the 1st FPA or the SP FPA awards to proceed to enforcement.

5.8 Full and frank disclosure

[205] CNG supplemented its skeletal written submissions by making the following points orally:

(1) Global/Gerald had stated, extraordinarily, that there were no defences to recognition of the 1st FPA;

(2) What Global/Gerald should have done is to tell this Court that they had obtained the 1st FPA; there are arguments about whether it was final and binding because Global/Gerald were asking the Tribunal for a further award; that Global/Gerald did not accept those arguments, maintaining that the 1st FPA was final and binding, but it was necessary to have another award to enforce in the BVI;

(3) Global/Gerald should have explained to the Court that there would be an argument that the 1st FPA was not final and binding because it was necessary to have another one;

(4) Global/Gerald should have shown their correspondence with the Tribunal saying it was necessary to have another award;

(5) Global/Gerald told the Tribunal it was necessary for them to have a further award, but they did not tell the Court that this was necessary.

[206] Mr. Malek, for Global/Gerald, argued that these points were misconceived.

[207] Mr. Malek observed that Global/Gerald had applied for registration of the 1st FPA on 20th April 2023, and at that time the application for specific performance had not yet been made. Global/Gerald made that application subsequently on 1st May 2023, so there was nothing to inform this Court of in relation to the future specific performance application, even if it was relevant.

[208] Mr. Malek also submitted that, in relation to the statement that there were no defences, there is no requirement for Global/Gerald 'to come up with every form of nonsensical nonsense argument that might be invented by somebody who has got a lot of imagination'.

[209] Mr. Malek urged that Global/Gerald's presentation to the Court did not amount to any non-disclosure, nor misrepresentation, and there was certainly no intention on the part of Global/Gerald to take a step that could possibly mislead the Court.

[210] I should observe here that the legal principles concerning an *ex parte* applicant's duty of full and frank disclosure are extremely well settled. In this jurisdiction they were summarized in the Court of Appeal case of **Commercial Bank – Cameroun v Nixon Financial Group Limited** [41] at paragraph [17]. I need not recite them here.

[211] It warrants observation that in this BVI Commercial Court, where an applicant has applied *ex parte* for any kind of relief, and when a respondent applies to set aside such relief, allegations of a breach of the duty of full and frank disclosure and fair presentation follow as night follows day. In a commercial law context, it requires no great imagination or creativity for an opportunistic respondent to come up with any number of facts or considerations which the applicant allegedly omitted to mention, or which the applicant either over – or underemphasised. But it is equally well established that discharge of an order made *ex parte* is not automatic where there has been a breach of full and frank disclosure and fair presentation.[42] Moreover, it behoves the Court to retain control over the use of the mechanisms of that doctrine and not to lose sight of the overall justice of a particular case; thus Slade LJ in **Brink's Mat Ltd v Elcombe**:[43]

> "…the nature of the principle…is essentially penal and **in its application the practical realities of any case before the court cannot be overlooked**. … While in no way discounting the heavy duty of candour and care which falls on persons making *ex parte* applications, **I do not think the application of the principle should be carried to extreme lengths**."

[41] HCVAP 2011/005 (Unreported, delivered 6th June 2011) (Bennett JA (Ag).)

[42] See e.g. 62 – 63 of Congentra Ag v Sixteen Thirteen Marine SA ('The Nicholas M') [2008] EWHC 1615 (following Brink's Mat Ltd v Elcombe [1988] 2 Lloyds Rep 602); and Boreh v Republic of Djibouti et al [2015] EWHC 769 at paragraph [225].

[43] [1988] 1WLR 1350 at 1359.

> "I am quite satisfied that **the punishment would be out of all proportion to the offence**, and indeed would cause a **serious potential injustice** if this court were, on account of such non-disclosure, to refuse to continue the injunction…" (Emphasis added

[212] In the present case, CNG has failed to show that it had any good defences to registration and enforcement of the 1st FPA. Moreover, its many points of objection to the 1st FPA that it had initially also included in its set aside application before this Court were adjudicated upon by the Hong Kong court and all dismissed.

[213] We are thus left with an argument, divorced from the actuality of this case, that the *ex parte* orders for recognition and permission to enforce the 1st FPA should nonetheless be set aside because Global/Gerald did not bring the possibility of such unmeritorious arguments to this Court's attention.

[214] In my view that would be taking application of the doctrine to extreme lengths. The fact of the matter is that Global/Gerald had obtained, in the 1st FPA, an arbitration award which ruled conclusively on the merits that Global/Gerald was the beneficial owner of the SIL Shares and that Global/Gerald was entitled to an order for specific performance. CNG was not able to show that those findings were anything other than final and binding upon CNG. Nothing CNG has submitted indicates that Global/Gerald was not entitled to seek registration and enforcement of the award in respect of those findings and rulings.

[215] The interests of justice would not be served if Global/Gerald should be deprived of that relief on account of an omission to mention possible arguments that were misconceived anyway.

[216] Furthermore, whatever Global/Gerald might have told the Tribunal that it was 'necessary' for them to obtain an order for specific performance, this does not mean that Global/Gerald could not use the registered 1st FPA to obtain other relief in this jurisdiction, whether it be rectification of the SIL share register or an order directly from this Court for specific performance.

[217] This is not a case where the *ex parte* applicant withheld or omitted to mention some fact or consideration which would have made any difference to the grant of the *ex parte* order. Global/Gerald were right: CNG had no defence to registration and permission to enforce the 1st FPA.

Whilst an *ex parte* applicant cannot presume to decide what is and what is not material, it is for the Court to have a robust and clear view of what is or is not in reality material for the Court's decision. Not everything will be material, however skilfully Counsel might conjure alleged non-disclosures into apparent being.

[218] In my respectful judgment there has been no material non-disclosure, and even if there has been, there is no good reason for visiting the penal sanction of dismissal of *ex parte* relief upon Global/Gerald here.

5.9 Stay

[219] Mr. Flynn, for CNG, urged that there was a pending determination by the Hong Kong court over whether or not the Tribunal had jurisdiction to make the SP FPA, so that this Court should at least stay the order for registration of the SP FPA pending that decision. He submitted that there would otherwise be a risk of inconsistent judgments: the SP FPA would be enforceable in this jurisdiction, even though the Hong Kong court, as the court of the seat of the arbitration, might rule that the Tribunal had no jurisdiction to make the SP FPA at all.

[220] Mr. Malek, for Global/Gerald, argued that there is no risk of inconsistent judgments. He argued that if the Hong Kong Court accepts CNG's case and finds that the Tribunal is *functus officio*, then the SP FPA will be set aside; but this BVI Court is the proper forum for the enforcement of the 1st FPA. This Court could enforce the 1st FPA by issuing an order in the same terms as the SP FPA. Consequently, nothing the Hong Kong court will determine in respect of the SP FPA will affect Global/Gerald's ability to enforce the 1st FPA in this jurisdiction. As a result, urged, Mr. Malek, this Court need not, and should not, stay the registration order for the SP FPA in this jurisdiction; to do so would only gift CNG delay, which it is trying to create.

[221] I accept Mr. Malek's argument in regard to a stay. In my respectful judgment:

(1) I bear in mind that CNG does not argue that Global/Gerald would not be entitled to an order for specific performance of the 1st FPA from this Court;

(2) In my respectful judgment, CNG's arguments that the Tribunal had rendered itself *functus officio*, and not able to reserve power to itself to make further orders of specific performance are wrong. If they were or are arguable, then they are, in my view, extremely weak. I take note of the fact that under the Hong Kong Arbitration Ordinance, at section 70, Hong Kong law itself confers power upon a Tribunal to do precisely what the Tribunal did here, i.e. to make orders for specific performance, which inherently place the on-going performance of persisting contractual obligations in the hands of the Tribunal. It is likely, in my view, that CNG's jurisdiction challenge in Hong Kong on that ground will not succeed.

(3) By contrast, enforcement in this jurisdiction of the 1st FPA is conceptually straight-forward, in that, armed with the Tribunal's award that Global/Gerald is the beneficial owner of the SIL Shares and is entitled to specific performance, Global/Gerald could obtain an order for specific performance from this Court and/or obtain an order for rectification of SIL's share register.

(4) I also bear in mind that Counsel for CNG in the arbitration, Mr. Mike McClure KC, had informed the Tribunal that Global/Gerald 'will be getting' the SIL Shares.[44] **CNG has never resiled from that position**. Indeed, Counsel for CNG had entirely properly and commendably acknowledged that:

> "The first award is an order that my client transfers its 65 percent shareholding to the Claimants, and we've not done so yet, and **we accept that is a breach of your order**...**we will face the costs consequences of failing to comply immediately with that award**."[45] (Emphasis added.)

There is great force in Mr. Malek's argument that CNG's motivation is to delay, and to drag out, with as much difficulty as possible, the inevitable day when the share transfer will have to be effected. On CNG's own acknowledged case before the Tribunal, CNG were required to effect this transfer long ago. This Court sees no good reason to delay this even further.

[222] In my respectful judgment it would be unjust to delay enforcement pending the outcome of CNG's jurisdiction challenge before the Hong Kong courts. Such delay would benefit only CNG and

[44] See Hearing Bundle Vol. 2, page 514 internal transcript of 6th March 2024 internal page 80 line 20.

[45] See hearing Bundle Vol. 2, page2 511 to 512 internal transcript of 6th March 2024 internal page 71 lines 22 to page 72 line 5.

extend the prejudice Global/Gerald has already suffered in being kept out of their entitlement to transfer of the SIL Shares.

[223] For these reasons this Court will not accede to the application for such a stay.

5.10 Disposition

[224] For the reasons set out above, CNG's set-aside applications fail.

[225] Global/Gerald are entitled to their costs of these applications, to be paid by CNG.

[226] The Court will hear further from the parties in relation to any consequential matters.

[227] The Court thanks Counsel for their assistance to the Court during this matter.

Gerhard Wallbank

High Court Judge

By the Court

Registrar