**IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT**
**OF THE REPUBLIC OF SINGAPORE**

**[2022] SGHC(I) 16**

Originating Summons No 10 of 2022

Between

(1) CUG
(2) CTM
(3) CTN
(4) CTO

… *Applicants*

And

CUH

… *Respondent*

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# JUDGMENT

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[Arbitration — Arbitral Tribunal — Jurisdiction]
[Contract — Formation]

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# CUG and others
# v
# CUH

**[2022] SGHC(I) 16**

Singapore International Commercial Court — Originating Summons No 10 of 2022
Sir Henry Bernard Eder IJ
7 July 2022

2 December 2022 Judgment reserved.

**Sir Henry Bernard Eder IJ:**

## Introduction

1 The present application before the court, SIC/OS 10/2022 (the "main application"), is a challenge against the decision of the sole arbitrator (the "Arbitrator" or "Tribunal") on jurisdiction contained in a Partial Final Award on Jurisdiction (the "Partial Award") delivered in Case No ICC XXXXX/ABC (the "ICC Arbitration"). The parties sought and were granted a sealing order to preserve the confidentiality of the parties and the arbitral proceedings. Therefore, all references to the parties, their places of business or any other details that might otherwise reveal their identities have been anonymised in this judgment.

2 In the Partial Award, the Tribunal determined that it lacked jurisdiction over the second arbitration respondent, CUH, to hear the claims brought by the

arbitration claimant, CUG. The other parties to the ICC Arbitration are CTM, CTN, and CTO, who are the first, third and fourth arbitration respondents in the ICC Arbitration respectively (together "the Original Parties").

3 Dissatisfied with the Tribunal's determination on the issue of jurisdiction, CUG, CTM, CTN and CTO (together "the Applicants") filed separate applications under s 10(3) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (the "Act") to challenge the Tribunal's decision. CUG filed its application under SIC/OS 10/2022 ("OS 10"). The Original Parties filed their application under SIC/OS 17/2022 ("OS 17").

4 At a case management conference that I conducted with the parties shortly before the hearing of the main application, the Applicants applied to the court for an order consolidating OS 10 and OS 17. CUH objected to any such consolidation on the basis that the Original Parties did not have *locus standi* in respect of the Original Parties' participation in OS 10 in particular because, according to CUH, the Original Parties did not have a sufficient "legal interest" in the outcome of OS 10 which is (again according to CUH) a necessary requirement of any party making an application under s 10(3) of the Act. For present purposes, it is sufficient to note that after considering the parties' submissions, I accepted that the Original Parties had the necessary *locus standi* by reason of being a party to the Partial Award and having a direct legal interest in seeking to ensure that CUH remained a co-respondent in the ICC Arbitration. Accordingly, I allowed the Applicants' request for consolidation and ordered the consolidation of OS 10 and OS 17 under one action, *ie*, OS 10.

5 As appears below, the crucial issue before this Court is whether a legally binding arbitration agreement came into existence between, in particular, CUG and CUH. It is common ground that CUH never signed any agreement



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containing any arbitration agreement. Notwithstanding, it is CUG's case (supported by the Original Parties) that such an agreement came into existence by reason of a course of conduct – in particular, the payment of certain monies by or at least on behalf of CUH. This has required a close examination of the parties' conduct over a period of almost three years between 2017 and 2020. The inferences to be drawn from such conduct are hotly disputed. Notwithstanding and although it is well established that an application of the present kind concerning the jurisdiction of an arbitral tribunal is determined by way of a *de novo* hearing, it is important to note that the present hearing took place without any oral evidence. The only evidence consisted of a number of affidavits (together with a selection of contemporaneous exhibited thereto) submitted by (a) on behalf of CUG, Mr G, Group Business Development Assistant Manager of CUG; (b) on behalf of the Original Parties, Mr P, Vice-President of CTM and Construction Director of the JV Project (as referred to below); and (c) on behalf of CUH, Mr H, Vice President and Project Director of CUH.

6 With that brief introduction, I turn to consider the issues with regard to the main application. I begin by summarising the main background facts leading up to the ICC Arbitration based on the affidavit evidence and the contemporaneous documents.

## Summary of the relevant background

### *The Parties*

7 The first applicant, CUG, is a company incorporated under the laws of Ruritania. It was the claimant in the ICC Arbitration.



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8 The second, third and fourth applicants, *ie*, the Original Parties, are all companies incorporated under the laws of Suburbia.

9 The respondent, CUH, is a company incorporated under the laws of Suburbia. It was the second respondent in the ICC Arbitration.

***The JV Project***

10 On 19 November 2013, CTM, CTN, CTO and CUH (each a "JV Party" and collectively referred to as the "JV Parties") entered into a joint venture agreement (the "JV Agreement") to form an unincorporated joint venture (the "JV"). The JV was formed to enable the JV Parties to act as joint contractors of a large refinery construction project in Osteria (the "JV Project"). The JV Project was awarded by the Osteria State Company ("OSC") to the JV in February 2014 (the "Main Contract").

11 Under the JV Agreement, CTM was appointed as the leader of the JV (the "JV Leader"). The JV operated one bank account (the "JV Bank Account"). Any transactions involving the payment of money out of the JV Bank Account required the authorisation of all the JV Parties, including CUH. Specifically, the relevant rules governing the banking transactions out of the JV Bank Account state that the mode of operation for the JV Bank Account is to require one approving signature from each JV Party's authorised representatives and joint execution for each instruction to the bank. In practice, however, written authorisation documents and signatures are not required for banking transactions. Instead, each JV Party enters its unique electronic token into the online banking system.



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***Engagement of CUG to provide services for the collection of outstanding payments under the Main Contract***

12 In the course of performing the Main Contract, the JV Parties were unable to collect payments due under the Main Contract. These included progress payments, payments for Detailed Variation Notices issued by OSC ("DVN") and payments for Extension of Time ("EOT") claims (together the "Outstanding OSC Payments").

13 Sometime in 2017, the JV and CUG entered into negotiations involving, *inter alia*, the provision of services by CUG in assisting the JV to secure the Outstanding OSC Payments (the "Services"). In return, the plan was that CUG would be entitled to fees on a commission basis, *ie*, a percentage of the payments which CUG collected from the OSC.

14 The JV Parties and CUG initially agreed to pay CUG a commission rate of 1% as consideration for CUG's performance of the Services. Following further discussions, the Original Parties agreed, on certain conditions, to increase CUG's commission rate to 2.2%. CUH, however, did not agree to the increment of 1.2% in CUG's fee structure. The parties thus reached an impasse on CUG's fees.

15 On 16 November 2017, CTM as the JV Leader issued what purported to be a provisional resolution supposedly on behalf of the JV to the effect that the JV would enter into agreements with CUG at the rate of 2.2% of the progress payments and the Outstanding OSC Payments (the "First Provisional Resolution"). The First Provisional Resolution was invoked pursuant to clause 4.7.15 of the JV Agreement, which states as follows:

> Notwithstanding the provisions of Article 4. 7.14 hereinabove and without prejudice to the rights of the [JV Parties] pursuant



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> to Article 13 herein, in the event that the necessary unanimity cannot be reached on any matter, then the matter in question shall be provisionally resolved by the [JV Leader]. [The JV Leader] can provisionally resolve the issue, commercial impact should be shared in such cases by each [JV Party] in accordance with each [JV Party's] Proportionate Share until the issue is finally resolved.

16 CUH maintained its objection to the First Provisional Resolution and stated that it would not agree to pay CUG a fee in excess of 1%. However, it is important to note that it did not resort to the dispute resolution mechanism in the JV Agreement.

17 In November 2017, the Original Parties and CUG commenced negotiations in respect of two agreements relating to the engagement of CUG for the aforesaid services. These two agreements were termed the Subcontract Agreement and the Services Agreement (collectively referred to as the "Agreements").

*The terms of the Agreements*

18 The Subcontract Agreement provided that the JV was obliged to pay CUG 1% of the portion of Outstanding OSC Payments which CUG successfully procures. The Services Agreement, on the other hand, provided that the JV was obliged to pay CUG 1.2% of the portion of Outstanding OSC Payments which CUG successfully procures.

19 Other than the clauses stipulating the calculation of fees payable to CUG, the rest of the clauses in the Agreements are identical.

20 Clause 2 of each of the Agreements provided that payment obligations retroactively applied to any progress payments made from 1 January 2017, regardless of the date the Agreements were executed:



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> 2. The … price (the "Agreement Price") of the Services shall be … payment amount actually paid to the JV under the Main Contract *during the period commencing from 1st January 2017* until the end of the term of this Agreement.
>
> [emphasis added]

21 Clause 3(7) of each of the Agreements provided that each JV Party shall be severally liable to CUG for payment of its respective proportionate share of fees, *viz*:

(a) CTM was liable for 26.5% of the fees;

(b) CTN was liable for 25% of the fees;

(c) CTO was liable for 11% of the fees; and

(d) CUH was liable for 37.5% of the fees.

22 Clause 12 of each of the Agreements provided that the Agreements shall be effective from the date of signing by CUG and the JV Parties:

> 12. This Agreement shall be effective from the date of signing hereof by [CUG and the JV Parties] till the JV has completely performed all the rights and obligations required under the Main Contract. …

23 Clause 13 of each of the Agreements contained identical arbitration clauses (the "Arbitration Agreements"). The Arbitration Agreements specified that the arbitration shall take place in Singapore and conducted pursuant to the Rules of Arbitration of the International Chamber of Commerce:

> 13. All disputes arising out of or in connection with this Agreement shall be amicably resolved by the Parties. If no amicable settlement is reached, the dispute shall be finally settled by the arbitration under the Rules of the Arbitration of the International Chamber of Commerce by one or more arbitrators appointed under such Rules. The arbitration shall take place in Singapore and its proceedings shall be conducted in the English language.



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> This arbitration award shall be final and binding on the [CUG and the JV Parties].

24 Clause 14 of each of the Agreements provided that the Agreements are governed by the laws of England and Wales.

25 Clause 16 of each of the Agreements provided that all waivers under the Agreements shall be in writing:

> 16. All waivers hereunder shall be made in writing, and the failure of any Party hereto at any time to require the other Party's performance of any obligation under this Agreement shall not affect the right substantively to require performance of such obligation. Any waiver of breach of any provision of this Agreement shall not be construed as a waiver of any continuing or succeeding breach of such provision or a waiver or modification of the provision.

*CUH's refusal to sign the Agreements and to authorise payment to CUG*

26 On 19 November 2017, CUG and the Original Parties signed the Agreements. However, CUH did not sign the Agreements as it maintained its objections in relation to the fee structure proposed by CUG.

27 It is important to note that both CUG and the Original Parties recognised from the outset that the fact that CUH had not signed the Agreements gave rise to a major potential problem. Thus, on the same day that CUG and the Original Parties signed the Agreements, *ie*, 19 November 2017, CTM sent a long important email to CUG stating in material part as follows with quotes from the JV Agreement:

> 1. According to clause 4.6.5 of the [JV Agreement], the [Agreements] award to [CUG] needs unanimous agreement between all [the JV Parties].
>
> [Clause 4.6.5 then quoted in full.]



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> 2. However, if unanimous agreement between all [the JV Parties] is not possible, JV Leader [CTM] can make provisional resolution with commercial impact shared by all [the JV Parties] according to clause 4.7.15 of the [JV Agreement].
>
> [Clause 4.7.15 then quoted in full]
>
> 3. As you know, [CUH] is still objecting [to the signing of the Agreements], so [CTM], as the JV Leader, made provisional resolution to enter into [the Agreements] between [CUG] and JV. The non-signing by [CUH] on [the Agreements] is neither important, nor affect the validity of [the Agreements] accordingly. Your invoice will be cleared by JV in due course. If [CUH] blocks the use of the JV Bank Acount [sic] to pay you, it shall be considered as Material Breach of the JV Agreement by [CUH] according to clause 4.9.3 b) of the JV Agreement.
>
> [Clause 4.9.3 then quoted in full.]
>
> 4. If [CUH] fails to cure such breach within 30 days, it shall constitute [CUH's] default, according to 6.1.2 of the JV Agreement.
>
> [Clause 6.1.2 then quoted in full.]
>
> 5. In this case, the Non-Defaulting Party [CTM, CTN and CTO] shall have the right to take over and complete the Defaulting Party([CUH])'s Scope of Work, according to clause 6.2.2 The Defaulting Party([CUH]) shall cease to have any right to operate the JV Bank Account, which required re-opening of JV Account in the name of the Non-Defaulting Party [CTM, CTN and CTO] subject to [OSC] approval.
>
> [Clause 6.2.2 the quoted in full.]
>
> 6. Explained by item 1 thru 5 above are the worst case scenario based on JV Agreement to resolve [CUH] problem, which would take less than 3 months from recipt [sic] your invoice to our payment to your account. Of course we believe [CUH] will change its mind to consent soon under the continued pressure inside JV and from [OSC], recognizing its position is very weak, and we can pay you sooner, but even in the worst case, our payment to your account will be made not later than 3 months. To minimize the time of this process and for our timely pressurizing on [CUH], you'd better to submit your 1st invoice (for the already paid amount - 368 million USD) shortly.

28 On the following day, *ie*, 20 November 2017, CTM further emailed CUG as follows:



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> Please submit your invoices for the amount already paid to [the JV] as follows immediately, to put maximum pressure on [CUH].
>
> 1) Invoice for subcontract agreement (1%) = $ 368,393,577 x 0.01 = $ 3,683,935.77
>
> 2) Invoice for service agreement (1.2%) = $ 368,393,577 x 0.012 = $ 4,420,722.92
>
> Please put the following condition in your invoices :
>
> "The invoiced amount shall be paid by 25th November 2017 to ensure [OSC] payment for the remaining amount by end of December 2017"
>
> [emphasis in original]

29 On the same day, *ie*, 20 November 2017, CUH sent a letter to CTM protesting as follows:

> **Subject: [The JV Project] - Objection to Unilateral Execution of an Agreement**
>
> On Nov 16, 2017, without obtaining the prior consent of other [JV Parties], and against the intentions of other [JV Parties], your company unilaterally notified of your intention to make a provisional resolution saying that, in doing so, you were exercising [the JV Leader's] rights as set out in Article 4.7.15 of the JV Agreement. Then, on Nov 18, [the JV Leader] signed an agreement with a new consultant to pay 1% of the balance of the contractual amount and to pay additional 1.2% of the balance of the contractual amount. Then, on Nov 19, [the JV Leader] notified [CUH] through the meeting of PDs.
>
> [emphasis in original]

Further, in that same letter, CUH stated in material part:

> Once again, we would like to clearly point out that the [Agreements do] not fall within the Scope of Authorized Power set out in Article 4.7.15 of the JV Agreement no matter what.

30 On 23 November 2017, CTM responded by letter to CUH stating in material part:



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> 2. As to the base rate of 1% under the [Subcontract Agreement], all [the JV Parties] including [CUH] agreed. As to the additional rate 1.2% all the [JV Parties] except [CUH] have consented.
>
> …
>
> 4. As we informed you in the prior official letter as well, it was such an urgent situation that any further delay in signing [the Agreements] would have caused the execution of the agreement, *per se*, to fall through, so, [CTM] was unavoidably compelled to make a provisional resolution. As we already informed you that [CUG] repeatedly expressed its position that it could not accept your alternative proposal, "A compensation proposal based on applying 5-6% of the amount from successful Change Order/Claim," as presented by [CUH] in the meeting on Nov 14, so [CTM] had no choice but to make a provisional resolution.

31 Two days later, CUG issued two separate invoices both dated 19 November 2017 in each case addressed to both the Original Parties and CUH headed "1st Payment – [the JV Project]" with invoice details as follows:

> **INVOICE DETAILS:**
>
> **1st Payment – [the JV Project]** **$3,683,935.77**
>
> 1.0 Percent (1%) of the total amount paid to JV by [OSC] up to date of this invoiced in 2017 (1% of $368,393,577)

> **INVOICE DETAILS:**
>
> **1st Payment – [the JV Project]** **$4,420,722.92**
>
> 1.2 Percent (1.2%) of the total amount paid to JV by [OSC] up to date of this invoiced in 2017 (1.2% of $368,393,577)

In both cases, the two invoices contained at the end the following remarks:

> Remarks: The invoice amount shall be paid by the 25th November 2017 to ensure [OSC] payment for the remaining amount by end of December 2017.



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However, CUH withheld authorising the payment out of the JV Bank Account. Thus, no payment was made by this date.

32 It appears that a few days later, *ie*, on 29 November 2017, CTM issued what CTM referred to as an "official letter" to CUH to request it to cure CUH's material breach within 30 days, *ie*, by 28 December 2017 in accordance with clause 6.1.2 of the JV Agreement.

33 On 2 December 2017, there was a phone call between Mr M of CUG and Mr W of CTM to discuss the position. This was followed up by another important email later that evening from Mr W to Mr M which stated as follows:

> Dear [Mr M],
>
> Our today's phone conversation refers. We fully understand your concerns but please understand our payment to your current invoices might be delayed until end of January 2018 in the worst case scenario as briefed below:
>
> As explained over the phone, we initiated JV internal procedures to release your payment upon receipt of your invoices, in order to put maximum pressure on [CUH]. However, [CUH] has rejected to sign on the payment slip up until now. In other words, [CUH] is blocking the use of JV [B]ank [A]ccount, which is a material breach on JV [A]greement, according to clause 4.9.3 of the JV [A]greement.
>
> Accordingly, we [CTM] issued an official letter on 29th November 2017 to [CUH] to request them to cure such material breach within 30 days (ie. by 28th December 2017), in accordance with clause 6.1.2 of the JV agreement. If [CUH] fails to do so, then we, [CTM], together with [CTN] and [CTO] (Non-defaulting party) will officially take [CUH] (Defaulting party) out of JV & [the JV Project], notifying that [CUH] has committed default according to clause 6.2.2 of the JV [A]greement around the end of December in 2017 or early January in 2018.
>
> The current JV [B]ank [A]ccount was initially set in a manner that it is mandatorily required for [the] JV to issue a payment slip signed by financial staffs from each [JV Party] (including [CUH]) to the bank in order for the bank to remit any payment from the JV [B]ank [A]ccount, so without [CUH] signature, the bank cannot release any payment, whether or not [CUH] is



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taken out of JV & [the JV Project]. So no payment can be released from the current JV [B]ank [A]ccount, as far as [CUH] is in dispute with us, even in case [CUH] is out.

Accordingly it is utmost important that a new JV account should be installed in the name of Non-defaulting party once [CUH] is taken out of JV and all future [OSC] payment should be remitted into this new JV account, not current JV account, to ensure smooth payment to you.

Due to this reason, we (Non-defaulting party) plan to open a new JV account before early January 2018 and inform the new JV account information to [OSC], asking them to remit all future payment to this new JV account. Of course, [OSC] should accept our (Non-defaulting party) action to take [CUH] (Defaulting party) out of JV & [the JV Project], in this case. We (Non-defaulting party) are confident that we have sufficient capability and resources to take all of [CUH's] scope of work, right and responsibility and complete this project smoothly, but we need your support ton [*sic*] get [OSC] acceptance smoothly in this case.

We (Non-defaulting party) expect to receive all outstanding payment (remaining amount of 130 million USD in Year 2017 + additional 300 million USD) to this new JV bank account from [OSC] by middle or end of January 2018 , and in this case, we can release all the payment to you by end of January 2018 smoothly at the latest. (In case additional 300 million USD is paid after the payment of remaining amount of 130 million USD in Year 2017, we will release your payment against current invoices just after we receive remaining amount of 130 million USD in Year 2017).

Mr. [M], this is the worst case scinario [*sic*]. Our payment to your current invoices might be delayed until end of January 2017 in this worst case scinario [*sic*].

We continue our efforts to put maximum pressure on [CUH]. If [CUH] change their mind and sign on the payment slip at any moment, we will release your payment from the current JV [B]ank [A]ccount immediately after getting [CUH] signature. This is the best case scinario [*sic*].

Mr. [M], we look forward to your kind understanding on current situation and hop you suceed [*sic*] in getting [CUH's] acceptance and patience.



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34 It appears that during December 2017, CUH maintained its position refusing to agree to pay the increased rate. Thus, on 18 December 2017, CUH wrote to the Original Parties stating in material part:

> 2. The execution of the so-called new subcontract agreement must be decided by agreement of all [the JV Parties]. Our company's objection is about that aspect that your company continuously raised an issue to execute the [Agreements], which is different from what was agreed, by unilaterally applying the changed rate without consent of our company, ignoring the rate that was previously agreed to by all the [JV Parties] who were present. If your company affirms that you will cancel the new changed rate, which was wrongfully and forcibly imposed by your company without our company's consent, we hereby inform you that we will consider this issue resolved, and will be thus willing to agree to sign the [Subcontract Agreement] at the previously agreed-upon rate. Please let us know at your earliest convenience.
>
> 3. Our company can not accept the point that your company has the authority of provisional resolution to sign the [Subcontract Agreement] that was unilaterally handed by your company. As a result, based on this, we will not accept any follow-up actions, such as invoices, etc., as taken in accordance with the JV Agreement.

***The Westalis Meeting***

35 As at the beginning of January 2018, the JV had not received any progress payments following the last payment made on 5 November 2017. Operating funds for the JV Project were low and anticipated to run out by April 2018. This would cause serious problems in running the JV Project and would require each of the JV Parties to provide further financing for the JV Project.

36 Given this state of affairs, CUH's project director for the JV Project, Mr H, met CUG's representative, Mr G, in Westalis on 5 January 2018 to discuss the terms of the Agreements (the "Westalis Meeting").



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37 On behalf of CUG, it was submitted (at least originally) that the Westalis Meeting was important because it provided evidence of CUH's intent to be bound by the Agreements. However, there is no written record of that meeting; and the evidence on what supposedly happened or what was said during the Westalis Meeting is scanty in the extreme. According to Mr G, Mr H "suggested a revision to the payment terms of the Service Agreement so that payments could be contingent on [CUG] securing the Payment of Claims". The evidence of Mr H was that "the [Westalis] Meeting was simply an attempt by parties to agree on a revision of the terms of the Agreements. If there was agreement on revised terms, then [CUH] would sign up to the agreements. As it turned out, no such agreement was reached. The [Westalis] Meeting was **not** a discussion on *variations* to an extant agreement (by which [CUH] was already bound)" [emphasis in original]. For the sake of completeness, I should mention that the Westalis Meeting is also referred to briefly in the first affidavit of Mr P, but he was not present at the meeting, and he says no more than that following the meeting, CUH appeared to appreciate the precarious financial situation that the JV was in. Although strictly not relevant, I note in passing that the Arbitrator accepted Mr H's account of the Westalis Meeting and concluded in the Partial Award that "[b]y far the greater likelihood is that [CUH] went, as it submits, to try and reach terms which it would agree to, would sign up to and be bound by".

***The proposed meeting with the Osteria Minister***

38 Following the Westalis Meeting, CUG extended an invitation to CUH's Chairman for a meeting with the Osteria Minister in an email sent by CUG to CUH on 30 January 2018. Mr H replied on 31 January 2018 that the invitation had been sent to CUH's headquarters in Suburbia, and that "[a]nything need to coordinate for the [JV Project], please contact me". However, it appears that this proposed meeting between CUG and CUH was not made known to the



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Original Parties. In the affidavit evidence, there was some dispute about whether this email exchange concerned specifically the JV Project. It is unnecessary to resolve that dispute. For present purposes, I simply note that it does not assist with regard to the main issue on this application.

***The payments made pursuant to CUG's invoices***

39 On 15 February 2018, the JV learned through a SWIFT message that OSC had wired a progress payment of USD 131.6m to the JV Bank Account. It appears that this progress payment was deposited into the JV Bank Account a few days later on 19 February 2018. According to Mr P, "[t]his proved to be a lifeline for the JV financially. This payment seemed to convince [CUH] that [CUG] should be retained and remunerated. Within a few days, [CUH] finally altered course, no more withholding authorization for payment to [CUG]". On the same date, *ie*, 19 February 2018, CUH signed off and authorised the JV to make payment amounting to USD 8,104,659 to CUG. It is important to note that this amount was equivalent to exactly 2.2% of USD 368,393,572.64 being the total amount of progress payments which CUG had procured from OSC at that time.

40 Between 19 February 2018 and 27 October 2018, a total of ten payments totalling approximately USD 28.6m equivalent to the 2.2% rate stated in the Agreements, were made by the JV out of the JV Bank Account against separate invoices issued by CUG, each of which referred specifically to the Agreements and were addressed to all the JV Parties including CUH.

41 I summarise the amounts paid by the JV to CUG and CUH's corresponding share of such payments in the table below:



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| S/No. | Date | Amount Paid by JV to CUG (USD) | CUH's share (USD) |
|---|---|---|---|
| 1. | 19.02.2018 | 8,104,658.69 | 3,039,247.01 |
| 2. | 11.03.2018 | 2,895,200.00 | 1,085,700.00 |
| 3. | 29.03.2018 | 2,200,000.00 | 825,000.00 |
| 4. | 29.03.2018 | 4,400,000.00 | 1,650,000.00 |
| 5. | 24.05.2018 | 2,200,000.00 | 825,000.00 |
| 6. | 04.06.2018 | 2,200,000.00 | 825,000.00 |
| 7. | 27.06.2018 | 2,200,000.00 | 825,000.00 |
| 8. | 09.08.2018 | 1,593,998.99 | 577,499.62 |
| 9. | 14.10.2018 | 1,540,000.00 | 577,500.00 |
| 10. | 27.10.2018 | 1,320,000.00 | 495,000.00 |
| **Total** | | 28,599,857.68 | 10,724,946.63 |

42 Each payment was expressly authorised by all the JV Parties, including CUH. In return, CUH received its share of the progress payments made by the OSC to the JV. At no point in time did CUH express any reservation whatsoever to authorising each of the payments out of the JV Bank Account. In other words, as stated by Mr H, "[a]t no point in time did [CUH] communicate that it was not agreeable to the payment of the invoices or that it was withholding payment of its share of the fees, although it had every opportunity to do so". However, it is important to note that, as Mr G expressly accepts in his affidavit, CUG "would not have had actual knowledge as to which of the JV Parties had given authorisation for each payment". Rather, his evidence is that CUG "reasonably (and correctly) assumed that [CUH] had authorised [CUG's] share of the payment when [CUG] invoice was paid in full". So far as relevant, I consider this important evidence further below.



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***Events from November 2018 leading up to the First Arbitration***

43 Apart from the ten payments referred to above, it appears that nothing else of any relevance for present purposes occurred until around November 2018, when disputes arose between CUG and the JV over the quality and scope of CUG's services provided under the Agreements, in particular CUG's failure to secure payment for the JV's EOT and DVN claims from the OSC. Accordingly, the JV suspended payments to CUG.

44 In a bid to resolve these disputes, negotiations took place between CUG and the JV Parties over a protracted period between the end of 2018 and well into 2019. It is common ground that CUH participated in these discussions although, once again, the evidence relating to them is very thin. For present purposes, it is sufficient to note that, on this application, CUG places particular reliance on the fact that as part of these negotiations, a draft supplemental agreement (the "Supplemental Agreement") was prepared which: (a) set out target dates for CUG to secure the EOT and DVN payments from the OSC; (b) expressly stipulated that "all terms and conditions of the Service Agreement shall remain in full force and effect"; and (c) also confirmed the "Additional Services" to be provided by CUG.

45 In summary, it was CUG's case that the fact that CUH participated in the discussions around the drafting of this Supplemental Agreement meant that it was a party to the Agreements. This is hotly disputed by CUH. According to Mr H, "[CUH's] participation was simply part of its facilitation and support of the other JV [P]arties, whilst at the same time, maintaining that it was not *itself* bound by the Agreements" [emphasis in original]. So far as relevant, I deal with this further below but, in passing and again whilst not strictly relevant, I note that the Arbitrator's conclusion that "[CUH's] entering into negotiations to



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settle the dispute with the JV, while still refusing to be bound by the Agreements, and not voluntarily participating in performance of them at this time, did not objectively evince the directly opposite intention to be bound by them". Be all this as it may, it is common ground that the Supplementary Agreement was never finalised and never executed.

46 The precise timing of the sequence of continuing discussions during 2019 is unclear. Be that as it may, the contemporaneous documents show that on 2 May 2019, CUG sent an email to all the JV Parties headed "Payment Request", demanding payment of its outstanding fees and stating that unless payments were "released" by 12 May 2019, CUG would commence arbitration proceedings immediately claiming payment of the "delinquent sum" and a wide range of further orders.

47 On 11 May 2019, the response came back from the Project Director of the JV Project on behalf of, it would seem, the Original Parties assuring CUG that the JV understood that the intention to commence arbitration was "an action…to retrieve your contractual right". However, the response continued as follows: "As you might be aware, however, the payment can only be made by a unanimous agreement among [the JV Parties]. But only one [JV Party] objects to signing on the payment certificate. In order to achieve this unanimity, JV is trying to persuade the [JV Party] with the target date by 19 May 2019, so JV would much appreciate if you could give a little more patience until that time". It is plain that the JV member who was objecting to signing the payment certificate was, of course, CUH.

48 Following what appears to have been further communications, CUG sent an email on 22 May 2019 notifying both CUH and the other JV Parties that



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unless the Supplemental Agreement was signed by 24 May 2022, "we will stay in our original contract and will be proceeding for arbitration immediately".

49 It is not clear what happened immediately thereafter, but it appears that following further correspondence at the end of June 2019, CUG instructed their lawyers, Eversheds LLP – Westalis ("Eversheds Westalis"). By letter dated 11 July 2019, Eversheds Westalis wrote to all the JV Parties making a formal complaint of the JV's failure to make payment of the then outstanding amounts said to be due under the Agreements, stating in material part: "our client is therefore of the view that [CUH] are preventing the JV from releasing the Outstanding Amount contractually due to our client under the Agreement, and are withholding their signature from the payment certificate", and calling upon CUH to co-operate with the other JV Parties, *ie*, the Original Parties, and release the payment of sums due in full and without deduction, failing which Eversheds Westalis intimated the possible commencement of formal proceedings against CUH.

50 On 16 July 2019, CTM invoked its power as the JV Leader under clause 4.7.15 of the JV Agreement to issue a second provisional resolution for the JV to pay CUG's fees. However, as Mr P himself accepts, CUH maintained its refusal to authorise payments from the JV to CUG.

***The First Arbitration***

51 On 19 September 2019, CUG filed a Request for Arbitration against the JV Parties to recover amounts said to be contractually due under the Agreements (the "First Arbitration").

52 Shortly thereafter, the JV Parties set up what was, in effect, a steering committee to seek to agree on a common approach to defend the First



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Arbitration. The evidence with regard to such committee and any internal discussions and meetings which may have taken place is scant. However, it appears to be common ground that at least one such meeting took place between the JV Parties on 23 September 2019 and that over the next month or so, settlement negotiations ensued with CUG seeking to resolve the disputes on the subject matter of the First Arbitration.

53 Eventually, on 1 November 2019, the JV Parties agreed to resolve the First Arbitration amicably. This resulted in the JV Parties signing a settlement agreement dated 2 November 2019 (the "Settlement Agreement"). Pursuant to the Settlement Agreement, the JV Parties agreed to pay CUG approximately USD 15.6m (the "Settlement Sum"). The Settlement Agreement also stated the following:

> … all [the JV Parties] … finally came to an agreement in the steering committee meeting held on 1st November 2019 to pay outstanding amount to [CUG] immediately… [the JV Parties] believes that [CUG] will give [its] 'good service' without interruption in order to achieve amicable VO/EOT settlement in addition to the continued payment release by [the OSC].

54 The Settlement Sum was paid out of the JV Bank Account to CUG on 6 November 2019. It is important to note that the Settlement Sum was equivalent to the fees amounting to 2.2% of the progress payments received by the JV from the OSC between November 2018 and September 2019; and was the sum that CUG had claimed in the First Arbitration. Following this payment, CUG withdrew the First Arbitration on 7 November 2019 and continued performing the Agreements.



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***Further disputes leading up to the ICC Arbitration***

55 In December 2019, the JV Parties met CUG in Ruritania and negotiated the final approved amount for two specific DVNs which the OSC owed the JV. During the meeting, it was CUH who led the negotiations with CUG.

56 By email dated 22 January 2020, CUG highlighted to the JV Parties (with CUH copied in the email) that the JV should expedite all DVN requests and update CUG so that it could follow up on them. CUG also highlighted the issue of outstanding payments which the JV had yet to make, and that it was crucial to obtain CUH's signature to the Agreements:

> … We strongly recommend that you expedite all DVN requests and update us on all of the details related to them so that we can follow up effectively in a timely manner.
>
> I also want to address the delinquent payment matter – As you know we have been expecting these payments for some time now, and you are kindly requested to clear them off not later than the end of this month. *It is also very important to us that we have [the Agreements] completed with the additional signing of [CUH] without further delay.*
>
> [emphasis added]

57 By email dated 23 January 2020, Mr H responded with details of the DVNs and proposed a timeframe for payments of the DVNs, the metadata of the excel spreadsheet document indicating the proposed timeframe showed CUH to be the last party that modified the file. It was clear that CUH played a role in the creation of the document. Crucially, Mr H also informed CUG in that email that "[w]e have done our best efforts to realize Contract Signing by [CUH], but no success. We believe our work can be proceeded smoothly in a secured manner even though Contract Signing is not made by [CUH]."



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58 However, a few days later, CUG sent an email dated 27 January 2020 stating in material part:

> Regarding the non-signing of [CUH], this is still a subject that we can never accept. Therefore, can you please prepare a letter of commitment from all other [JV Parties] stating that you are willing to jointly pay [CUH's] portion if there was any refusal from them to authorize our payment in the future.

59 On 13 February 2020, CTM responded declining to give any letter of commitment. CTM, however, proposed to meet CUG on 17 February 2020 to discuss the issue.

60 On 15 February 2020, CUG responded requesting that its outstanding invoices be paid before 17 February 2020, before it would consider the meeting that Mr H proposed.

61 On 22 February 2020, CTM sent an email to CUG proposing to release the pending payment of USD 10.12 million to CUG. Specifically, 50% of the amount invoiced by CUG would be paid to CUG after the proposed meeting between the Parties, and the next 50% would be paid after the Parties reached an agreement on the time frame and strategy for resolving the remaining payments due from the OSC. It is important to note that the email stated in material part:

> Please note that all of the PDs of [the JV Parties] have agreed to the payment schedule mentioned above.

62 Thereafter, in March 2020, CUH and the Original Parties met CUG at the JV Project site in Osteria. This was followed up by an email from CTO to CUG requesting CUG to issue a new invoice for 50% of the outstanding fees under the Agreement. The JV Parties were copied in this email.



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63 On 18 March 2020, the JV made payment of USD 5.06m to CUG. This reflected the 50% payment of CUG's outstanding fees. Once again, this payment from the JV Bank Account was only possible given CUH's authorisation.

64 On 25 March 2020, CTM emailed CUG, with CUH copied on the email recipient list. Two documents were attached to that email and are titled: "Major 39 DNV Status" and "Summary for Extension of Time Claims". These two documents elaborate on the outstanding "Payments for Claims" that CUG was required to secure. It is undisputed that the metadata of these two documents showed CUH's involvement in the preparation of the documents. Specifically, CUH was shown to have last modified "Major 39 DNV Status" and was also the original author of "Summary for Extension of Time Claims".

65 In summary, therefore, CUH authorised a total of approximately USD 49.2m in payments to CUG across 12 separate transactions from February 2018 to March 2020.

66 However, CUG did not receive the remainder of the payments that it alleged it was entitled to. Further, the dispute between the JV Parties and CUG was not resolved. Accordingly, CUG terminated the Agreements on 21 May 2020.

**Proceedings before the Tribunal**

67 On 6 July 2020, CUG commenced the ICC Arbitration against CUH and the Original Parties by filing its Request for Arbitration and claiming payment of USD 12.8m allegedly due under the Agreements. In the Original Parties' Answer and Counterclaim dated 16 September 2020, the Original Parties denied that they owed CUG the sums claimed. The Original Parties also



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counterclaimed for breach of contract caused by CUG's failure to perform its obligations under the Agreements. The Original Parties sought an award of damages amounting to approximately USD 5m and restitution for overpayment on the unperformed services.

68 In its separate Answer to the Request for Arbitration filed on 16 September 2020, CUH raised its jurisdictional objection on the basis that it denied that it was a party to the Agreements. Specifically, CUH argued that there was no binding agreement between itself and CUG because it had not signed the Agreements and further, clause 12 of the Agreements stated that the Agreements would only be effective from the date of signing of all parties.

69 The Tribunal was constituted on 21 January 2021. Shortly thereafter, on 16 March 2021, CUH filed its Statement of Objections to Jurisdiction. Both CUG and the Original Parties objected to the CUH's jurisdictional challenge on the basis that CUH had accepted the binding effect of the Agreements by its conduct and had waived any signature requirement; and that CUH was, by its conduct, estopped from denying that it was bound to the Agreements.

70 The Tribunal ordered that CUH's jurisdictional challenge should be heard as a preliminary issue. Following the parties filing and exchange of their respective written submissions, the Tribunal proceeded to hear the jurisdictional challenge on two days across 15 and 16 September 2021.

71 On 20 December 2021, the Tribunal delivered its ruling in the Partial Final Award. As stated at [5] above, the present challenge is conducted by way of a *de novo* hearing before this court; I therefore proceed on the basis that the conclusions reached by the Tribunal are irrelevant. However, by way of background, it is convenient to mention that the Tribunal held that it lacked



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jurisdiction over CUH on the basis that (a) CUH was not a party to the Agreements and hence was not bound to the terms of the Agreements, which included the Arbitration Agreements contained therein; (b) there was no waiver of clauses 12 and 16 of the Agreements; and (c) CUH was not estopped by convention from denying that it is bound by the Agreements. In summary, the Tribunal's reasons were as follows:

(a) All the indicators of acceptance and performance of the Agreements by CUH were negated by CUH's alleged repeated refusal to sign the Agreements.

(b) While the Tribunal accepted that there was a degree of performance of the Agreements by CUH which might be expected from a party which accepted that it was bound by the Agreements, CUH's conduct was at best equivocal given that CUG knew that CUH had repeatedly refused to sign the Agreements. Specifically:

(i) While CUH's authorisation of payment of CUG's fees from the JV Bank Account as indicated in the various invoices which CUG had issued was a strong objective indication that CUH intended to be bound by the Agreement, this did not amount to a clear and equivocal intention to be bound.

(ii) In the Tribunal's view, CUH's conduct in this regard must be balanced by CUH's refusal to sign the Agreements and that CUH was motivated by commercial reasons in authorising the payments to CUG, rather than its recognition that it was contractually obliged to authorise the payments.

(iii) The settlement of the First Arbitration likewise did not constitute CUH's acceptance of the Agreements. Rather, CUH



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was motivated purely by commercial reasons when it resumed its voluntary participation in the performance of the Agreements.

(c) The Tribunal also found that CUG continued to perform the Agreements on the strength of the assurance by the Original Parties that they would take the necessary actions to ensure that CUG would be paid in full for its services. In the Tribunal's view, CUG did not continue its performance of the Agreements on the strength of CUH's contractual promise.

(d) Finally, the Tribunal found that CUH was not estopped by convention from denying the binding effect of the Agreements for the following reasons:

(i) The Applicants did not and could not have reasonably formed an assumption that CUH regarded itself as severally bound under the Agreements to perform them. Any conduct on CUH's part that supported the finding that CUH had assented to the assumption was negated by CUH's refusal to sign the Agreements.

(ii) CUH also did not assume responsibility for the Applicants' reliance on any common assumption.

(iii) There was, accordingly, no reliance by and no detriment to the Applicants or benefit to CUH that would make it unconscionable for CUH to deny that it was bound by the Agreements. Any detriment suffered by the Applicants was in consequence of their own actions, and not from any common assumption.



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**The application to challenge the Tribunal's jurisdiction**

72 Having laid out the background, I turn at last to consider the Applicants' challenge against the Tribunal's ruling on its jurisdiction with respect to CUH. In so doing, it is important to recognise the slightly different positions of, on the one hand, CUG, and, on the other hand, the Original Parties. I deal with this further below.

***The parties' submissions***

73 In summary, CUG's case is as follows:

(a) While CUH objected to and therefore did not sign the Agreements, the outward manifestation of CUH's conduct in performing the Agreements, from CUG's perspective, demonstrates a clear and unequivocal intent on CUH's part to accept and therefore be bound by the Agreements. In particular:

(i) CUH's email to CUG stating that "[a]nything need to coordinate for the [JV] Project, please contact me" was an invitation from CUH to CUG to liaise with CUH's representative for the JV Project. This reflected CUH's intention to remain involved in the Agreements.

(ii) CUH had performed the Agreements, by its authorisation of the payments out of the JV Bank Account and by its payment of its 37.5% share of the fees to CUG pursuant to the terms of the Agreements. CUG submits that CUH's authorisation of full payments of CUG's invoices conveyed to CUG that CUH's objections to the Agreements no longer existed, and that CUH accepted the Agreements. CUH thus conducted itself no



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differently from the Original Parties who were signatories to the Agreements. CUG was also aware that CUH had authorised payments out of the JV Bank Account, and that CUH had paid its portion of the fees because full payment of the invoiced amounts was made.

(iii) Even if there is any difficulty in identifying the exact point in which acceptance of the offer on the terms of the Agreement took place, CUH's conduct of paying the invoices over the period of eight months in 2018, considered in totality, reflects CUH's unequivocal intention to accept and be bound by the Agreements.

(iv) CUH's explanation that it authorised the payments to CUG from the JV Bank Account only because it wanted to facilitate or cooperate with the other JV Parties in their dealings with CUG, and not out of a contractual obligation under the Agreements, is inherently illogical. CUG submits that the JV Parties are severally liable for the fees due under the Agreement. If CUH wanted to facilitate the other JV Parties' dealings with CUG, it could have authorised the payment of the Original Parties' collective share of fees out of the JV Bank Account, whilst withholding its 37.5% share of the fees. Further, this explanation constitutes CUH's subjective intent and its unexpressed mental reservation which was never communicated to CUG.

(v) Following CUG's expression to the JV Parties that withholding of part of the services fees was a breach of their agreement and unacceptable, CUH had unqualifiedly



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participated in the preparation of the Supplementary Agreement. Since, CUG considered CUH on equal footing with the Original Parties, CUH's conduct gave CUG the impression that CUH was interested in ensuring that CUG performed its services under the Agreements satisfactorily.

(vi) CUH chose to sign the Settlement Agreement to the First Arbitration and made payment of its share of the Settlement Sum without any qualifications nor any objections that it was settling the First Arbitration without prejudice to its position that it was not a party to the Agreements. Neither did CUH boycott its participation in the settlement nor proceed to defend the First Arbitration. CUG thus argued that CUH's conduct of settling the First Arbitration, viewed in totality, is unequivocal in its indication that CUH was bound by the Agreements.

(vii) CUH, together with the other JV Parties, continued to engage in discussions with CUG concerning CUG's performance of the Agreements and made a further payment of fees to CUG. CUH was also involved in the preparation of documents dealing with details of the DVNs and the proposal of a timeframe for payments of the DVNs.

(b) Other than the first time CUH had objected to signing the Agreements in November 2017, CUH never denied the binding effect of the Agreements to CUG directly, despite numerous opportunities to do so and being fully aware that CUG considered CUH bound by the Agreements. CUH's unexpressed and subjective reservations are accordingly irrelevant to the objective determination of whether its conduct constituted acceptance of the Agreements.



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(c) In so far as CTM had informed CUG on 23 January 2020 that CUH still did not sign the Agreements, CUG submits that this is irrelevant and that the Tribunal erred in finding that there were repeated refusals on CUH's part to sign the Agreements. This is because the need for the formal requirement of signature was already overtaken by events. CUH's refusal to sign the Agreements first surfaced on 19 November 2017, and the next occasion was on 23 January 2020. During the period in between, CUG never asked CUH to sign the Agreements because this was overtaken by CUH's acceptance of the Agreements.

(d) CUH had, by its conduct, clearly and unequivocally elected to waive clauses 12 and 16 of the Agreements, thereby effectively affirming the Agreements. This was because the outward manifestation of CUH's conduct demonstrates its election to bring the Agreements into effect. Those conducts included accepting the benefit of CUG's service, performing its payment obligations and also actively participating in ensuring CUG's performance of the Agreements.

(e) CUH is estopped from denying the binding effect of the Agreements. This is because CUH's conduct has given rise to the common assumption that it is legally bound by the Agreements, and further that CUH had assented to this assumption by taking positive steps to affirm the Agreements. It is also irrelevant that CUG was mistaken in forming such an assumption. Further, CUH was responsible for the understanding that it had conveyed to CUG, and on which it expected CUG to rely. Finally, CUG relied on CUH's conduct of affirming the Agreements to its detriment without the secure legal entitlement to payment, and to CUH's benefit by the receipt of payments which CUG secured from the OSC.



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74 The Original Parties' submissions are substantially similar to CUG's submissions, *viz*:

(a) Despite CUH's refusal to sign the Agreements and its blocking of payments out of the JV Bank Account, CUH had, by its subsequent conduct, accepted the Agreements. In particular, the Original Parties relied on the following:

(i) CUH's authorisation of a retroactive payment made out of the JV Bank Account to CUG on 19 February 2018. This payment was made in respect of CUG's performance of services prior to the parties entering into the Agreements on 19 November 2017. The Original Parties submit that CUH's authorisation of this payment is consistent with the retroactive payment obligation contained in clause 2 of the Agreements.

(ii) CUH's authorisation of ten payments to CUG totalling USD 28.6m in respect of the invoices which CUG sent to the JV Parties, with the invoices making reference to the Agreements. This is akin to CUH making payments to CUG out of its own funds. This is explicable only on the basis that CUH considered it to be contractually bound to make the payments.

(iii) CUH's participation in negotiating the draft Supplementary Agreement to the Agreements, even though its participation was not necessary if it maintained that it was not a party to the Agreements. Even though the Supplementary Agreement was never finalised, the fact that CUH never once suggested that this agreement was pointless because it was not



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bound by the Agreements, showed that CUH considered itself a party to the Agreements.

(iv) When CUG commenced the First Arbitration, CUH never once indicated that it was not subject to the Arbitration Agreements. Instead, CUH indicated that it wanted to participate and respond to CUG's arbitration notice. When the JV Parties agreed to settle the First Arbitration, CUH signed the Settlement Agreement which stated that CUG would continue to provide its "good service" under the Agreements. The Original Parties submit that it is highly improbable that CUH was simply voluntarily participating in the other JV Parties' performance of their obligations for its own commercial purposes, especially when the context included the payment of significant sums of monies as settlement.

(v) CUH's conduct in taking a leading role in internal JV meetings regarding CUG's performance of the Agreements and preparing documents for the purpose of negotiating with CUG.

(b) CUH commenced a course of conduct that was clearly referable to the Agreements. Further, CUH's failure to indicate that it was not bound by the Agreements at any time during the abovementioned events, and its decision to remain silent, conveyed an unspoken but unequivocal message to CUG and the Original Parties that CUH considered itself bound by the Agreements. Therefore, the reasonable expectation of any honest, sensible businessperson in CUG's shoes would be that CUH considered itself bound by the Agreements.



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(c) CUH's explanation that it had authorised the various payments in order to facilitate the JV Project, on the basis that CUH "retained a financial interest in the successful completion of the [JV Project]", and that CUH "voluntarily chose to participate …in the other JV Parties' performance of the Agreements … for its own commercial purpose", is irrelevant. The Original Parties submit that these constitute CUH's subjective expectations and unexpressed mental reservations, which is inconsistent with the objective approach in contractual formation. CUH's conduct, objectively construed, can only show that it agreed and elected to be bound by the Agreements.

(d) CUH's argument that it persistently and repeatedly refused to sign the Agreements is misleading and untenable. The evidence shows that there were three occasions where CUH refused to sign the Agreements. The first was CUH's objection to signing the Agreements prior to February 2018. The second was in May 2019 when CUH raised its objections against signing the Agreements to the Original Parties. The third was in January 2020, when CUH refused to sign the Agreements after CUG had asked CTM to obtain CUH's agreement. CUH had, by its conduct between February 2018 and October 2018, accepted the Agreements. Any subsequent objections expressed by CUH are irrelevant. Further, CUH's expression of its refusal to sign the Agreements was always followed by its conduct of authorising and making payments to CUG. CUH's subsequent conduct thus negates CUH's position as verbally intimated.

(e) As to clause 12 of the Agreements:

(i) The Original Parties submit that clause 12 is not a "subject to contract" clause as it does not stipulate that the only



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method of accepting the Agreements is by signature. Therefore, this does not preclude the Agreements from coming into effect through acceptance by conduct.

(ii) Even if clause 12 was construed as a "subject to contract" clause, CUH had by its conduct unequivocally waived the signature requirement. First, CUH was aware that it has a clear choice between two inconsistent or mutually exclusive courses of action, *ie*, to insist on the signature requirement under clause 12, or abandon that requirement and indicate to the parties by its conduct that there was a valid and binding contract. Second, despite CUH's knowledge of its right to refuse to sign, it had by its clear and unequivocal conduct abandoned its right to insist on signing the Agreement. CUH's private reservation and intention that it should not be bound by the Agreements is irrelevant.

(f) As to clause 16 of the Agreements, which states that any waivers shall be made in writing:

(i) Clause 16 takes effect only upon acceptance of the Agreements, since it is a contractual provision conferring upon the parties a contractual right.

(ii) Since the Agreements are effective only upon acceptance, it follows that clause 16 would only be effective *after* CUH accepted the Agreements.

(iii) CUH cannot therefore rely on clause 16 to argue that any waiver of clause 12 must be made in writing.



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(g) Finally, CUH was estopped by convention from denying that it is bound by the Agreements and hence the Arbitration Agreements contained therein:

(i) The Applicants assumed that CUH consented to be a party to the Agreements from CUH's conduct of authorising payments due under the Agreements, being involved in the negotiations of the Supplementary Agreement, and signing the Settlement Agreement and making payment of the settlement sum. CUH thus acquiesced to the assumption by its conducts stated above.

(ii) CUH was clearly responsible for its expression of acquiescence to the common assumption as it intended the Applicants to rely on its expression of the common assumption that it was bound to the Agreements.

(iii) The Applicants relied on the common assumption to their detriment. CUG performed its obligations under the Agreements on the belief that CUH was bound. The Original Parties did not seek to take steps under the JV Agreement to remove CUH from the JV. CUH also benefited by avoiding a conflict with the Original Parties under the JV Agreement. The Applicants' reliance occurred in connection with the parties' mutual dealings.

75 CUH's submissions in response to the Applicants are as follows:

(a) The starting position is that CUH did not sign the Agreements. Accordingly, CUH submits that the *legal* burden of proof is on the Applicants to demonstrate that CUH was a party to the Agreements, and



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this burden remains even in the present application. Given that CUH did not sign the Agreements, it is necessary for the Applicants to demonstrate that there was clear and unequivocal conduct on CUH's part that supports the finding that CUH intended to be bound by the Agreements. Further, since clause 12 of the Agreements conferred upon CUH the right to require its signature on the Agreements before being bound, there must be clear and unequivocal words or conduct on CUH's part that it had waived this right. In this case, where one contracting party had actual knowledge of the counterparty's intention, an objective test is applied.

(b) On the facts, the Applicants failed to establish that CUH had, by its words or conduct, clearly and unequivocally intended itself to be bound to the Agreements. CUH relies on the following in support:

(i) The paramount consideration is the fact that CUH had objected to signing the Agreements on 19 November 2017 because it did not agree to the terms. The objection was communicated to CUG in three separate emails sent by CTM on 19 November 2017, 20 November 2017 and 2 December 2017. CTM sent these emails to CUG on the status of the Agreements and on CUH's authorisation of payments to be made pursuant to CUG's invoice. CUH relies on these three emails to make the point that a reasonable businessman in CUG's shoes, having sight of these emails, would have actual knowledge that CUH was not agreeing to be bound to the Agreement.

(ii) Other instances where CUG would have actual knowledge of CUH's refusal to sign the Agreements include: (a) the Westalis Meeting where no agreement was reached on the



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terms of the Agreements; (b) on 22 January 2020 when CUG emailed the JV Parties stating that it was important for CUH to complete and sign the Agreements; (c) on 23 January 2020 where CTM had informed CUG that CUH maintained its refusal to sign the Agreements; and (d) in the correspondence between CUG and CTM on 27 January 2020 and 15 February 2020.

(iii) The Original Parties would thus have actual knowledge of CUH's refusal to be bound by the Agreements, based on the numerous correspondence between CUH and the Original Parties indicating CUH's objections to signing the Agreement.

(c) In so far as the Applicants seek to rely on the instances of CUH's conduct which allegedly evinced CUH's acceptance that the Agreements were binding on it, CUH's responses are as follows:

(i) In relation to CUH's facilitation of payments by the JV to CUG through authorising the payment of money out of the JV Bank Account, CUH submits that the context in which authorisation was given must be borne in mind. CUH repeatedly stated its refusal to be bound by the Agreements. Further, CUH had obligations to its JV partners under the separate JV Agreement, and a commercial interest in the success of the JV Project. Accordingly, the fact that CUH assisted with the facilitation of payment to help its JV partners discharge a liability they had assumed to CUG, in circumstances where CUH retained a financial and commercial interest in the successful completion of the JV Project, is not sufficient to evidence a clear and unequivocal intention that CUH intended to enter into the Agreements with CUG.



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(ii) In relation to the First Arbitration, CUH argued that its participation in the First Arbitration must be seen through the lens of its objections to the payments made to CUG. Further, the settlement of the First Arbitration was concluded without prejudice to any of the allegations made in the First Arbitration. There was no express admission of liability or that CUH was party to the Agreements. Had the First Arbitration proceeded, CUH would have challenged the arbitral tribunal's jurisdiction. Finally, the mere fact that CUH had agreed to the terms of the Settlement Agreement did not mean that it consented to being bound to the Agreements.

(iii) In relation to CUH's attendance at meetings and participation in discussions, this must be viewed in the context of its repeated refusals to sign the Agreements and expressed disagreements to the terms thereof. They were simply part of CUH's attempts to facilitate CUG's service under the Agreements in the interest of the JVs.

(iv) CUH finally submits that the Applicants failed to specify exactly when CUH's conduct was alleged to have constituted acceptance of the Agreements. This supports their case that none of the conduct relied upon by the Applicants suffices to constitute a "clear and unequivocal" intention on CUH's part to be bound by the Agreements.

(d) CUH had consistently and repeatedly asserted that it was not bound by the Agreements and/or was not a party to the Agreements, and these were made known to the Applicants. Accordingly, the various conducts relied upon by the Applicants cannot suffice to constitute a



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clear and unequivocal waiver of the requirements for signature and/or any waiver to be in writing under clauses 12 and 16 of the Agreements respectively.

(e) Finally, in response to the Applicants' reliance on estoppel by convention, CUH submits the following:

(i) There was no common assumption between the parties that the Agreements were binding on all parties, including CUH. This was so given CUH's repeated communications to the Applicants that it was not bound by the Agreements, and the Applicants' knowledge of the same.

(ii) There is no evidence that CUG provided the services under the Agreements in reliance of the alleged common assumption. On the contrary, the evidence suggests that CUG continued performing the Agreements despite CUH repeatedly making its position clear that it was not bound. As for the Original Parties, CUH submits that the Original Parties subjectively knew at all times that CUH did not intend to be bound to the Agreements. Yet, they were prepared to enter into the Agreements with CUG despite knowing that CUH did not agree to CUG's proposed commission rate, and in this regard had indicated to CUG that they were prepared to take over CUH's scope of work. Any detriment suffered on the Applicants' part can thus only be attributed to their own doing.

***The issues in this application***

76 Against that background, I turn to consider the central issue in this application, *viz*, whether CUH is bound by the Agreements, and therefore the



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Arbitration Agreements contained within. As originally addressed in the Parties' written submissions, this is further broken down into the following sub-issues:

(a) Did CUH, by its conduct, accept the Agreements notwithstanding its refusal to sign them? If so, at which period throughout the parties' transaction did the acceptance take place (the "Acceptance Issue")?

(b) Did CUH, by its conduct, waive clauses 12 and 16 of the Agreements, such that it was not necessary for CUH to have given its waiver of clause 12 in writing (the "Waiver Issue")?

(c) Is CUH estopped by convention from denying that it was a party to the Agreements (the "Estoppel Issue")?

77 I deal with the Acceptance Issue below.

78 As for the Waiver Issue, I have already set out CUH's case above. In summary, CUH submits that whatever the position may be as a matter of general principle, it is legally impossible to conclude that a legally binding contract came into existence in the circumstances of the present case, because of the combination of: (a) the terms of Clause 12 which, in effect, require that the Agreements be signed by all the parties – including CUH – which, of course, never happened; and (b) Clause 16 which required all waivers to be made in writing which again never happened.

79 There is much debate in the authorities and learned textbooks as to the legal effect of such types of clauses and whether they can, in effect, be overridden by a subsequent oral agreement or other conduct of the parties which



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would otherwise give rise to a legally binding contract. In the event, I consider that it is unnecessary to consider this interesting debate. This is because, even if the Applicants were to succeed on the Waiver Issue, it would still be necessary for them to establish their case on the Acceptance Issue, *ie*, that CUH had, by its conduct, accepted the Agreements. If the Applicants are successful on the Waiver Issue, but fail on the Acceptance Issue, then their application in the present case will still fail. Without deciding the point, therefore, and for present purposes only, I am prepared to proceed on the basis, in favour of the Applicants, that neither Clause 12 nor Clause 16 (either alone or in combination) would operate to preclude what would otherwise be regarded as a legally binding contract between, on the one hand, the Applicants or at least CUG and, on the other hand, CUH. Thus, it is unnecessary to reach any conclusion on the Waiver Issue.

80 As for the Estoppel Issue, during the hearing, counsel for the Applicants conceded that their submissions on the Acceptance Issue and the Estoppel Issue, in particular on whether there was an assent to a common assumption between the parties (see *Tinkler v Revenue and Customs Commissioners* [2021] UKSC 39 at [39], [45] and [53]), stand and fall together. The Applicants accept that if their case on the Acceptance Issue fails, it follows that there would likewise be insufficient facts to establish the element of a common assumption that is to be inferred from conduct or silence on CUH's part. On this basis, it is unnecessary to consider the Estoppel Issue separately.

### *The applicable principles*

*Principles governing a tribunal's ruling on jurisdiction*

81 As I have set out above, the Applicants bring the present application under s 10(3) of the Act, which provides as follows:



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> **Appeal on ruling of jurisdiction**
>
> **10.**— …
>
> …
>
> (3) If the arbitral tribunal rules –
>
> (a) on a plea as a preliminary question that it has jurisdiction; or
>
> (b) on a plea at any stage of the arbitral proceedings that it has no jurisdiction,
>
> any party may, within 30 days after having received notice of that ruling, apply to the General Division of the High Court to decide the matter.

82 It is important to understand the applicable threshold when reviewing an arbitral tribunal's preliminary ruling on jurisdiction. To this end, it is well-established, perhaps even axiomatic, that the court conducts a *de novo* review when reviewing the tribunal's ruling on jurisdiction under s 10(3) of the Act. In other words, the tribunal's views and findings have no legal or evidential value and are not binding on the curial court: see *Jiangsu Overseas Group Co Ltd v Concord Energy Pte Ltd and another matter* [2016] 4 SLR 1336 ("*Jiangsu Overseas Group*") at [48]. At best, the tribunal's reasonings may be of persuasive value to the court: see *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [41].

83 Further, when an arbitration agreement is contained in a contract and the validity of the arbitration agreement is challenged on the basis that no binding contract was concluded, the validity of the arbitration agreement and the existence of the binding contract "stand or fall together" and the court may determine both issues on the basis of a full rehearing: see *Jiangsu Overseas Group* at [48].



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84 I turn next to discuss the applicable principles relating to the Acceptance Issue. As the Agreements are governed by English law, I shall consider the relevant principles under English law.

*The applicable principles on contract formation under English law*

85 The UK Supreme Court ("UKSC") in its leading decision of *RTS Flexible Systems Limited v Molkerei Alois Müller Gmbh & Company KG (UK Production)* [2010] UKSC 14 ("*RTS Flexible Systems*") restated the relevant principles relating to contractual formation under English law:

(a) English law generally adopts an objective theory of contract formation, ignoring the parties' subjective expectations and unexpressed mental reservations. Instead, the governing criterion is the reasonable expectations of honest sensible businessmen: *RTS Flexible Systems* at [50], citing *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25 ("*Percy Trentham*") at 27.

(b) Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations: *RTS Flexible Systems* at [45]. For the avoidance of doubt, I understand that the reference to communication between the parties by words or conduct will, of course, include the relevant "factual matrix" known to both parties prior to the making of the (alleged) contract.



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(c) Contracts may come into existence, not as a result of offer and acceptance, but during and as a result of performance. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations and difficult to submit that the contract is void for vagueness or uncertainty. That parties have performed the contract is a relevant factor pointing in the direction that parties entered into a contract: *RTS Flexible Systems* at [50] and [54], citing *Percy Trentham* at 27.

86 The fact that contracts may come into existence, not as a result of offer and acceptance but during and as a result of performance is, of course, a well-established trite law stretching back at least 150 years to the great case of *Brogden v Metropolitan Railway* (1877) 2 App Cas 666, as every law student will know. However, as other more modern cases show, it does not always follow that performance will, of itself, necessarily mean acceptance of a binding contract on terms of an unsigned draft contract: see, for example, *Picardi (t/a Picardi Architects) v Cuniberti* [2002] EWHC 2923 (TCC); *Arkley Homes North West Ltd v Cosgrave* [2016] 4 WLUK 27731. In each case, it is necessary to consider carefully the relevant evidence and whether it can properly be said from an objective point of view that there has been an unequivocal acceptance of a binding contract. In the absence of any special circumstances, silence and inaction by a party are, objectively considered, just as consistent with his having inadvertently forgotten about the matter; or with his simply hoping that the matter will die a natural death if he does not stir up the other party; or with his office staff, or his agents, or his insurers, or his solicitors, being appallingly slow; the court should therefore be slow to infer that a party has, by his conduct, accepted a contract: see *Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA* (*The Leonidas D)* [1985] 1 WLR 925 at 937, cited in *Front*



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*Carriers Ltd v Atlantic and Orient Shipping Corp (The Double Happiness)* [2007] All ER (D) 137 (Mar) at [46].

87 Where a contract prescribes signature as the mode of binding the parties to the contract, a draft agreement can nevertheless have contractual force if essentially all the terms have been agreed upon, and their subsequent conduct indicates this. However, the court will not reach this conclusion lightly: *Reveille Independent LLV v Anotech International* (UK) Ltd [2016] EWCA Civ 443 ("*Reveille Independent*") at [41], citing *RTS Flexible Systems* at [54]–[56]. It therefore follows that if a party has a right to sign a contract before being bound, it is open to it by clear and unequivocal words or conduct to waive the requirement and to conclude the contract without insisting on its signature: *Reveille Independent* at [41], citing *Oceanografia SA de CV v DSND Subsea AS (The Botnica)* [2006] EWHC 1360 at [94].

88 Finally, I should point out that while an offeree's words and conduct must be considered objectively in order to determine whether an offer has been accepted, this requirement is displaced where the offeror has actual knowledge of the offeree's intentions. In other words, even if it can objectively be said that an offeree has the requisite intention to be bound by the offer, the offeree would not be bound if the offeror had actual knowledge of the offeree's intention: see *Covington Marine Corp v Xiamen Shipbuilding Industry Co Ltd* [2005] EWHC 2912 (Comm) at [43(vi)]; *Chitty on Contracts* (H G Beale gen ed) (Sweet & Maxwell, 34th Ed, 2021) at para 4-004.



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***The Acceptance Issue***

89 Having set out the broad legal principles that are to be applied in this case, I turn to analyse the parties' submissions with regard to the Acceptance Issue.

90 Before doing so, it is important to bear in mind what seems to me two general points.

91 First, it is important to bear in mind the fact that the Agreements which lie at the heart of the present dispute involve a number of different parties. The fact that this is a multi-party dispute gives rise to somewhat unusual – perhaps unique – and potentially difficult arguments. Thus, as between CUG and CUH, the question as to whether CUH's conduct is to be regarded as giving rise to a legally binding contract must, in my view, depend upon what "crossed the line" between them. By "crossed the line", I mean that which is communicated between the parties by words or conduct as well as any relevant "factual matrix" known to both parties. However, as between the Original Parties and CUH, the submissions made on behalf of the Original Parties as to the question whether CUH's conduct is to be regarded as giving rise to a legally binding contract focus at least in some part upon what "crossed the line" not between CUG and CUH but between the Original Parties and CUH. If that latter focus is correct, I suppose that, in theory at least, the answer to those two questions might conceivably give rise to different answers. However, in reality, it seems to me that this cannot be so because the thrust of the application by the Original Parties is, in effect, that CUH is properly regarded as being a party to the Agreements including the Arbitration Agreements, *ie*, a party together with not only the Original Parties but also with CUG.



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92 I mention these matters because in preparing this Judgment, I confess that I have had some difficulty in disentangling or at least separating the various submissions made on the part of, on the one hand, CUG, and, on the other hand, the Original Parties. Be that as it may, in light of my conclusions as set out below, the potential difficulties I have mentioned above would seem to fall away. However, when considering the relevant conduct on the part of CUH said to give rise to a legally binding contract, it is, as I have said, important to bear the foregoing in mind.

93 Second, it is also important to bear in mind that the present challenge concerns the jurisdiction of the Tribunal, which itself turns on the question of whether there is a binding arbitration agreement. In that context, when considering the conduct of CUH in relation to, for example, the payments made to CUG, it is not obvious that such conduct is necessarily to be treated as giving rise to unequivocal acceptance by CUH of any arbitration agreement.

94 In considering the Parties' submissions, the starting point is, of course, that CUH never signed the Agreements and that the Applicants' case rests entirely on what they say was relevant conduct by CUH.

95 In principle and consistent with the authorities cited above including *RTS Flexible Systems* at [45], I readily accept that the absence of a signature to a written agreement does not, of itself, preclude the coming into existence of a legally binding contract; the relevant conduct on the part of the parties which "crosses the line" may nevertheless justify a conclusion that the parties are to be regarded as having entered a legally binding contract on the terms of such written agreement. Needless to say, I bear well in mind the cautionary words in *Reveille Independent* at [41], citing *RTS Flexible Systems* at [54]–[56], that where a contract prescribes signature as the mode of binding the parties to the



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contract, the court will not reach this conclusion lightly. However, the appropriate conclusion ultimately rests on the particular conduct in question, ignoring the subjective expectations and the unexpressed mental reservations of the parties and focusing instead on what "crosses the line" and the reasonable expectations of honest sensible businessmen.

96 As referred to above, there is no doubt that not only did CUH not sign the Agreements in November 2017 when they were signed by, on the one hand, CUG and, on the other hand, the Original Parties, but that CUH made it absolutely plain to all concerned, both CUG and the Original Parties, that it was not prepared to do so in particular because it objected to the fee structure claimed by CUG.

97 Moreover, as appears from the long email dated 19 November 2017 (see [27] above), it is also plain that CUH's position was communicated to and well understood by not only the Original Parties but also CUG; and that this gave rise to a major problem. In my view, the terms of that email provide an important backdrop to subsequent events. In particular, the last part of that email emphasises that there would be "continued pressure inside the JV"; and that although the Original Parties will "pressure" CUH, they will, if necessary, in the "worst case scenario" be able to trigger mechanisms internally within the JV structure so as to prevent CUH from blocking payments from the JV to CUG. In effect, the Original Parties were giving appropriate assurances to CUG that CUG would get paid, *regardless* of CUH's position.

98 The email from Mr W of CTM to Mr M of CUG on 2 December 2017 following the phone call which apparently took place earlier that day (see [33] above) is also important. It is plain that CUG was well aware that CUH had still not signed the Agreements and that CUH's position remained unchanged.



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Further, the email informed CUG in clear terms that: (a) CTM had issued an official letter requiring CUH to "cure" its material breach; and (b) CTM had taken steps internally amongst the JV Parties to release payment to CUG upon receipt of CUG's invoices.

99 As referred to above, it was submitted (at least originally) on behalf of CUG that the Westalis Meeting was important because it provided evidence of CUH's intent to be bound by the Agreements. However, as I have already explained, the evidence as to what supposedly happened or what was said during the Westalis Meeting is scanty in the extreme (see [37] above). I would tend to agree with the Tribunal that "by far the greater likelihood is that [CUH] went, as it submits, to try and reach terms which it would agree to, would sign up to and be bound by". In any event, the evidence falls far short of any agreement or conduct by CUH which might give rise to a legally binding contract.

100 The next events relied upon by the Applicants are the series of payments made by the JV between 19 February 2018 and 27 October 2018. In particular, I note the submission made by the Applicants that the first payment is of particular importance because it related to progress payments having been made to the JV in 2017, prior to the contracting date of the Agreements. Further, clause 2 of the Agreements provided that payment obligations retroactively applied to any progress payments made from 1 January 2017, regardless of the contracting date. The Applicants thus submit that CUH's authorisation of the payment to CUG is, in effect, compliance on CUH's part with the obligation provided under clause 2 of the Agreements.

101 In one sense, all these payments are the highpoint of the Applicants' case in particular because: (a) this is not a case of a single or isolated payment but a series of payments over a period of time; (b) the invoices submitted by CUG



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expressly referred specifically to the Agreements and were addressed to all the JV Parties including CUH; (c) the payments are consistent with the full amounts due by the JV to CUG under the Agreements; and (d) there is no doubt that all such payments were in fact duly authorised by CUH.

102 Further, all these payments were made without any apparent objections or qualifications on CUH's part at the actual time of payment. According to CUG and adopting the relevant objective legal test, any reasonable person in its position would obviously have regarded CUH as having agreed by conduct to be bound by the terms of the Agreements including the Arbitration Agreements contained therein. According to CUG, any other conclusion would be contrary to the reasonable expectations of honest sensible businessmen in the position of CUG.

103 I confess that, at first, I was much impressed by that argument, *ie*, that by virtue of such conduct, CUH must be regarded as having agreed to the terms of the Agreements and become legally bound thereby. There is perhaps an interesting issue as to exactly when such a legally binding contract might have come into existence, *ie*, was it when the first payment was made, or perhaps the second, or the third and so on. However, as I understand from the Applicants' submissions, this point is academic because the payments continued until 27 October 2018 and a legally binding contract must have come into existence at the very least by that date.

104 However, on reflection, it is my conclusion that, whilst superficially attractive, such an argument is flawed when focus is made, as it must be, on what "crossed the line".



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105 Considering first the position as between CUG and CUH, what crossed the line was simply the series of invoices issued by CUG to the JV and the payments by the JV to CUG. There was no actual payment at all directly by CUH itself to CUG. Further, although it is indisputable that CUH did in fact authorise the payments on behalf of the JV to CUG, it is common ground, as CUG conceded, that CUG was not aware that such payments were in fact authorised by CUH. Thus, Mr G candidly acknowledged in his second affidavit that, whilst CUG was not a JV Party, it "would not have had actual knowledge as to which of the JV Parties had given authorisation for each payment". Rather, Mr G's evidence is that CUG "*reasonably assumed* that [CUH] had authorised payments to [CUG] and paid its share of the fees" [emphasis added].

106 Mr G's assertion in his second affidavit that such an assumption was *made* and was reasonable appears to be founded on three points, *viz*:

(a) The fact that the payments were made.

(b) The fact that at no point in time did CUH communicate that it was not agreeable to the payment of the invoices or that it was withholding payment of its share of the fees, although it had every opportunity to do so.

(c) The fact that, in the event, CUH did, in fact, authorise such payment even though CUG did not know at the time that this was indeed the case.

107 I take each of these points in turn.

108 As to the first point, I fully recognise that there is no doubt that CUH did in fact authorise each of these payments. However, and at the risk of



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repetition, this was *not known* by CUG at the time. I am prepared to assume in favour of CUG that if, from an objective point of view, it could be said that it was reasonable for CUG to assume that such payments had been authorised by CUH, then such conduct would (potentially) justify a conclusion that CUH was to be regarded as being legally bound by the Agreements including the Arbitration Agreements. However, on the evidence, I am not persuaded that such an assumption (even if made in fact) was reasonable in the circumstances.

109 I reach that conclusion in light of, in particular, the two emails dated 19 November 2017 and 2 December 2017 which I have already referred to at [27] and [33] above. In my view, these emails made plain to CUG that, even if CUH maintained its position and continued to refuse to sign up to the Agreements, the payments due to CUG under the Agreements as signed by the Original Parties would be made in full and that, if necessary, internal JV mechanisms would be triggered to ensure that this happened. On this basis, it seems to me quite impossible to say that it was reasonable for CUG to assume that CUH had, in fact, itself authorised the payments. On the contrary, from an objective viewpoint, it was entirely possible (or at the very least equally possible) that CUH's position remained unchanged and that the Original Parties had indeed activated the internal JV mechanisms (or even made other possible arrangements) to enable the JV to make the payments to CUG itself without CUH's active approval. At the very least, there is no conduct (let alone any unequivocal conduct) on the part of CUH which crossed the line, and which might justify a reasonable assumption on the part of CUG that CUH was agreeing to be bound by the Agreements including the Arbitration Agreements.

110 Further, it is perhaps noteworthy that throughout the period of time when these payments were being made by the JV, *ie*, from February to October 2018, the Agreements remained unsigned by CUH; and there is no evidence to suggest



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that CUG made any contact with CUH to seek to persuade CUH to sign the Agreements.

111 In considering this part of the case, I have not addressed the question as to whether CUG in fact made the assumption that CUH had authorised the payments. In truth, whatever CUG subjectively assumed would seem irrelevant as a matter of law. However, so far as may be relevant, and despite Mr G's assertions (which unfortunately were never tested in cross-examination), I am far from convinced that any such assumption was, in fact, ever made. In my view, it would seem at least equally possible that CUG was simply prepared to let sleeping dogs lie: provided that CUG received the relevant payments from the JV (as it did), CUG was, for the time being at least, content not to stir the pot or itself press CUH for its signature. That would seem more consistent with subsequent events which I consider later in this Judgment.

112 Second, it is certainly correct that, on the evidence, CUH did not, at least between February to October 2018 communicate to CUG that it was not agreeable to the payment of the invoices or that it was withholding payment of its share of the fees. However, there is no doubt that CUH's refusal to sign the Agreements had been communicated in forceful terms to CUG at the end of 2017. As such, CUG must have been well aware of that position in January 2018 prior to the Westalis Meeting. On the evidence, I have already rejected the case (originally) advanced by CUG that the Westalis Meeting in January 2018 provided evidence of CUH's intent to be bound by the Agreements (see [99] above). The absence of any agreement by CUH to be bound by the Agreements, therefore, provides the important backcloth to the series of payments made by the JV from February 2018 onwards. Apart from the fact of such a series of payments, there is nothing else crossing the line that might reasonably indicate to CUG that CUH had suddenly changed its mind. As stated above, such



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payments were made by the JV, *not* CUH. To repeat, there is no conduct (let alone any unequivocal conduct) on the part of CUH which crossed the line, and which might justify a reasonable assumption on the part of CUG that CUH was agreeing to be bound by the Agreements including the Arbitration Agreements.

113 The fact that the payments were made is, of course, important because that is something that obviously "crossed the line". However, again at the risk of repetition, so far as CUG was concerned, such payments were made by the JV – not by CUH – and CUG was not actually aware that CUH had authorised such payments. At most, there was, so far as CUG was concerned, silence on the part of CUH. I fully recognise that in certain circumstances, a positive inference may be inferred from silence. However, in the present circumstances, where CUG had, in effect, been given assurances that the JV would make the necessary payments regardless of CUH's position by, if necessary, activating internal JV mechanisms, I do not consider that it is relevant, from an objective point of view, to have regard to the fact that such payments were in fact authorised by CUH.

114 The third point relied upon by CUG is the fact that CUH did, in fact, authorise such payments. I have already dealt with this point (see [103]–[104] above). Again, I acknowledge that this point appears to be superficially attractive. However, in my view, it is flawed if only because, as is common ground, the fact that such payments were authorised by CUH was unknown to CUG. In other words, such fact did not "cross the line" and cannot therefore be a relevant fact in deciding whether a legally binding agreement came into existence.

115 There is then the further argument raised by CUH as against CUG that the fact that CUH assisted with the facilitation of the payments to help the



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Original Parties discharge a liability they had assumed to CUG is not sufficient to evidence a clear and unequivocal intention that CUH intended to enter into the Agreements with CUG. CUH's argument was that its conduct was explicable on the basis of the obligations to its JV partners under the separate JV Agreement and its commercial interest in the success of the JV Project. To the extent that such an argument rests on CUH's subjective intent or state of mind, I accept CUG's submission that such an argument is legally irrelevant. In any event, I have considerable doubts as to whether such an argument is of much, if any, relevance, at least as between CUG and CUH.

116 So far, I have considered the position specifically between CUG and CUH. To a large extent, much, if not all, of what I have said in that context applies equally to the position as between the Original Parties and CUH. However, as I have already indicated, the positions between, on the one hand, CUG and CUH and, on the other hand, the Original Parties and CUH are slightly different. In particular, it is important to note that the Original Parties submitted that CUH was or, at least, must have been aware that not only CUG but also the Original Parties were acting under the belief that CUH was under a binding obligation to them; that each time CUH authorised a payment, it conveyed an unspoken but unequivocal message not only to CUG but also to the Original Parties that CUH considered itself bound by the Agreements; and that CUH did nothing to dispossess not only CUG but also the Original Parties of the notion that this was for its own commercial purposes.

117 In this context, the Original Parties relied upon a number of both English and Singapore authorities including *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR(R) 258 at [79] and *Jiangsu Overseas Group* at [39] and [40] in support of the submission that CUH cannot have it "both ways" or "have its cake and eat it". Indeed, the Original Parties submitted



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that CUH's conduct smacked of dishonesty; that the law will not countenance such conduct because it ran counter to the court's underlying policy that "in commercial dealings, the reasonable expectations of honest, sensible business persons must be protected": see *Reveille Independent* at [42]. I readily accept that that is the court's policy.

118 However, on the basis of the limited evidence before me, I do not accept that CUH's conduct smacks of dishonesty. Here, CUH had made it absolutely plain to the Original Parties from the outset that it was not prepared to sign the Agreements. There is no positive evidence that CUH's position changed during the period between February and October 2018 and indeed subsequent events (which I consider later in this Judgment) would seem to confirm that position at least in part.

119 It is certainly important to note that unlike CUG, the Original Parties were, of course, obviously aware that CUH authorised the payments which were made by the JV to CUG during the period February 2018 to October 2018. I fully recognise that that is an important – indeed stark – difference between, on the one hand, CUG and CUH and, on the other hand, the Original Parties and CUH.

120 However, it is plain from the emails sent by the Original Parties to CUG in November 2017 that the Original Parties were intending to exert "maximum pressure" on CUH to stop CUH from blocking the JV account to enable payments to be made to CUG (see [28] and [33] above). The evidence with regard to the communications between CUH and the Original Parties thereafter and, in particular, during the period from February to October 2018 is extremely thin. However, there is no reason to suppose that CUH's decision to authorise



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the payments was not the result of such pressure although I accept that that is perhaps a matter of some speculation.

121 In any event, as between the Original Parties and CUH, there can be no doubt that, as between those parties, there was an obvious financial and commercial interest in the successful completion of the JV Project and that such mutual interest was an important factor which "crossed the line" or was, at least, a relevant part of the factual matrix between those parties. Bearing that in mind, it does not seem to me to follow that CUH's conduct in authorising the payments during the period between February and October 2018 necessarily conveyed an unspoken but unequivocal message to the Original Parties that CUH considered itself bound by the Agreements. In particular, the fact that CUH decided to authorise a particular payment or even a series of payments alongside the Original Parties does not, in my view, unequivocally amount to a legally binding contract to allow the JV to make any future payments, still less to justify a conclusion that CUH thereby became legally bound to the Agreements including the Arbitration Agreements which would involve not only obligations to the Original Parties but, most importantly, separate and direct obligations to CUG. Again, it seems to me that CUH's conduct was, at least equally consistent with an (objective) intention not to stir the pot at least for the time being.

122 I should emphasise that in this context, I bear well in mind the evidence of Mr P that from February 2018 to mid-2019, the Original Parties believed that CUH had dropped its initial objections and acquiesced to the Agreements. The difficulty with such evidence is that, once again, it was never tested in cross-examination. However, I am far from convinced that this was indeed the case. As with CUG, it seems to me at least equally possible that the Original Parties were content not to stir the pot or to press CUH for its signature. Again, that would seem more consistent with subsequent events which I consider later in



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this Judgment. In any event, the Original Parties' actual subjective belief is ultimately irrelevant to the question as to whether a legally binding contract came into existence.

123 For the sake of completeness, I should also mention that the Original Parties sought to rely upon a further discrete point to the effect that: (a) as a matter of Suburbian law, if CUH was not bound by the Agreements, it would have been obliged to obtain special approval of its Board of Directors to make (or, I assume, authorise) the payments; and (b) since CUH never did obtain such special approval, it must necessarily follow that CUH must have considered itself legally bound or obliged to make (or, I assume, authorise) the payments. As to this point, it is important to note that: (a) it was not advanced by CUG; and (b) Mr H has denied any breach of Suburbian law and disputed the need to get the Board of Directors' approval. In any event, it seems to me that any failure to obtain specific Board approval is ultimately irrelevant because, at most, it concerns procedures internal to CUH and did not cross the line.

124 It is therefore my conclusion that there is nothing in CUH's conduct prior to the end of October 2018 which justifies the conclusion that CUH is to be regarded as being a party to and bound by the Agreements including the Arbitration Agreements.

125 I turn then to consider CUH's conduct post-October 2018 as relied upon by the Applicants. I can deal with such events more briefly.

126 First, the Applicants rely on CUH's participation in the preparation of the Supplementary Agreement. In my view, there is nothing in this point. I have already set out the relevant history leading up to the preparation of the draft Supplementary Agreement (see [43]–[45] above). In summary, it was prepared



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in circumstances when CUH was objecting to the payments to CUG which conduct is, if anything, inconsistent with CUH's acceptance of the Agreements. In any event, the draft Supplementary Agreement was never signed.

127 Second, the Applicants rely on the fact that CUH defended the First Arbitration, chose to sign the Settlement Agreement to the First Arbitration and also made payment of its share of the Settlement Sum without any qualifications nor any objections that it was settling the First Arbitration without prejudice to its position that it was not a party to the Agreements. In my view, these points do not assist the Applicants. As submitted by CUH, had the First Arbitration proceeded, it would have been open to CUH to challenge the issue of jurisdiction. In this regard, I agree with the Tribunal's observations in paragraph 166 of the Partial Award as follows:

> … the occasion to challenge the jurisdiction of the Tribunal had not arisen by the time [CUH] was persuaded and decided not to fight and to settle instead; and that nothing in its conduct in response to the claims in arbitration, can objectively be taken as unequivocally evincing its acceptance of being bound by the Agreements

128 As for the Settlement Agreement itself, there was no express admission of liability, still less that CUH was party to the Agreements. On the contrary, the Settlement Agreement was concluded without prejudice to any of the allegations in the First Arbitration. As such, it seems to me impossible to contend that CUH's conduct in entering into the Settlement Agreement or in authorising the payment of the monies by the JV pursuant to the Settlement Agreement can be construed as an acceptance of the terms of the Agreements, including the Arbitration Agreements. Again, I agree with the conclusions reached by the Tribunal as stated in paragraph 165 of the Partial Award as follows:



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> [CUH's] conduct before the [First Arbitration] was commenced, remained consistent and clear in sending a message that it did not regard itself as under an obligation to pay. It was refusing to pay, which, as it had made clear by refusing to sign the agreements, it was not bound to do so; and it would not engage with [CUG]. It was being held responsible for the failure of the JV to pay, because it was now unwilling to authorise payments. The Tribunal accepts that [CUH's] commercial motives for securing performance from the [CUG] for the good of the JV, the [JV Project] and in its own interests nevertheless remained the same. It accepts [CUH's] submissions … that entering into negotiations to settle the dispute with the JV, whilst still refusing to be bound by the Agreements, and not voluntarily participating in performance of them at this time, did not objectively evince the directly opposite intention to be bound by them.

129 Third, the Applicants seek to rely upon the fact that at various times CUH, together with the Original Parties, engaged in discussions with CUG concerning CUG's performance of the Agreements and making further payment to CUG, and that CUH was also involved in the preparation of documents dealing with details of the DVNs and the proposal of a timeframe for payments of the DVNs.

130 As to such matters, the threshold point to make is that whatever internal discussions may have taken place between CUH and the Original Parties are ultimately irrelevant to the position as between CUH and CUG unless they crossed the line between CUH and CUG.

131 Of the four main matters relied upon by the Applicants, the first is the Westalis Meeting in January 2018 which I have already addressed above (see [37] above). As I have stated, the evidence as to what happened in that meeting does not, in my view, support the Applicants' case but rather the contrary.

132 The second concerns the communications between CUH and CUG with regard to the potential meeting with the Osterian Minister which I have also



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addressed briefly above (see [38] above). Again, I do not consider that such communications assist the Applicants' case.

133 The third concerns the discussions between CUG, the Original Parties and CUH with regard to the preparation of the draft Supplemental Agreement from November 2018 to December 2019 (see [44]–[45] above). Again, I have dealt with this above and concluded that it does not assist the Applicants.

134 Fourth, the Applicants rely upon the steering committee meeting between the JV Parties on 23 September 2019 (see [52] above). For present purposes, it is sufficient to note that according to the (translated) minutes of that meeting, CUH's position was that it did not accept the contents of the arbitration notice and disagreed with the payment of outstanding fees. Again, this does not seem to support the Applicants' case but, if anything, is consistent with CUH's position.

135 Finally, it is, in my view, important to note the communications in January 2020, *viz*, the email from CUG dated 22 January 2020, CTM's response on 23 January 2020 and CUG's further email dated 27 January 2020 which I have already referred to above and do not propose to repeat (see [56]–[58] above). For present purposes, it is sufficient to state that such exchanges would seem, at least in part, inconsistent with the Applicants' case that CUH was to be regarded as legally bound by the Agreements including the Arbitration Agreements contained therein. However, I fully recognise that these exchanges come somewhat late in the day and that, as a matter of analysis, if in truth the proper conclusion were that CUH became legally bound to the Agreements at some earlier stage by reason of its conduct, such exchanges are (or at least may be) legally irrelevant; and that, to that extent, such exchanges are perhaps ultimately of limited value.



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**Conclusion**

136 For all these reasons, it is my conclusion that CUH did not by its conduct become bound by the Agreements or the Arbitration Agreements contained therein and that the present applications should therefore be dismissed.

137 It follows that the Applicants must pay the costs of the present proceedings. I will invite the Parties to agree on the quantum of such costs and the form of any Order to be made by the Court within 21 days of the date of this Judgment, failing which the Parties should serve written submissions with regard thereto limited to ten pages within 14 days thereafter. Unless otherwise ordered, the Court will deal with such issues on paper.

Sir Henry Bernard Eder
International Judge

Toh Wei Yi and Jaclyn Leong Shan Wei (Harry Elias Partnership LLP) for the first applicant;
Abraham Vergis SC, Zhuo Jiaxiang and Vanathi Eliora Ray (Providence Law Asia LLC) for the second to fourth applicants;
Prakash Pillai, Koh Junxiang and Charis Toh Si Ying (Clasis LLC) for the respondent.



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