Neutral Citation Number: [2023] EWHC 316 (Comm)

Case No: CL-2022-000006

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**COMMERCIAL COURT**

Royal Courts of Justice, Rolls Building
Fetter Lane, London, WC4A 1NL

Date: 15/02/2023

**Before** :

**MR JUSTICE BRIGHT**

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**Between :**

**SUI NORTHERN GAS PIPELINES LIMITED**

**Claimants**

**- and -**

**NATIONAL POWER PARKS MANAGEMENT COMPANY (PRIVATE) LIMITED**

**Defendants**

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Khawar Qureshi KC (instructed by Collyer Bristow LLP) for the Claimants
Toby Landau KC and Peter Webster (instructed by Linklaters LLP) for the Defendants

Hearing dates: 6 February 2023

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# Approved Judgment

This judgment was handed down remotely at 10am on 15 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE BRIGHT

## Mr Justice Bright:

1. This judgment concerns an application by the Claimant ("SNGPL") under Section 68 (2)(a), (b) and (d) of the Arbitration Act 1996 (but primarily Section 68(2)(a)), challenging two Awards in related LCIA arbitrations, both dated 12 December 2021. SNGPL seeks to have the Awards set aside, alternatively remitted to a differently constituted Tribunal. The application is resisted by the Defendant ("NPPMCL"), which was the counterparty to both references.

2. The application was supported by the witness statement of Shala Abdul Ghani, dated 6 January 2022. NPPMCL relied on the responsive witness statement of Waleed Khalid dated 29 June 2022.

3. SNGPL was represented by Mr Khawar Qureshi KC, NPPMCL by Mr Toby Landau KC. I am grateful to them both for the considerable assistance that they provided.

## Background

4. The disputes arose out of two Gas Supply Agreements dated 29 October 2016 ("the GSAs"), by which SNGPL agreed to supply and NPPMCL agreed to take or pay for gas to be used at two power plants operated by NPPMCL (known as the Balloki plant and the Haveli plant). The GSAs are in materially identical terms. Each had a term of 15 years, extendable for a further 15 years upon NPPMCL's notice.

5. The GSAs were "take or pay" agreements, meaning that NPPMCL was obliged either to (a) take a specified quantity of gas during every month, in which case it would pay the contractual price, or (b) not take gas but pay anyway, in which case SNGPL could divert the gas not taken to other customers, with NPPMCL being entitled to be reimbursed the sums received by SNGPL from those other customers (less certain costs).

6. The critical provisions in each GSA are Sections 3.6 and 9.1, plus a definition relevant to interest. These provide as follows:

> " Section 1.1 Definitions…
>
> Delayed Payment Rate" – One month KIBOR plus two percent (2% per annum), compounded semi-annually, calculated for the actual number of Days which the relevant amount remains unpaid…"
> …
>
> "Section 3.6 Diversion of Gas and Take or Pay
>
> (a) From and after the Commercial Operations Date GT1 and during a Month in the Delivery Period, the Buyer shall take and if not taken pay for the portion of the Firm Gas Allocation pertaining to that Month (the "Monthly Take-or- Pay Quantity") divided by number of days in that Month multiplied by the difference between the number of the days in that Month and (i) the number of days (or fractions thereof) of Force Majeure

> Events declared by the Seller or the Buyer, (ii) the number of days (or fractions thereof) of non- delivery of Gas by the Seller in that Month for any reason, including a breach or default by the Seller or maintenance undertaken by the Seller pursuant to Section 12.1, and (iii) the number of days of Scheduled Outages in that Month notified to the Seller pursuant to Section 12.2 (in relation to the maintenance and scheduled outages, each to the extent not already catered for under the Firm Gas Order).
>
> (b) In case Monthly Take-or-Pay Quantity is not fully utilized by the Buyer in the Complex, the Buyer may request the Seller to divert any unutilized Monthly Take-or-Pay Quantity to any other power plants (after seeking their consent) and the Seller shall arrange for such diversion at the cost and risk of Buyer subject to available capacity in its pipelines. Any amounts received by the Seller from the other power plants in consideration of supply of the diverted Gas shall, after making deduction of any additional charges incurred by the Seller in arranging the sale, be paid by the Seller to the Buyer within 3 Business Days of receipt of such amounts (along with a copy of the invoice evidencing the selling price of the unutilized Monthly Take-or-Pay Quantity). If other power plants refuse or the Seller due to technical constraints or any other reasons is unable to supply the diverted Gas to the other power plants, the Seller shall have the right to supply such Gas to any of its consumers and the amounts recovered from those consumers shall, after making deduction of any additional charges incurred by the Seller in arranging the sale, be paid by the Seller to the Buyer within 3 Business Days of receipt of such amounts (along with a copy of the invoice or any other document evidencing the selling price of the unutilized Monthly Take-or-Pay Quantity)."
>
> …
>
> "Section 9.1 Billing
>
> The Seller's bills for the supply of Gas during a Billing Cycle, including any adjustments under Section 9.7, shall be furnished to Buyer on the first Business Day following each Billing Cycle. Invoices for Monthly Take or Pay Quantity shall be billed monthly."

7. Both plants commenced operations on different dates in 2017. NPPMCL did not take the specified quantity of gas in every month. SNGPL did not issue any invoices in relation to the gas not taken until May 2018, when, for each plant, a single invoice was issued in relation to several months in 2017 and 2018. These invoices did not seek payment of the full price of the quantities of gas not taken. Instead, each invoice sought an amount calculated by SNGPL as reflecting the difference between the full price and the sum realised by diverting the gas to other customers who paid on a different (lower) tariff. This was referred to in the arbitrations as the "Tariff Differential Loss".

8. The Tariff Differential Loss was, in effect, the inverse of the sum that Section 3.6(b) provides should be paid back to NPPMCL. Section 3.6 provides that NPPMCL should pay up-front for gas not taken, then be reimbursed if and when SNGPL sells such gas to other customers. In the event, SNGPL did not invoice in full and then reimburse. Instead, it invoiced only for what it contended was the net difference between the full price and the sum that would otherwise have been reimbursed. Furthermore, it did so some months later and by way of a single invoice for each plant, covering November 2017 to March 2018.

9. NPPMCL did not pay these invoices. On 7 June 2018, SNGPL encashed a Gas Supply Deposit, which NPPMCL had given under the terms of the GSA.

## The references to arbitration and the Award

10. The dispute was referred to LCIA arbitration on 11 October 2019. There being two GSAs, there were two references, the same Tribunal being appointed in each. In each, the Claimant was NPPMCL, which sought a declaration that SNGPL had not been entitled to issue the May 2018 invoices (and others) and an order that SNGPL should repay the monies drawn encashed from the Gas Supply Deposit. It also claimed interest on those monies, at the Delayed Payment Rate of KIBOR +2%.

11. SNGPL resisted this claim and brought its own counterclaim. That counterclaim was not merely the mirror-image of NPPMCL's claim. As well as pleading its case as to the May 2018 invoices, SNGPL also set out a case on various further invoices, relating to months after March 2018, up to and including August 2020. I was not shown all these later invoices, but it is apparent from those that were shown to me that many of them covered only one month, and were issued within days of the end of the relevant month – sometimes on the very first day of the next month. In this respect they differed significantly from the May 2018 invoices, each of which covered multiple months and was issued a substantial period after the event.

12. SNGPL counterclaimed for payment in respect of the aggregate arrears under both the May 2018 invoices and these further invoices (having taken into account the sums realised by diverting gas to other customers). It also sought declaratory relief, to the effect that NPPMCL was obliged to pay future invoices in accordance with the GSA.

13. The parties exchanged extensive pleadings and pre- and post-hearing submissions and the Tribunal heard evidence from numerous witnesses and oral opening and closing submissions over 6 days, in September 2021. I was taken through the pleadings and written submissions with some care both by Mr Qureshi and by Mr Landau. It is striking that, even though the Defence and Counterclaim had dealt with numerous invoices, the only invoices that received any real attention in the other pleadings and in the written submissions were those of May 2018. I was not taken through the evidence in the same detail, but my impression is that this was also the case with the evidence.

14. The Tribunal issued Awards in each reference on 12 December 2021. The two Awards were materially identical, so I focus on the Award relating to the Balloki plant.

15. In the Award, after the usual introductions, the Tribunal summarised the issues identified by the parties. The Tribunal then set out a detailed summary of the position

taken by NPPMCL on each issue (running over 8 pages), followed by a similarly detailed summary of the position taken by SNGPL (running over 9 pages).

16. Many of the points being run by both parties are not relevant to this application, but it is relevant that NPPMCL advanced a case that the May 2018 invoices were not consistent with the GSA, and that, having delayed for a substantial period before issuing the invoices, SNGPL was estopped from relying on them. SNGPL said that the May 2018 invoices were consistent with the GSA and denied that it had waived its rights in relation to the May 2018 invoices. This part of the case required both parties to make submissions about Section 3.6 of the GSA.

17. The Tribunal set out its analysis in relation to Section 3.6.a of the GSA at paragraphs 131 to 146 of the Award, which I reproduce in full as an Appendix to this judgment. This culminates in the following conclusion in paragraph 142:

> "… the Respondent's failure Monthly to invoice for Take-or-Pay quantities pursuant to Sections 3.6 and 9.1 meant that the Claimant was unable to discharge any Take-or-Pay obligation that it might have had under the GSA."

18. The dispositive section of the Award is in paragraph 200, which is also reproduced in full in the Appendix to this judgment. At paragraph 200.a, the Tribunal declared that:

> "…the GSA requires the Respondent to issue invoices for the Monthly Take-or-Pay Quantity on a Monthly basis."

19. Then, and apparently in the light of that declaration, at paragraph 200.b the Tribunal declared that SNGPL's invoices were issued in contravention of the GSA, and at paragraph 200.c-d that SNGPL was not entitled to recover the amounts that it sought and had not been entitled to draw down from the Gas Supply Deposit in satisfaction of these invoices.

## The law on s. 68 challenges

20. The starting-point is the decision of the Privy Council in *RAV Bahamas v Therapy Beach Club Inc* [2021] UKPC 8, [2021] AC 907. That was a case on the kind of challenge provided for in Section 68(2)(d) of the Arbitration Act 1996. At [42] the Privy Council observed:

> "There is a degree of overlap between the considerations relevant to whether there is an "issue" and whether it has been "put to" to the tribunal. It is clear that this does not require the issue to have been pleaded or included in a list of issues. It is necessary to consider the arbitration proceedings as a whole, including the pleadings and the written and oral submissions. Having done so, in general, what is required is that the tribunal's attention has been sufficiently clearly drawn to the issue, as one which it is required to determine, that it would reasonably be expected to deal with it."

21. At [49] the Privy Council approved the following dictum from the judgment of Popplewell J in *Reliance Industries Ltd v Union of India* [2018] EWHC 822 (Comm) at [32]:

> " It is enough if the point is "in play" or "in the arena" in the proceedings, even if it is not precisely articulated. To use the language of Tomlinson J, as he then was, in *ABB AG v Hochtief Airport* [2006] 2 Lloyd's Rep 1 at [72], a party will usually have had a sufficient opportunity if the "essential building blocks" of the tribunal's analysis and reasoning were in play in relation to an issue, even where the argument was not articulated in the way adopted by the tribunal. Ultimately the question which arises under s. 33(a), whether there has been a reasonable opportunity to present or meet a case, is one of fairness and will always be one of fact and degree which is sensitive to the specific circumstances of each individual case. That applies to points of construction as much as to other points in dispute."

22. If the Tribunal is interested in a point that is not "in play" or "in the arena", the Tribunal's duty to act fairly under Section 33(1)(a) has the consequences noted long ago by Bingham J *in Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14, at p. 15 (approved by the Privy Council in *RAV* at [46]):

> "…the rules of natural justice do require . . . that matters which are likely to form the subject of decision, in so far as they are specific matters, should be exposed for the comments and submissions of the parties. If an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission then again it is his duty to give the parties a chance to comment. If he is to any extent relying on his own personal experience in a specific way then that again is something that he should mention so that it can be explored. It is not right that a decision should be based on specific matters which the parties have never had the chance to deal with, nor is it right that a party should first learn of adverse points in the decision against him."

23. These principles were applied recently in the context of Section 68(2)(a) by Bryan J in *PBO v DONPRO* [2021] EWHC 1951 (Comm) and again by Butcher J in *Ducat Maritime Limited v Lavender Shipmanagement Incorporated* [2022] EWHC 766 (Comm).

## SNGPL's principal challenge

24. The principal challenge of SNGPL, which took up nearly all the written and oral submissions, related to the Tribunal's approach to Section 3.6.a. SNGPL's Arbitration Claim Form did not set out the basis of the challenge, instead referring to the witness statement of Ms Ghani. Her witness statement highlighted paragraphs 142 and 143 of the Award – described by her as the "central finding" – which, she said, was a finding

made on the basis of issues not put to the Tribunal, in that (she said) (a) NPPMCL's case on this had been confined to estoppel and did not raise any issues of construction of Section 3.6.a (or, at least not the relevant issues) and (b) the specific issue of construction on which the ruling was based was the Tribunal's interpretation of "during", which was not an issue put to it.

25. This case was further explained by Mr Qureshi KC, who summarised the essence of SNGPL's complaint in his skeleton argument, as follows:

> "19. On the basis that the Claimant's invoices for a given "Month" were issued after the end of a "Month", the Sole Arbitrator concluded that those invoices had not been issued in a contractually compliant manner.
>
> 20. With respect, not only was this approach never canvassed by either party, nor were they given an opportunity to address the same, it is also irrational and commercially unworkable…"

26. It is appropriate to highlight these paragraphs, because they make it apparent that the challenge is entirely predicated upon the assumption – which was not really explored before the start of the hearing before me – that the effect of the Award is as set out in Mr Qureshi KC's paragraph 19. This is the "approach" that, in paragraph 20 and in the rest of his skeleton (and orally), Mr Qureshi KC said had never been canvassed.

27. In his written submissions and orally Mr Qureshi KC developed SNGPL's case with great care, as follows:

    i) The Tribunal appeared to have reached this view on the basis of the word "during" in Section 3.6.a.

    ii) An interpretation of the GSA that required invoices to be issued before the end of the month to which they related was inconsistent with the express terms of the GSA, including Section 8.1.

    iii) Such an interpretation was commercially unworkable, because the precise quantities of gas taken/not taken in a month could not be known, nor (therefore) could the invoice amount be calculated, until the end of the month.

    iv) The Tribunal received factual and expert evidence that confirmed the commercial unworkability of this interpretation. This included the evidence that the Tribunal cited in paragraph 141 of the Award.

    v) Neither party argued for this interpretation. On the contrary, both parties indicated to the Tribunal that invoices were to be issued at the end of the relevant month, not before the end of the month.

28. It is the last element of this case that is important for Section 68(2)(a). Mr Qureshi KC submitted that the Tribunal's conclusion related to an issue or point of the interpretation of the GSA that had not been "in play" or "in the arena", because it had not been raised by either party. His reliance on the terms of the GSA, commercial workability and the evidence given was really on the basis that they provide the context within which the

party's submissions fell to be processed by the Tribunal, and provide a similar context when those submissions are considered by this Court for the purpose of deciding what had and had not been "in play".

29. Mr Qureshi KC took me through the statements of case, the pre-hearing submissions, the transcripts of the evidence and submissions and the post-hearing submissions, in order to demonstrate that neither side had suggested that invoices should or could be issued before the end of the relevant month. I found this helpful as regards my understanding of the overall context. However, because the exercise was intended to prove a negative, there would be no utility in setting out these passages in this judgment.

**NPPMCL's case, on the assumption that the Award decides that invoices must be issued before the end of the relevant month**

30. On the assumption that the Award decides that invoices must be issued before the end of the relevant month, Mr Landau KC addressed me with similar care on the same materials.

31. He did not suggest that NPPMCL had submitted that invoices should be issued before the end of the month. However, he did suggest that this approach had been put before the Tribunal by SNGPL. I did not understand him to be saying that this was, taken overall, the position being advanced by SNGPL, on an objective assessment. Rather, he suggested that there were some points in the hearing when formulations were used by SNGPL which could be interpreted as meaning that invoices should be issued before the end of the relevant month; even though, as he accepted, there were other (clearer and more numerous) passages indicating that SNGPL's case was that this would be unworkable.

32. The specific instances he relied on were as follows:

i) SNGPL's pre-hearing submissions at paragraph 7:

> "Apart from seeking recovery of Take or Pay invoices, the Respondent has also sought a declaration from the Tribunal in these proceedings that Take or Pay invoices must be paid in accordance with the terms of the GSA. These invoices are payable at the end of the relevant Month on the basis of the Monthly Take-or-Pay Quantity as expressly set out in Section 3.6(a) read with Section 9.1 and 9.3 of the GSA."

The assertion that invoices were payable "at the end of the relevant month" did not mean or imply that they could or should be issued before the end of the month. If anything, it suggested that the relevant obligations arose (on both sides) when the month ended – not before.

ii) SNGPL's pre-hearing submissions at paragraph 130:

> "The Respondent submits that where a Take or Pay invoice has been generated in a particular disputed Month, the unutilized Gas was diverted to the domestic sector. The reasons for this position are set forth in the Respondent's evidence, factual and expert."

Neither in form nor in substance was this an assertion that an invoice should be issued ("generated") before the end of a month. The references in the second sentence to SNGPL's evidence should have made it apparent that the first sentence referred to an invoice issued or generated in relation to a particular month, not to this happening before the month had concluded.

iii) SNGPL's pre-hearing submissions at paragraph 140:

> "During the months in which the unutilized Gas was diverted to lower tariff sectors, the Respondent has raised the Take or Pay invoices."

In the overall context, this could not sensibly be understood as an assertion that invoices had been issued before the end of the relevant month – not least because it was well-known by everyone that they had not.

iv) SNGPL's oral submissions on Day 1 of the hearing:

> "… the declaration that we seek going forward, the legal foundation of that is 3.6(a) and we submit that [NPPMCL] cannot refuse to pay the monthly take or pay invoice: it must pay it at the end of the month. It cannot demand a net invoice until it has paid. … if you read in isolation 3.6(a) and (b), the scheme is very clear. You pay it. If there is diversion I have to refund to the extent I have managed to divert."

Once again, the assertion that NPPMCL had to pay at the end of the month did not mean that the invoice should be issued before the end of the month.

33. I therefore do not accept that SNGPL (or either side) had put in play the suggestion that invoices should be issued before the end of the relevant month.

**My conclusion, if I were satisfied that the Award decides that invoices should be issued before the end of the relevant month**

34. Accordingly, if I were satisfied that the effect of the Award were as SNGPL suggested – i.e., as set out in paragraph 19 of Mr Qureshi's skeleton argument, set out above – then I would have concluded that the Tribunal had not acted as required by Section 33. More specifically:

i) I would not have accepted SNGPL's complaint that the Tribunal should have confined itself to dealing with NPPMCL's case of estoppel and should not have decided the legitimacy of the invoices as a matter of the construction of Section 3.6.a of the GSA. The meaning and effect of Section 3.6.a was in fact addressed by both parties and deciding the estoppel case required the Tribunal first to consider what the relevant provisions meant.

ii) I would, however, have accepted that neither side had suggested that, whether because of the word "during" or otherwise, Section 3.6.a required invoices to be issued before the end of the relevant month. This was not "in play" or "in the

arena". Accordingly, if the Tribunal had become interested in this point, it should have put it to the parties.

iii) On this basis, subject to SNGPL being able to demonstrate substantial injustice and satisfy the other statutory requirements, the challenge would have succeeded, in principle.

iv) The Arbitration Claim Form does not aver that the Award has caused substantial injustice. Ms Ghani's witness statement explained SNGPL's case on substantial injustice as being that, for the remaining period of the GSAs, SNGPL is required to do something "which, even if not effectively impossible is highly impracticable, in circumstances where any delay at all (even of one day) apparent precludes it from recovering any payment for that gas". In oral submissions Mr Qureshi KC confirmed that SNGPL's case on substantial injustice was not that the Tribunal's mis-step had led to the wrong result in relation to the May 2018 invoices or the other invoices covered by the counterclaims in the reference, but was confined to the position going forward. He was right to make this concession, because the Tribunal rejected SNGPL's case on all those invoices not only because of its conclusion on the construction of Section 3.6.a but also for other reasons not relevant to this judgment.

v) I therefore would not have set the Award aside. I would at most have remitted it.

vi) Furthermore, I would have remitted it to the original Tribunal.

**The Award does not decide that invoices must be issued before the end of the relevant month**

35. In the event, however, I see no basis for upsetting the Award on the basis of this aspect of SNGPL's challenge.

36. This is because the challenge is entirely predicated on SNGPL's case that the effect of the Award is as per paragraph 19 of Mr Qureshi KC's skeleton argument – i.e., that an invoice issued after the end of a month is not contractually compliant and does not have to be paid by NPPMCL. I cannot accept this premise. The Award says no such thing and, in my judgment, this is not its meaning or effect.

37. I have come to this conclusion with some caution, in that, at the outset of the hearing before me, it appeared to be common ground between the parties that the effect of the Award was as contended by SNGPL. The skeleton argument of Mr Landau KC proceeded on this basis. Indeed he asserted that "the Tribunal cannot be criticised for reaching a result that an invoice needed to be issued in the same month as the gas to which it relates." Furthermore, Mr Qureshi KC has told me that, in correspondence, this understanding of the Award has been common to the parties until now.

38. Because this understanding of the Award does not appear to have been challenged previously, I spent some time exploring it with Mr Qureshi KC and with Mr Landau KC. I am extremely grateful to both of them for the patience with which they indulged my process and for the open-minded intelligence with which they both responded. The result of their assistance is that I am in no doubt that the Award does not have the

meaning or effect that is the premise of SNGPL's challenge. Indeed, in oral submissions Mr Landau KC effectively disavowed the position adopted in his skeleton argument. He told me that his primary position, on behalf of NPPMCL, was that the Award does not decide that invoices must be issued before the end of the relevant month.

39. In my judgment it is clear, on an objective reading of paragraphs 131 to 146 of the Award, that:

    i) The Tribunal's focus was not on the word "during" but was on the repeated use of the word "Month" and "Monthly" in Section 3.6.a.

    ii) This led to the conclusion that invoices must be issued on a monthly basis.

    iii) This is the language used in paragraph 200.a. Importantly, this is the dispositive section – i.e., the part of the Award that contains the decision (which is what may give rise to injustice) rather than the reasoning leading to that decision (which, in itself, is generally of no importance).

    iv) The natural meaning of the words used in paragraph 200.a – that the GSA requires SNGPL to issue invoices "on a monthly basis" – is that for each month, there must be an invoice. It says nothing about when such invoices must be issued.

    v) Having formed the view that invoices must be issued monthly, the Tribunal applied that conclusion to the facts relating to the May 2018 invoices which received most of the attention in the course of the reference.

    vi) Those invoices were not "monthly" in that they related to several different months.

    vii) In this part of the Award, the Tribunal then appears to have lost sight of the fact that there were also other invoices, which were issued "monthly" – i.e., they dealt only with a single month. Furthermore, they were (at least in general) issued immediately following the end of the relevant month.

    viii) This led the Tribunal to declare that all the invoices under consideration were non-compliant, even though some of them were issued "monthly".

40. This reading of the Award is clear from the following:

    i) In paragraph 133, great significance is attached to the definition of Month.

    ii) While paragraphs 134 and 135 refer to the take or pay obligation arising and needing to be discharged "during every Month", they lead to paragraph 136. This begins with the words, "Put another way…" indicating that the Tribunal treats what is said here not as different in effect from what has been said in paragraphs 134 and 135, but a simpler way of saying the same thing. But what is said in paragraph 136 is that NPPMCL cannot pay during a Month if it is not invoiced monthly. The emphasis therefore is on invoices being issued monthly, rather than on when, precisely, they must be issued.

iii) In paragraph 137, the interpretation stated in paragraphs 134 and 135, and then re-stated in another way in paragraph 136, is then said to be confirmed by Section 9.1. The text cited here states only that invoices "shall be billed Monthly".

iv) Critically, the paragraphs that follow proceed as if only one invoice were in issue: in the context of the Balloki GSA/Award, the Balloki invoice of May 2018.

v) In paragraphs 138 and 139, the Tribunal noted, correctly, that this invoice retroactively sought payment for several earlier months[1], and that SNGPL had no explanation for this.

vi) In paragraph 140 the Tribunal stated that this retroactive invoicing "is not what the unambiguous wording of the GSA contemplates… [SNGPL's] failure Monthly to invoice for Take-or-Pay quantities prevented [NPPMCL] from discharging its Take-or-Pay obligation for the disputed Months."

vii) This was an unexceptionable observation in relation to the May 2018 invoices, on which the Tribunal's attention was exclusively focussed. Those invoices were issued extremely late and covered more than one month. It was obvious how this could be said not to be what the GSA contemplated.

viii) It would not have been justifiable to apply this to the other invoices, certainly without explanation. I am in no doubt whatsoever that paragraph 140 was not intended to relate to the other invoices. The words "retroactive invoicing" refer back to the May 2018 invoices discussed in paragraphs 138 and 139. They do not refer to the other invoices, which were (at least in general) issued promptly following the end of each month.

ix) If I had been in any doubt about that, it would have been extinguished by paragraph 141, where the Tribunal said that its view that "Monthly invoices are central" was confirmed by a passage in the evidence in which SNGPL's expert ended up saying that the position changes during the month and at the end of the month a matching-up process is completed. The sense of this evidence was that the figures would only become apparent at the end of the month.

x) In submissions before me, SNGPL relied on this evidence as demonstrating that it was unworkable for invoices to be issued before the end of the month. I agree. It therefore is highly significant that the Tribunal gave prominence to this evidence as supporting its conclusion on Section 3.6.a. It would not have done so if that conclusion had been inconsistent with this clear evidence.

xi) Paragraphs 142 and 143 are conclusory and shed no further light on this point.

xii) However, the language of paragraph 200.a is significant.

xiii) It is also striking that paragraph 200.b refers to "invoices" (plural) and gives a reference that identified all the invoices relied on by SNGPL, but then described

[1] The Award incorrectly states that these months included April 2018. In fact, the last month covered by either of the May invoices was March 2018.

them as invoices "for the satisfaction of which it drew down on the Gas Supply Deposit". My understanding is that this was true of the May 2018 invoices, but that none of the other invoices gave rise to any such drawdown. This again suggests that the Tribunal failed to distinguish between the May 2018 invoices and other invoices, at least in some parts of the Award.

41. I understood Mr Qureshi KC's approach to be essentially as follows:

i) The Tribunal held that not only did the May 2018 invoices fail to comply with the requirements of the GSA, but so too did the other invoices.

ii) The requirements found by the Tribunal therefore must have been requirements that all the invoices can be seen not to have complied with, on the facts.

iii) Those requirements therefore were not limited to the conclusion that invoices should be issued monthly in the sense of one per month, or to the conclusion that they should not be issued retroactively in the sense of being issued several months after the event.

iv) The only logical explanation is that the Tribunal considered that invoices must be issued before the end of the relevant month. Otherwise, some of the invoices would be found to have complied with the requirements of the GSA.

v) "Monthly" therefore must be taken to mean, one invoice per month, issued before the end of the relevant month.

42. I do not agree. There is a simpler explanation – namely, that the Tribunal lost sight of the differences between the May 2018 invoices and the other invoices. This explanation is made irresistible by the elision evident in paragraphs 138 to 140.

43. I therefore conclude that the Award does not hold that invoices must be issued before the end of the relevant month. Its effect is merely as stated in paragraph 200.a, i.e., the GSA requires SNGPL to issue invoices monthly. That means, one invoice per month.

44. The Award also suggests that invoices should not be issued retroactively, in the sense of several months after the event as happened in the case of the May 2018 invoices. However, the Award does not decide precisely how promptly invoices must be issued. As set out earlier, that was not an issue that was "in play".

## The outcome of SNGPL's principal challenge

45. It follows that SNGPL's principal challenge, i.e., in relation to the Tribunal's conclusions on Section 3.6.a of the GSA, fails.

46. In the light of my view that the Award manifests a degree of confusion regarding the differences between the May 2018 invoice and the later invoices, I should say that this is perhaps not entirely surprising, given that (as I have noted) it was the May 2018 invoices that seem to have received most if not all of the attention in the course of the hearing.

47. This could possibly have been the subject of an application under Section 57 of the Arbitration Act 1996, or under Section 68(2)(d) and/or (f). However, the application actually made has been entirely different.

## The challenge in relation to the Award of interest

48. SNGPL also challenged the Tribunal's Award as regards the rate of interest. NPPMCL claimed, and the Tribunal awarded, interest at the rate of one-month KIBOR plus (2%) per annum, compounded semi-annually.

49. NPPMCL claimed interest at this rate on the basis that it was set out in the GSA as the "Delayed Payment Rate". Under the GSA, this rate was to apply contractually in various situation, notably involving late payment by NPPMCL. SNGPL stated that this contractual interest did not however apply, under the GSA, to the claim advanced in the reference by NPPMCL. SNGPL therefore contended that it was wrong in principle for the Tribunal to award interest at this rate.

50. The Tribunal did not award this rate of interest under the misapprehension that the GSA so provided. It is clear from paragraph 170 of the Award that the Tribunal simply noted that the GSA provided for this rate to apply in a number of circumstances, and then said that it stood to reason that it should also apply on the facts of this case.

51. This is wholly unexceptionable. The Tribunal had a discretion as to the rate of interest. It was within its power to exercise that discretion as it did, taking into account the rate that the parties had agreed as appropriate in other circumstances.

52. This challenge therefore also fails

## Overall conclusion and costs

53. SNGPL's application fails and is dismissed.

54. It follows that SNGPL is the loser and NPPMCL is the winner, and this will be reflected in my order on costs.

55. However, it is significant that SNGPL's application might have succeeded, at least to some degree, were it not founded upon a false premise; and that SNGPL's faith in this false premise was bolstered by the fact that it was shared by NPPMCL, at least until Mr Landau KC's oral submissions.

56. I therefore anticipate that I therefore may reduce NPPMCL's recoverable costs, to reflect this, but on this I await the parties' submissions.