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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Rolls Building
Fetter Lane
London
EC4A 1NL
Date: 23/04/2015

Before :
THE HON MR JUSTICE WALKER
- -

IN AN ARBITRATION CLAIM BETWEEN :

SADRUDDIN HASHWANI	**Claimant**
- and -	
NURDIN JIVRAJ	**Defendant**

- -

Annex 2 to the Main Judgment:

History of main events

Mr Justice Walker:

Annex 2: Summary of events....2
A2/A. Summary of events: introduction....2
A2/B. The period up to and including 30 October 1988....4
A2/C. 31 October 1988 up to and including 16 July 1990....5
A2/D. 17 July 1990 up to and including 17 January 1994....12
A2/E. 18 January 1994 to 19 April 1995 inclusive....13
A2/F. 20 April 1995 to 14 August 1995 inclusive....19
A2/G. 15 August 1995 to 19 February 1996 inclusive....24
A2/H. 20 February 1996 to 16 July 1997 inclusive....38
A2/J. 16 July 1997 to 31 August 1999 inclusive....44
A2/K. 1 September 1999 to 23 October 2000 inclusive....46
A2/L. 24 October 2000 to 31 July 2008 inclusive....52
A2/M. 1 August 2008 to 27 July 2011 inclusive....55
A2/N. 28 July 2011 onwards....64

Annex 2: Summary of events

A2/A. Summary of events: introduction

A2/1. In this summary I identify some stages in the course of events. Abbreviations and short forms used in this annex are set out in annexes 1A and 1B. On occasion, when quoting from documents or emails, I have added paragraph numbers, or bullet point numbers, in square brackets for ease of reference. What is set out in relation to each stage does not give a complete account of all relevant events: only the most important events or alleged accounts are described.

A2/2. Not all the matters described are agreed. In certain instances I have merely described one side's account, identifying whose account it is. I indicate some major matters of controversy, but do not seek to decide them. To the extent necessary, matters of controversy are resolved in the main judgment.

A2/3. Much of what happened is common ground. Where that is so in relation to a particular event, I have, for convenience only, adopted the account of that event given by one or other of the parties without necessarily identifying whose account it is.

A2/4. The stages I have identified are:

(1) The period up to and including 30 October 1988, the day on which Mr Hashwani and Mr Jivraj entered into an agreement ("the Panel agreement") as

to the authority of Messrs Nathoo, Jaffer and Pirani ("the Panel") and the principles under which their joint ventures would be terminated (section A2/B below).

(2) The period from 31 October 1988 up to and including 16 July 1990, the day on which Mr Ahamed set out a revised timetable and course of action (section A2/C below).

(3) The period from 17 July 1990 up to and including 17 January 1994, when Mr Ahamed was in London and issued his award dated 23 December 1993 (section A2/D below).

(4) The period from 18 January 1994 to 19 April 1995, when Mr Ahamed wrote to the parties that he was "defeated" (section A2/E below).

(5) The period from 20 April 1995 to 14 August 1995, when, after the parties had in June 1995 entered into an agreement for the transfer of certain of the joint venture companies, Mr Ahamed recommended that the parties attend to implementation of a matter dealt with in his award in accordance with their recently concluded agreements and any other arrangements that they may have arrived at (section A2/F below).

(6) The period from 15 August 1995 to 19 February 1996, when Mr Ahamed reiterated that the agreement of June 1995 had been made between the parties on such terms as they thought appropriate (section A2/G below).

(7) The period from 20 February 1996 to 16 July 1997, when Mr Hashwani said to Mr Ahamed that Mr Jivraj should be immediately ordered to make a payment, and that this should be given top priority (section A2/H below).

(8) The period from 16 July 1997 to 31 August 1999, a period during which, after Mr Ahamed ignored a deadline set by Mr Hashwani, Mr Hashwani asked a senior member of the Community to intervene to secure payment, but no payment took place (section A2/J below).

(9) The period from 1 September 1999 to 23 October 2000, this being the date of a letter which concluded, for the time being, an exchange of correspondence between the parties' solicitors (section A2/K below).

(10) The period from 24 October 2000 to 31 July 2008, this being the date on which Mr Hashwani claimed to give notice of the commencement of an arbitration under Article 8 of the 1981 JVA and claimed to appoint Sir Anthony Colman as an arbitrator (section A2/L below).

(11) The period from 1 August 2008 to 27 July 2011, this being the date on which the Supreme Court gave judgment (section A2/M below).

(12) The period from 28 July 2011 onwards (section A2/N below).

A2/B. The period up to and including 30 October 1988

A2/5. Mr Hashwani's chronology states that in the early 1980s Mr Hashwani invested substantial amounts of money into the parties' joint venture.

A2/6. Section A of the main judgment notes that on 29 January 1981 Mr Hashwani and Mr Jivraj entered into the JVA. In it they were collectively called "the investors". It was expressly subject to English law (Article 9) and contained an arbitration agreement at Article 8:

> 8. (1) If any dispute difference or question shall at any time hereafter arise between the investors with respect to the construction of this agreement or concerning anything herein contained or arising out of this agreement or as to the rights liabilities or duties of the investors or either of them or arising out of (without limitation) any of the businesses or activities of the joint venture herein agreed the same (subject to sub-clause 8(5) below) shall be referred to three arbitrators (acting by a majority) one to be appointed by each party and the third arbitrator to be the President of the HH Aga Khan National Council for the United Kingdom for the time being. All arbitrators shall be respected members of the Ismaili community and holders of high office within the community.
>
> (2) The arbitration shall take place in London and the arbitrators' award shall be final and binding on both parties.

A2/7. Mr Hashwani's chronology states that Mr Hashwani was sleeping partner and Mr Jivraj was managing partner in the JVA, the purpose of which was to set up a joint venture company and invest in real estate in various parts of the world.

A2/8. Park Hotels & Properties International Ltd ("PHPI") was registered as a limited liability company in Jersey on 2 August 1984. Mr Hashwani's chronology states that it was incorporated as the parties' joint venture company, that through "trusts/corporate vehicles" the parties hold equal shares in PHPI, and that PHPI continues in existence.

A2/9. Mr Hashwani's chronology states that during 1985-87 PHPI "carried out the joint venture through holdings in other companies under Mr Jivraj's exclusive control/management". Relevant companies in this regard are described in section B2 of the main judgment.

A2/10. In 1987 Mr Hashwani and Mr Jivraj mutually decided to terminate the joint venture. Mr Hashwani's chronology states that during 1987-1988 discussions took place as to the most tax-efficient way to wind up the joint venture.

A2/11. A letter dated 18 March 1988 from Mr Jivraj to Mr Hashwani stated, among other things:

> The arrangements for the dissolution, while superficially simple, are in fact complex in their implementation, and may have taxation

> consequences in a great number of jurisdictions, in view of the complexity of the group structure. It is obviously in the interests of both joint venturers that the dissolution is structured so far as possible in the most advantageous way in this regard.

A2/12. In June 1988 Mr Hashwani appointed Mr Pyarali Pirani as his arbitrator under the JVA. By letter dated 4 July 1988 Mr Jivraj appointed Mr Mahomed Jaffer as his arbitrator, adding that he agreed "that the parties should proceed with the route of arbitration so as to dissolve the joint venture in the most effective manner".

A2/13. On 30 October 1988 Mr Hashwani and Mr Jivraj entered into the Panel Agreement as described in the main judgment. The members of the Panel were Mr Pirani and Mr Jaffer, along with Mr Niaz Nathoo, President of the H.H. Aga Khan National Council for the United Kingdom ("the UK Council").

A2/14. Clauses 4, 5, 6 and 7 of the Panel Agreement dealt respectively with arrangements for realisation of joint venture assets in Canada, the USA, Pakistan and the UK. In relation to each of Canada, the USA and Pakistan, those arrangements involved offers for assets in those countries. Those offers were to be:

> made on the basis that any tax liabilities and tax credits arising upon the change in ownership of the [relevant] Joint Venture which would follow the implementation of such offer shall be attributable to the parties hereto on a 50/50 basis …

A2/C. 31 October 1988 up to and including 16 July 1990

A2/15. During 1988-1989 Mr Hashwani and Mr Jivraj submitted sealed bids for the joint venture assets. Mr Hashwani's bids for the Canada and USA joint venture assets were successful. In each case the bid was dated 7 December 1988 and took the form of an offer made by Mr Hashwani (described as "Party One"). The amount of the offer was described as the Specified Net Asset Value (which I shall refer to as "SNAV") of the relevant joint venture assets. Clause 4 of the offer provided for two adjustments, referred to below respectively as "the clause 4(b) adjustment" and "the clause 4(c) adjustment":

> 4(b) … any tax liabilities tax credits and any other liabilities or credits triggered in [the relevant subsidiary of Jivji BV] or any of its subsidiaries by such purchase shall to the extent determined by the Panel be attributable to the parties on a 50/50 basis in a manner acceptable to the Panel (and the consolidated net asset value of [the relevant subsidiary of Jivji BV] shall be adjusted accordingly for the purposes of determining its [SNAV]);
>
> 4(c) the consolidated net asset value shall be further reduced by the amount certified by the auditors of [the relevant subsidiary of Jivji BV] (failing whom some other person approved by the Panel) as being, in the opinion of the person giving the certificate, the tax that would be chargeable to [the relevant subsidiary of Jivji BV] if on 31 October 1988 it had disposed of the whole of its business and undertaking at a price equal to the price specified in the Schedule hereto for those assets

> and book value (as shown in the Completion Accounts) for any other assets. For the avoidance of doubt, the actual amount payable by me … at Completion shall also take into account the tax computed as per this sub-paragraph (c)…

A2/16. The offers also provided in clause 4(l):

> on Completion… the net proceeds realized by [Jivji BV] will be passed upwards through its holding companies to the shareholders of [PHPI], such arrangements must however be satisfactory to the Panel…

A2/17. By letter dated 8 February 1989 Deloitte Haskins & Sells wrote to the parties referring to the calculation required by paragraph 4(c) of Mr Hashwani's offer for NI Canada. They stated that Revenue Canada was auditing NI Canada's tax returns, and that what its conclusion would be could not be predicted. Accordingly they had performed the calculation under each of four circumstances. The amount of tax, in each case payable two months after NI Canada's 31 December 1988 taxation year end, ranged from a minimum of Can$5,111,322 to a maximum of Can$9,149,573.

A2/18. A further letter was sent by Deloitte Haskins & Sells on 23 February 1989. This letter was addressed to Mr Shiraz Malik-Noor, a lawyer who at that time was acting for Mr Hashwani. As regards the adjustment required by paragraph 4(b) of Mr Hashwani's offer for NI Canada, the letter explained that the four possible liabilities identified in the letter of 8 February 1989 would give rise to four different values under the bid. They ranged from a maximum value of Can$14,107,119 (if the tax liability were the minimum figure of Can$5,111,322) to a minimum value of Can$10,068,868 (if the tax liability were the maximum figure of Can$9,149,573).

A2/19. The letter of 23 February 1989 also noted that, whereas a sale by Jivji BV of its shares in NI Canada would give rise to a Canadian tax liability, if Jivji BV had no assets or liabilities other than its investments in NI Canada then, despite those investments, shares in Jivji BV would not be "taxable Canadian property".

A2/20. A draft letter dated 27 February 1989 addressed to the directors of Rushlake USA was prepared by Pannell Kerr Forster. They had been instructed by Mr Jivraj and Mr Hashwani to prepare a tax computation in relation to Mr Hashwani's bid for "the USA joint venture". The draft letter stated that sale by Jivji BV of its shares in Rushlake USA would give rise to a tax liability, collected through withholding at source at the time of sale, under the Foreign Investment in Real Property Tax Act of 1989 ("FIRPTA"). It added:

> We have recommended the transaction be restructured to involve the sale of stock in Jivji Holding B.V., thereby avoiding the imposition of FIRPTA tax. You have indicated that this recommendation is under consideration but that the computation requested should still be prepared pursuant to the "Agreement" taking into account the representations made to us as outlined in this letter.

A2/21. As to what happened in early April 1989 after Mr Hashwani's offers succeeded, the main judgment describes in section B2 the abeyance assertion advanced by Mr

Hashwani in later correspondence. That correspondence is dealt with in sections A2/E onwards below. On this topic, Mr Hashwani said in Hashwani 2013:

> 19. … instead of paying 100% of the values bid for the shares in [NI Canada] and Rushlake USA to Jivji B.V., I paid 50% of the values I had bid – to Mr Jivraj himself, which he received through his company, Naaz Holdings Limited. The purpose of these payments was implicitly to acquire, in due course, his half interest in one of the Jivji companies – either Jivji B.V. or Jivji N.V., depending on the corporate level at which we might later agree to structure the transactions. Further, the precise details of the precise structure of the transactions to be implemented were left in abeyance to be determined at a later date, but I was placed in de facto control over Naaz [NI Canada] and Rushlake USA, once Mr Jivraj/Naaz Holdings had received their cash, and this control was achieved through my personnel being appointed to the boards of directors of Naaz [NI Canada] and Rushlake USA.
>
> …
>
> 20.8 … accordingly two cheques, dated 3 and 5 April 2009, totaling the half sum bid, instead of the full sum bid, which would otherwise have been payable to Jivji B.V. were made out by my company Arix Holding B.V. ("Arix") to Mr Jivraj's company, Naaz Holdings, not to Jivji B.V.
>
> 20.9 Instead, therefore, of paying CAD 17,738,324.50 to Jivji B.V. for all its shares in Naaz [NI Canada], Arix paid CAD 8,869,162.25 to Naaz Holdings Limited for Mr Jivraj's half share in the Canadian joint venture, the details to be structured tax advantageously in due course at a later stage.

A2/22. Mr Hashwani added in Hashwani 2013 that there were various further "at or post completion adjustments" which were not relevant for present purposes.

A2/23. By contrast Mr Berkson, in paragraph 22 of Berkson 2013, described what happened on 3 April 1989 in this way:

> Mr Hashwani made the higher bids on the footing that he would buy all the shares in Rushlake [USA] and Naaz [NI Canada] from Jivji … Completion of these transactions took place on 3 April 1989 when Mr Hashwani paid the purchase price to Naaz Holdings Ltd and Jivji executed a blank transfer of the whole share capital in Rushlake [USA] and Naaz [NI Canada] ….

A2/24. The exhibit to Hashwani 2013 includes copies of a blank transfer of the whole share capital in NI Canada executed by Jivji BV, and of other documents concerning NI Canada executed in blank. It also includes copies of the two cheques referred to by Mr Hashwani at paragraph 20.8 of Hashwani 2013, together totalling the sum of Can$8,869,162.25 referred to at paragraph 20.9. The cheques in question are not in fact made out by Arix. Instead they are banker's drafts. The first was drawn by the

Royal Bank of Canada in favour of Naaz Holdings on 3 April 1989 for Can$7,816,534.50. The second was drawn by Grindlays Bank in favour of Naaz Holdings on 5 April 1989 for Can$1,052,623.75.

A2/25. The copy of the first banker's draft is on a page which includes manuscript notes stating in relation to NI Canada that, with the addition of interest, the SNAV "per Deloitte Haskin & Sells calculation" was:

(i) on basis of maximum tax liability [Can$] 10,498,329

(ii) minimum do. [Can$] 14,708,820

A2/26. The manuscript notes then identified the average of (i) and (ii) as Can$12,603,574.50. To this was added "Shareholders' loans" of Can$5,134,750.

A2/27. The sum thus arrived at for Total SNAV and shareholders' loans was $17,738,324.50. The manuscript notes then continued:

50% thereof [Can$] 8,869,162.25

A2/28. The remainder of the manuscript notes then stated that the sum of Can$8,869,162.25 had been settled by the two banker's drafts.

A2/29. As to Mr Jivraj's stance, Berkson 2013 added at paragraph 24, among other things:

> … Mr Hashwani … relies on a series of inferences at his paragraph 20, but he is unable to point to any agreement to hold anything in abeyance. Mr Jivraj does not agree that he made any such agreement and he points out that the parties did not bid on the basis that anything would be held in abeyance. There were separate bids for Rushlake and Naaz and there was no reason at the time to think that both bids would be won by the same party or that there would be any subsequent transfer of Jivji NV (which is how Mr Hashwani later acquired [Jivji BV]). Once the bidding process was complete, the directors and managers of Rushlake and [NI Canada] were changed to reflect Mr Hashwani's purchase and a new corporate structure appears to have been put in place. On 27 June 1989, Noorsultan Hashwani (Mr Hashwani's wife) made an application for a liquor licence in the US State of Florida for Econo Lodge West (one of the hotels owned by the Rushlake group) which showed Rushlake Hotels (USA) Inc as owned by a company called Arix Holdings BV and not by Jivji Holdings BV …

A2/30. The Panel, as conciliators, made the February 1990 determinations as described in section B2 of the main judgment.

A2/31. Mr Hashwani stated in paragraph 28 of Hashwani 2013 that, after obtaining control of relevant subsidiary companies:

> I was concerned that I found numerous instances where I considered that Mr Jivraj had not acted properly in dealing with the funds of the companies concerned. I felt that the only way that justice could be done was by … resorting to the courts. Accordingly, Rushlake USA filed a suit against Mr Jivraj in Florida …

A2/32. The proceedings referred to in paragraph 28 of Hashwani 2013 were issued on 4 April 1990 in the Circuit Court for Orange County, Florida. They are described in section B2 of the main judgment as "the Florida litigation".

A2/33. The Aga Khan directed that the Florida litigation should be withdrawn and that the parties should resolve all their disputes before a sole arbitrator in accordance with written pre-conditions ("the Pre-Conditions"). In May 1990 both Mr Hashwani and Mr Jivraj agreed to the Pre-Conditions. The Pre-Conditions did not specify the identity of the sole arbitrator.

A2/34. The Pre-Conditions stated, among other things:

> 1. There will be a single arbitrator. Both parties will accept without question his appointment. All disputes or issues directly or indirectly relating to the parties, any companies or bodies in which they are interested or any companies or bodies now or previously in the joint venture must be referred to the arbitrator and may not be referred (before or after the arbitration process) to any other person or body and the parties must undertake to resolve those disputes and issues wholly within the Jamati context.
>
> 2. The arbitration will not be a formal arbitration. The appointment of the arbitrator is on the basis that he will make such decisions regarding these disputes and issues as he considers just and equitable and the parties agree to accept and implement those decisions and to resolve those disputes or issues on the basis of both the spirit and the letter of his decisions. His decisions will be final and binding and the parties must carry them out and cause all such companies and bodies to carry them out. The arbitrator will not be obliged to give reasons for his decisions. There will be no appeal from a decision of the arbitrator.

A2/35. In June/July 1990 the Aga Khan identified Mr Zaher Ahamed to act as the parties' sole arbitrator. Mr Ahamed acted without fee and was reimbursed for expenses only.

A2/36. As described in section B2.2 of the main judgment the Ahamed arbitration agreement was made between Mr Hashwani and Mr Jivraj (described as the "Investors") and Mr Ahamed (described as the "Arbitrator"). Mr Hashwani and Mr Jivraj also signed indemnities dated 14 July 1990 in favour of Mr Ahamed and in favour of Mr Ahamed's advisers, Clifford Chance (on legal matters) and Coopers and Lybrand Deloitte (on accounting matters).

A2/37. The Ahamed arbitration agreement recited that the Investors had been associated in various joint ventures and that the Panel had been appointed in connection with the determination of such joint ventures. By clause 11 it was governed by English law. The Ahamed arbitration agreement also stated, among other things:

> 1. The Investors hereby appoint the Arbitrator upon the terms, and to conduct arbitration between them upon the terms, of this Agreement. Each Investor agrees that all disputes and issues directly or indirectly relating to the Investors or any Body [a term defined in clause 12 of the Ahamed arbitration agreement] relating to either of them ("the Disputes") shall be referred by such Investor to the Arbitrator pursuant to the terms hereof and shall not be referred to any other person or body, including any court or other arbiter or arbitral body.
>
> Each Investor undertakes to resolve all Disputes exclusively through the Arbitrator and wholly within the context of the Jamat and confirms that (except as regards the referral of disputes to the Panel) insofar as any Disputes may have been referred by him (or any Body relating to him) to any such other person or body, including as aforesaid, the same has been withdrawn or terminated in a manner such that the same may not be revived or newly referred to such other person or body.
>
> 2. The arbitration established hereby will not be a formal arbitration. The appointment of the Arbitrator is on the basis that he will make such decisions regarding the Disputes as he considers just and equitable, and each Investor agrees to accept and implement (both as regards himself and each Body relating to him) those decisions and to resolve the Disputes or issues on the basis of both the spirit and the letter of those decisions. The Arbitrator's decisions will be final and binding on the Investors, each of whom undertakes to carry them out and to cause all Bodies relating to him to carry them out. The Arbitrator will not be obliged to give reasons for his decisions. There will be no appeal from a decision of the Arbitrator.
>
> 3. The Arbitrator may specify a period or periods during which Disputes may be raised with him. Any such period or periods specified by the Arbitrator prior to the date hereof shall be treated as having been specified under the terms of this Agreement and shall have effect accordingly. Unless the Arbitrator otherwise decides, any dispute not raised during the relevant specified period may never be raised (whether by the Investor or by anybody relating to either of them) either with the Arbitrator or any other person or body, including any court or other arbiter or arbitral body, and each Investor undertakes to comply with, and to procure that all bodies relating to him comply with, this clause.
>
> 4. The procedure of the arbitration, its venue and dates will be decided by the Arbitrator who may choose to adopt such process and procedures as he considers appropriate. He may decide not to pass on

to one Investor information supplied or points raised with him by the other.

5. The Arbitrator will be entitled to appoint professional advisers to advise him. The costs of the arbitration and all costs and expenses incurred by the Arbitrator will be payable by the Investors in such shares and at such times as the Arbitrator shall decide (including, if the Arbitrator so decides, payment on account in advance).

6. Each Investor undertakes to participate fully, honestly and in good faith in the arbitration established hereby and to disclose all information pertaining to any Dispute to the Arbitrator both accurately and without being misleading. Each Investor shall permit the Arbitrator and his advisers full and free access at any time to the books, records and personnel of such Investor and every Body relating to him.

…

8. The appointment of the Panel is hereby terminated by the Investors but without prejudice to all rights of the Panel under the 30th October Agreement and all liabilities of the Investors and each of them to the Panel and the members of the Panel, and the arrangements established by the 30th October Agreement (but without prejudice as aforesaid) are hereby superseded by the arrangements established hereby. All determinations of the Panel are to stand and be binding upon the Investors except to the extent that the Arbitrator otherwise decides.

9. Each Investor undertakes to enter into and deliver to the Arbitrator the following, all substantially in the form annexed: (a) an indemnity in favour of the Panel and the members of the Panel, (b) indemnities in favour of the advisers to the Panel, (c) an indemnity in favour of the Arbitrator and (d) indemnities in favour of the Arbitrator's advisers.

10. (1) In the event of any doubt or dispute regarding the interpretation or application of, or any issue arising regarding the application of, this Agreement, the same shall be interpreted or applied as decided by the Arbitrator in his absolute discretion and whose decision shall be final and binding upon the Investors.

(2) In making any decisions or exercising his discretion pursuant to this Agreement the Arbitrator shall be entitled to have regard to, and make his decision on the basis of, his interpretation of the intention behind or the spirit of this Agreement and what he in his absolute discretion considers just and equitable (and for this purpose the Arbitrator may make a decision although the same is at variance with the terms of this Agreement).

(3) The Investors expressly acknowledge that: Clause 2, paragraph (1) and (2) of this Clause and the indemnities referred to in Clause 9 and the effectiveness of all of such items are fundamental to this

> Agreement and to the Arbitrator's acceptance of his appointment hereunder; that the Arbitrator is receiving no remuneration for his own services under this Agreement (without prejudice to Clause 5 and the indemnities referred to in Clause 9); that he has agreed to enter into this Agreement and to carry out the arbitration established hereunder specifically on the basis that the Investors accept and comply strictly with the terms of this Agreement and in particular (but without limitation) Clause 2, paragraphs (1) and (2) of this Clause and the indemnities referred to in Clause 9; and that in the absence of the Investors' acceptance thereof the Arbitrator would not have accepted his appointment hereunder.

A2/38. Hashwani 2013, after describing the Ahamed arbitration agreement, added that Mr Hashwani procured Rushlake USA to withdraw the Florida litigation.

A2/39. Directions given by Mr Ahamed, including the July 1990 directions, are described in section B2 of the main judgment.

A2/D. 17 July 1990 up to and including 17 January 1994

A2/40. Mr Hashwani said at paragraph 37 of Hashwani 2013 that it was not necessary to describe the course of the arbitration before Mr Ahamed in any detail. Mr Hashwani added, however, that "Mr Ahamed took a very long time to consider submissions".

A2/41. As to what should happen to Jivji BV, on 20 November 1993 Mr Ahamed wrote a letter ("the November 1993 alternatives letter") to the parties. It stated, among other things:

> [1] I have considered the submissions … on the request by [Mr Hashwani] that he or a company under his control should be allowed to acquire the entire issued share capital of Jivji BV.
>
> [2.1] … [2.2] It is clear that the purchase price was calculated by reference to the net assets of [NI Canada]; each party made its own evaluation of the terms and method of purchase and for this purpose took account of potential tax liabilities of [NI Canada]. [2.3] It is equally clear to me that it was and remains the responsibility of the parties and individual companies to ensure compliance with any tax or other legal requirements imposed on them in connection with that transaction.
>
> [3.1] The position now canvassed before me is that [Mr Hashwani] maintains that he should be awarded "the joint venture corporate structure" because "… it is of no use whatsoever to the unsuccessful party". [3.2] [Mr Jivraj], on the other hand, takes the view that if [Mr Hashwani] wishes "… to acquire a joint venture asset such as Jivji Holdings BV, the value of that company in these circumstances should be calculated and he should have to pay Mr Jivraj half of that value" …

> [4] In my view, there are three alternative ways of dealing with this issue:
>
> > either (i) there are direct negotiations for [Mr Hashwani] to acquire Jivji Holdings BV; or (ii) each party bids for Jivji Holdings BV in the same manner as was done with the other assets; or (iii) Jivji Holdings BV is wound up.
>
> [5] Please could you let me know latest by November 30, 1993 how you would wish to proceed.

A2/42. It appears that on 27 December 1993 Mr Ahamed prepared an award ("the December 1993 award"). The December 1993 award was not, however, formally issued to the parties until 17 January 1994. In the interim Mr Ahamed wrote the January 1994 reflection request letter as set out in section B2 of the main judgment.

A2/43. On 17 January 1994 Mr Ahamed met Mr Hashwani and Mr Jivraj in London, and issued the December 1993 award. Relevant extracts from the award are set out in section B3 of the main judgment.

A2/E. 18 January 1994 to 19 April 1995 inclusive

A2/44. Mr Hashwani stated at paragraph 45.2 of Hashwani 2013 that, following the meeting on 17 January 1994, he and Mr Jivraj then had discussions about Jivji NV and Jivji BV.

A2/45. On 3 February 1994 Mr Ahamed wrote a letter to the parties. I shall refer to this letter as "the February 1994 tax liability and timetable letter". It stated, among other things:

> 5. As regards the issue of any potential tax liability with Jivji Holdings in respect of the disposal of the Canadian and US investments, there are no outstanding issues on this point. I consider that as part of the purchase arrangements for these investments, the responsibility for discharging such tax liability, if any, lies with the purchaser of those investments. As I pointed out in my determination dated 27 December 1993, it is not for me to give a ruling on how these determinations should be implemented at the various company levels. My determinations take effect only as between the two parties and me. It is for you to effect the implementation of these determinations subject to and in accordance with all applicable legal, fiscal and other relevant requirements. In making determinations, I have not considered any impact (whether in respect of taxation or any other matters) on either of you or any other person of such determinations, and you are to recognise that such matters are for each of you to consider and deal with and not me.
>
> 6. As regards the timetable, although eventually the companies that have not been purchased by either party may have to have proper audited accounts so that they can be dissolved, wound up or liquidated, my particular timescale relates to the financial settlement and not to the

formal preparation of the audited accounts. However, I would expect that the audited accounts would be completed very shortly thereafter.

A2/46. On 10 March 1994 Mr Jivraj faxed a letter ("the March 1994 Jivraj letter") to Mr Ahamed. It stated:

> [1] All matters relating to the dispute between Sadru Hashwani and myself have been dealt with and covered in your determination dated 27th December, 1993.
>
> [2] The only outstanding issue relates to Sadrubhai's wish to take over the Jivji Holdings NV and Jivji Holdings BV companies. We have had numerous discussions about the value that Sadrubhai should pay for taking over these companies and you are fully aware of my views that Sadrubhai will save and defer a considerable amount of tax by taking over these companies. However, having given a lot of consideration and thought to this matter and in the spirit of our Tariqah I have decided to hand over both Jivji Holdings BV and Jivji Holdings NV "as is" to Sadrubhai without any compensation.
>
> [3] For the sake of clarity, may I point out that Rushlake Holdings Limited is the only remaining subsidiary of Jivji Holdings BV. I assume that Rushlake Holdings Limited will not be transferred to Sadrubhai but will be liquidated like all other joint venture companies, with all assets and liabilities of Rushlake Holdings Limited being for the account of the joint venture.
>
> [4] Last but not least, my family and I would like to express our deepest gratitude for all the time and effort you have put in over the last few years in bringing this dispute to its conclusion. We would also like to thank you most sincerely for your constant guidance during this time. We pray that Hazar Imam gives you the strength and courage to continue serving the Imam and the Jamat for many years. Amen

A2/47. On 17 March 1994 Mr Hashwani sent a fax ("the March 1994 Hashwani fax") to Mr Ahamed. It stated:

> PHPI ARBITRATION – JIVJI GROUP STRUCTURE
>
> [1] As you are aware, Nurdinbhai telephoned me in Dubai last Friday to say that he has decided to offer the Jivji Structure (ie: Jivji Holdings NV and Jivji Holdings BV), free of charge, to my family trust, and to cooperate fully to enable the transfer to take place effectively.
>
> [2] As a result of this decision, the shares of Rushlake Holdings USA Inc. and Center-Point Holdings (Canada) Ltd. (formerly Naaz Investments Inc), are not to be treated as sold or transferred following the bidding process. This matter was kept in abeyance, pending the resolution of the structural issue and Jivji BV has throughout the

> duration of the arbitration process continued to own 100% of the share capital of Rushlake USA and CPH Canada.
>
> [3] Following the settlement of this issue and Nurdinbhai's offer, PHPI should in due course, transfer 100% of the shares of Jivji to my family trust. Prior to doing so, the shares of any other companies owned by Jivji NV or Jivji BV would need to be transferred out to either PHPI or some other joint venture entity, outside the "Jivji Group", which Group would then comprise of only Jivji NV, Jivji BV, Rushlake USA and CPH Canada. The Jivji companies should have no assets or liabilities other than the investments in the subsidiary companies; any assets or liabilities would either be cleared or moved upto PHPI.
>
> [4] Since Stoy Hayward is presently revising and updating the accounts of PHPI and its subsidiaries, unless this has already been done, to expedite matters I would respectfully suggest subject to your approval, that Stoys are instructed to adjust the accounts to reflect the settlement of this issue.
>
> [5] Finally, I would like to thank you for all your help, support and patience in dealing with this dispute in a most professional and just manner, for which I am very grateful to you.

A2/48. By letter dated 7 April 1994 ("the April 1994 clarification letter") Mr Ahamed responded to both the March 1994 Jivraj letter and the March 1994 Hashwani fax. Among other things, the April 1994 clarification letter stated:

> [3] In response to Sadrubhai's comment, I would clarify that, as both of you are well aware, the original bidding process in relation to Rushlake Holdings USA and Naaz Investments Ltd. [NI Canada] was indeed completed and did effect a sale of those two companies. These matters were not kept in abeyance and the structural issue has been clear from the outset. … it has been clear from the very outset that the parties understood all the implications of all the transactions and the manner in which these were structured; and they submitted their bids after making evaluation of all the circumstances and conditions.
>
> [4] The present arrangement concerning Jivji Holdings NV and Jivji Holdings BV has been arrived at between two of you through a negotiated settlement, and it is now entirely up to you jointly to ensure compliance (by yourselves and your companies) with any tax or any other legal obligations arising in connection with this transaction. I would however, be grateful if you could advise me of the timing you propose regarding the transfer of the two Jivji companies, so that the arbitration could be formally concluded.

A2/49. On 1 November 1994 a meeting took place between Mr Ahamed, Mr Hashwani and Mr Jivraj. This meeting was referred to in a letter ("the November 1994 expectation letter") from Mr Ahamed to Mr Hashwani and Mr Jivraj dated 19 November 1994, which stated, among other things:

> [1] I am in receipt of Sadrubhai's letter of November 5 and Nurdinbhai's letter of November 14. Copies are attached with this letter
>
> [2] May I open this letter by pointing out that our meeting in Nairobi on November 1, 1994 was not, and was never intended to be a hearing. You had asked me to join in discussions over the future of Jivji and, reluctantly, even more so now in the light of your letters, I agreed to do so.
>
> …
>
> [5] … in my letter of April 7, 1994 to you both I indicated my understanding of what had happened and indicated in the penultimate paragraph that:
>
> > "it is now entirely up to you jointly to ensure compliance (by yourselves and your companies) with any tax or any other legal obligations arising in connection with the transaction".
>
> [6] Accordingly, to the extent that Sadrubhai's dealing in America and Canada may have created problems for organising the completion and filing of tax returns for the Jivji companies, you jointly must resolve the issues and deal with the compliance obligations.
>
> [7] As to what are the proper steps to clear the outstanding tax issues, I suggest that you and Sadrubhai obtain the appropriate advice on this issue and then act accordingly.
>
> [8] In the meantime, once we have received the final accounts from Stoy Hayward, this will permit calculations of who is to receive what in accordance with what I have determined. I expect that the parties will pay the appropriate amount.
>
> [9] I am also arranging to send separately to each one of you a copy of a Deed of Arbitrator's Release and I request both of you to execute the Deed in the appropriate manner and return the copies to me at the very soonest. In addition I am arranging to send to each one of you the accounts in connection with the arbitration. As far as I am concerned, this will settle all outstanding matters before me.

A2/50. On 26 November 1994 Mr Ahamed wrote a letter to Mr Hashwani and Mr Jivraj. It stated:

> [1] Further to my letter of November 19, 1994, I am sending herewith to each one of you, a copy of a Deed of Arbitrator's Release. Please could you arrange to execute the Deed in the appropriate manner and return the signed copy at the very soonest.
>
> [2] The accounts in connection with the arbitration are being finalised and will be sent to you in the next few days.

A2/51. The Deed of Arbitrator's Release enclosed with Mr Ahamed's letter of 26 November 1994 stated, among other things:

> 1. The Investors agree:
>
> (1) that all disputes referred to the Arbitrator for resolution have been resolved;
>
> (2) that the Arbitrator is released from and has no further duties in respect of any Disputes (as defined in the Agreement) or any other matters referred to him for arbitration;
>
> (3) fully to implement the determinations of the Arbitrator and in a manner which complies with all legal, fiscal and other requirements relevant thereto in all relevant jurisdictions;
>
> (4) that compliance with all legal, fiscal and other requirements in all relevant jurisdictions in connection with the implementation of the Arbitrator's determinations is a matter for the Investors and not the Arbitrator;

A2/52. Correspondence then took place which led Mr Ahamed to write a letter ("the December 1994 factual position and responsibility letter") to the parties on 17 December 1994:

> [1] During the last few days you have both copied to me correspondence and documents relating to PHPI group companies.
>
> [2] I am not clear why it is that you have copied them to me or why they are relevant to me. To the extent that the correspondence concerns the former Canadian and US companies, may I draw your attention:
>
> > [2.1] first, that the arrangements overseen by the Panel involved a transfer of these companies (Naaz Investments Canada and Rushlake Hotels USA) in 1989. This is the correct factual position; and
> >
> > [2.2] second, that it is your responsibility to ensure that all determinations and all transactions which have taken place are correctly implemented and recorded in compliance with all relevant legal, fiscal and accounting requirements.
>
> [3] As implementation is not a matter before me as arbitrator or part of the arbitration which I have been conducting, I am returning these papers to you and expect that you have complied or will comply fully with your responsibilities.
>
> [4] With my letter of November 26, 1994, I sent your forms of release for you to complete and return to me. I would be grateful if you would complete and return these to me as soon as possible.

A2/53. On 19 April 1995 Mr Ahamed wrote to the parties. His letter ("the April 1995 defeat letter") stated:

> [1] I have received a letter dated April 5, 1995 from Sadrubhai, a copy of which I am sending to Nurdinbhai (Annexure 1).
>
> [2] I have since the receipt of Sadrubhai's letter reviewed this correspondence which has been sent to me over the past six months or so. My understanding was that after the publication of my Award in December, 1993 the only outstanding point related to the Jivji companies. It was also the subject of Nurdinbhai's letter to me of March 10, 1994 and my letter to you both of April 7, 1994. I am taking the liberty of quoting the relevant extracts from these letters:
>
> > "the only outstanding issue relates to Sadrubhai's wish to take over the Jivji Holdings NV and Jivji Holdings BC companies. We have had numerous discussions about the value that Sadrubhai should pay for taking over these companies and you are fully aware of my views that Sadrubhai will save and defer a considerable amount of tax by taking over these companies. However, having given a lot of consideration and thought to this matter and in the spirit of our Tariqah, I have decided to hand over both Jivji Holdings BV and Jivji Holdings NV "as is" to Sadrubhai without any compensation". (emphasis supplied).
>
> [3] I said in my letter, among other things, that:
>
> > "I was very pleased to see from Nurdinbhai's fax of March 10 and Sadrubhai's fax of March 17 that you have both resolved by agreement between you the situation with regard to Jivji Holdings BV and Jivji Holdings NV. Copies of these faxes are attached, as well as that dated March 14 from Nurdinbhai, so that each of you has a copy of the other's faxes. … it is now entirely up to you jointly to ensure compliance (by yourselves and your companies) with any tax or any other legal obligations arising in connection with this transaction".
>
> [4] In January, 1995, I was informed by Sadrubhai that he had arranged "a meeting between representatives of the two sides this Friday, 27th January. The purpose of the meeting is to agree the precise terms of the tax indemnity to enable the Jivji companies to be transferred to me." I was asked to make myself available as, according to Sadrubhai, clarification was needed on what was said in the Award about the tax liabilities of the Jivji companies. I kept my diary free on that day and the following Monday, but no one contacted me. I therefore assumed that my assistance was not needed.
>
> [5] I had also taken for granted that whilst the parties were settling the only outstanding point, they would be attending to the implementation of the other terms of the Award relating to the preparation of the

> accounts, calculation of capital accounts and interest and review by each of these final accounts and calculations of the Shareholders' Funds. The intention was to ensure that equalisation payments were duly made to the appropriate party. I had, in fact, proceeded on the assumption that the parties were intending to settle the equalisation payment as a follow up of the finalisation of the Jivji companies transaction.
>
> [6] Sadrubhai's letter indicates that this appears not to have been done. If this is so, then I must express my profound disappointment to both the parties.
>
> [7] I was jointly appointed by you in July 1990, that is almost five years ago. By any account, this arbitration has dragged on for too long. It is now causing a great deal of concern, distress and embarrassment to all concerned. Regrettably, I have exhausted all my patience, tact, power of persuasion and skill.
>
> [8] Having done my best, I am driven to the conclusion that the parties for reasons best known to themselves, either do not wish the arbitration to be brought to a satisfactory conclusion, or for it to be concluded only on terms acceptable to themselves. I regret the mandate entrusted to me does not allow this latter to happen. I am mandated to complete my assignment or else to report that I have failed to resolve the dispute. I must thus finally admit defeat.

A2/F. 20 April 1995 to 14 August 1995 inclusive

A2/54. At paragraph 38 of Berkson 2013, Mr Berkson noted that he had stated at paragraph 12 of Berkson 2008 that Mr Jivraj did not know whether the deed of Arbitrator's Release sent by Mr Ahmed on 26 November 1994 had been executed. Mr Berkson also noted that in response Mr Zaiwalla had said at paragraph 12 of Zaiwalla 2008 that:

> It is common ground that Mr Ahmed eventually admitted in his letter dated 19 April 1995 that he was "defeated" and that after that he was released by the parties.

A2/55. At paragraph 39 of Berkson 2013 Mr Berkson stated:

> Mr Hashwani now says, at paragraph 149 of his witness statement, that no indemnities were signed, but he does not give any further explanation, or contradict his solicitor's statement in 2008 that Mr Ahamed was released. For his part, Mr Jivraj agrees that Mr Ahamed was released, although it is unclear what was signed.

A2/56. Mr Zaiwalla responded to paragraph 38 of Berkson 2013 at paragraph 28 of Zaiwalla 2013:

> Para 38: No release was given by the parties. In fact, as Mr Hashwani's First Witness Statement shows, Mr Ahamed continued to act for several years afterwards; in particular, after 26 November 1994 and after 19 April 1995. There was no agreement in the Agreed Statement of Facts before the Supreme Court to the effect that Mr Ahamed was released.

A2/57. There was no response in Zaiwalla 2013 specifically directed to paragraph 39 of Berkson 2013.

A2/58. A memorandum of agreement ("the June 1995 MoA") dated 6 June 1995 was signed by Mr Jivraj and Mr Hashwani. Under the June 1995 MoA the parties agreed, among other things:

(i) by clause 1, that they would procure that specified transfers would be made by Jivji NV to PHPI, and that specified other arrangements affecting Jivji NV and Jivji BV would be made;

(ii) by clause 2, that they would procure the transfer by PHPI of the entire issued share capital of Jivji NV to Mr Hashwani or such other person as he might direct;

(iii) by clause 6, that the June 1995 MoA was to be governed by and construed in accordance with English law; and

(iv) also by clause 6, that the parties irrevocably submitted to the non-exclusive jurisdiction of the English courts in relation to all matters, claims and disputes arising out of the June 1995 MoA.

A2/59. Neither side suggests that there has been any failure to procure and make the transfers and arrangements expressly described in the June 1995 MoA. However, none of the transfers or arrangements in the June 1995 MoA was stated in that document to have any effect on NI Canada or Rushlake USA. No express reference was made to those companies in the June 1995 MoA.

A2/60. Mr Jivraj has contended, for example in the October 1995 formal response letter and the October 1995 personal points fax (see below), that the June 1995 MoA did not alter what was recorded in paragraph [3] of Mr Ahamed's April 1994 clarification letter, namely that the original bidding process effected a sale by Jivji BV of Rushlake USA and NI Canada. By contrast, Mr Hashwani has repeatedly stated, most recently at paragraph 46 of Hashwani 2013, that pursuant to the June 1995 MoA:

> … in June 1995, … I … acquired Jivji NV, which continued to hold Jivji BV and through it [NI Canada] and Rushlake USA. Hence and in this way, the original transactions held in abeyance were completed.

A2/61. Mr Hashwani commented at paragraph 48 of Hashwani 2013 that:

> completion of this transaction was not achieved by any award from Mr Ahamed, but by protracted negotiation between myself and Mr Jivraj.

A2/62. On 24 July 1995 BDO Stoy Hayward ("BDO") produced a draft report ("the July 1995 BDO draft report") on PHPI's consolidated financial statements for the years ended 31 December 1985 to 31 December 1993. Paragraphs 13 to 17 of the July 1995 BDO draft report were headed "IV Shareholders' Funds". Paragraph 13 stated, among other things:

> Detailed schedules reflecting movements on the respective parties' loan accounts, including monies lent, offset, paid and converted into share capital, are set out under Appendix VI. The schedules have previously been considered by the parties and we have received confirmation from the latter that they are in agreement therewith either in the context of the separate exercise in relation to interest calculations on shareholders' funds or specifically as to movements within each year.

A2/63. Paragraph 14 stated that the balances due from the joint venturers at 31 December 1993, as reflected in the detailed schedules, were $31,871,144 due from Mr Jivraj and $29,139,104 due from Mr Hashwani.

A2/64. Paragraphs 18 to 20 of the July 1995 BDO draft report were headed "V Taxation". Under a sub-heading "Jivji Holdings BV", paragraphs 18.1 and 18.2 stated:

> 18.1 Any taxation over and above that already paid which may arise as a result of the disposal by Jivji Holdings BV of its interests in Rushlake Hotels (USA) Inc and Naaz Investments Limited has not been provided within the group accounts.
>
> 18.2 Under the terms of the Sale Agreements, and as reflected in the Panel's Determination included within the 6 October 1989 letter from Coopers & Lybrand (Appendix V), the responsibility for discharging any such tax liabilities which may arise lies with the Purchaser of these interests.

A2/65. In paragraph 18.3 BDO computed what they described as "the effect on the shareholders' funds balances" of taxation matters relating to the USA and Canada. As regards the USA, paragraph 18.3 referred to what it described as "the latest estimates of the potential liabilities" in respect of Rushlake USA. Three items were identified in that regard. The first was "FIRPTA (not quantified)". The amount of the relevant estimate was stated as "TBA". The second was "Florida Income Tax", for which the estimate was $204,092. The third was "Total Federal Tax", for which the estimate was $1,153,191.

A2/66. As regards Canada, paragraph 18.3 referred to two items. The first was what it described as "Canadian income tax, penalties and interest owed by Jivji Holdings BV" in respect of NI Canada, using exchange rates as at 31 March 1995, calculated up to 30 June 1993. Jivji's liability in this regard was said to be Can$1,013,673, equivalent to US$723,277. The second was what it described as "Canadian income tax, penalties and interest owed by purchaser" in respect of NI Canada, using exchange rates as at 31 March 1995, calculated up to 30 June 1993. The liability of

the "purchaser" in this regard was said to be Can$3,464,731, equivalent to US$2,472,159.

A2/67. The outcome of the computation in paragraph 18.3 was that the balance due from Mr Jivraj was unchanged at $31,871,144. However the balance due from Mr Hashwani, previously quantified at $29,139,104, was said to be increased by the amounts identified in paragraph 18.3 so as to become $33,691,823.

A2/68. Paragraph 19 was headed "Rushlake Holdings Ltd". It stated as follows:

19 Rushlake Holdings Limited

19.1 Corporation tax liabilities in respect of 1988, 1991 and 1992 are open due to assessments raised on the company under S419 ICTA 1988. The amounts of tax charged by the assessments are as follows:

	£
Year ended 31 December 1988	361,333
Year ended 31 December 1991	47,667
Year ended 31 December 1992	38,667
	447,667
Tax effect of 1989 repayment	(50,000)
	397,667

19.2 No provision has been made in the group accounts for the above.

A2/69. Paragraph 20 was headed "Sabre Petroleum UK Ltd". It stated as follows:

20 Sabre Petroleum (UK) Limited

20.1 Corporation tax liabilities in respect of the years ending 31 December 1989 to 31 December 1992 inclusive are open due to assessments raised on the company under S419 ICTA 1988. The amounts of tax charged by the assessments are as follows:

	£
Year ended 31 December 1989	325, 364

Year ended 31 December 1990	70,309
Year ended 31 December 1991	31,700
Year ended 31 December 1992	17,745
	445,118

20.2 No provision has been made in the group accounts for the above.

A2/70. On 7 August 1995 Mr Hashwani wrote a letter ("the August 1995 disengagement letter") to Mr Ahamed. The August 1995 disengagement letter began by noting that on 1 August BDO had released the draft accounts of PHPI and its subsidiaries for the year ended 31 December 1993, together with the July 1995 BDO draft report (a copy of which was enclosed). It then set out what it described as "comments" in five numbered paragraphs. I have referred to this as a "disengagement" letter because, as will be seen, the general theme of the comments was that Mr Hashwani's "only interest" was "to recover the funds due to me since 1988 and to be disengaged from this long drawn out matter once and for all". The five numbered paragraphs stated:

> 1. You will notice that the actual Report of the Auditors is set out in Section VI. The earlier sections are to a large extent irrelevant. I totally disagree with some of the comments made in these sections. They are provocative and uncalled for. In fact the accountants have no jurisdiction to make such comments. In any event, the recent Memorandum of Agreement between Nurdinbhai and myself overrides the contents of those sections.
>
> 2. In order to conclude matters as soon as possible, I do not propose to pursue these issues and enter into further arguments. PHPI's consolidated accounts are not statutory accounts and the basis of their preparation are to a large extent academic. My only interest is to recover the funds due to me since 1988 and to be disengaged from this long drawn out matter once and for all.
>
> 3. The Shareholders Funds calculations show that at 31st December 1993 Nurdinbhai's drawings exceeded mine by $2,732,040. To equalise this imbalance, in accordance with your Award, please immediately and without allowing further time to elapse, direct Nurdinbhai to make a payment to me of one-half of this amount. ie. $1,366,020.
>
> 4. The only material tax liability which now concerns the PHPI companies is the potential UK tax liability of £397,667 relating to Rushlake Holdings Limited. So as not to further delay the payment due to me while this issue is being resolved, you may wish to direct Nurdinbhai to immediately pay over to me the amount necessary to

> equalise our accounts after allowing for my share of the above potential liability. To ensure our accounts remain equalised from hereon until the PHPI companies are liquidated and dissolved, Nurdinbhai should also pay into PHPI's bank account his share of the same potential tax liability.
>
> 5. You will recall the Award required interest on the Shareholders Funds to be calculated up to 31st December 1992. In view of the considerable time which has elapsed since the date of your Award, may I urge you to please consider whether the interest should be calculated to say 30th June 1995. I feel it would be the right and proper thing to do particularly since you have previously rejected my repeated requests for an interim payment. Throughout the period up to the date of your Award and since then up to the present date, Nurdinbhai has been in possession of my funds against my will. To end this iniquitous situation, please give the appropriate direction for payment now.

A2/71. On 14 August 1995 Mr Ahamed wrote a letter ("the August 1995 recommendation letter") to the parties. After an introductory paragraph referring to Mr Hashwani's August 1995 disengagement letter, it continued:

> [2] I am glad to note that the draft accounts are finally ready. The parties should now jointly attend to the implementation of Equalisation payments. Please refer to my letter of April 19, 1995.
>
> [3] Interest on equalisation payment should be calculated up to the date of payment. In this context, I would like to draw your attention to clause 15 (b) of the Award, which reads as follows:
>
> > [Paragraph 15(b) of the December 1993 schedule was then set out – see section B3 of the main judgment.]
>
> [4] I would warmly recommend that both of you arrange to meet at the earliest opportunity and settle the issue of Equalisation payment amongst yourselves in accordance with your recently concluded Memorandum of Agreement and any other arrangements you may have arrived at. No doubt you will also want to ensure that the draft accounts are finalised promptly.

A2/G. 15 August 1995 to 19 February 1996 inclusive

A2/72. Mr Hashwani wrote on 15, 28 and 29 August 1995 to Mr Jivraj seeking amounts allegedly due. On 31 August 1995 Mr Jivraj wrote a letter ("the August 1995 tax imbalance letter") in reply. The letter began by explaining that he had been away on vacation, and continued:

> [2] The BDO Stoy Hayward Report shows that there is no imbalance in your favour, but rather an imbalance in my favour taking into account the material tax liabilities that arose in consequence of the arbitrators' award. The Memorandum of Agreement that you and I recently signed

> had no retrospective effect whatsoever and provided simply for the parties to procure, on the execution of the Memorandum of Agreement, the transfer of the share capital in Jivji Holdings NV to you or as you might direct. It did not absolve you or any of the Jivji Companies from any tax liability that they have incurred in consequences of the award of the arbitrators, and those tax liabilities cannot be disregarded for the purpose of the accounting between us: the Memorandum of Agreement had no effect on that accounting and indeed cannot do so by its terms.
>
> [3] You also know that the alleged liability for taxes in the UK is not a real liability. We have both been clearly advised that that claim will have to be dropped by the UK Inland Revenue as a matter of law even though it may take a little while before that position is reached.
>
> [4] As I have said in my fax today to Vazir Zaher Ahamed, I am more than willing to meet with you, Vazir Zaher Ahamed and BDO Stoy Hayward to discuss these matters so that we can resolve our parting finally.

A2/73. On 4 September 1995 Mr Hashwani wrote a letter to Mr Ahamed, headed "Private and Confidential" refuting Mr Jivraj's August 1995 tax imbalance letter, and urging Mr Ahamed "to please take firm action". This was followed on 11 September 1995 by a letter from Mr Hashwani to Mr Jivraj stating, among other things:

> [2] In your fax you refer to the Stoys report and their comments pertaining to potential tax liabilities in respect of Rushlake Hotels and Naaz Investments. I would simply like to make the point that these companies, as well as Sabre Petroleum, are no longer joint venture entities and therefore any potential, or for that matter actual, tax or any other liabilites, these companies may or may not have, does not effect you or the dissolution of the remaining joint venture companies.
>
> [3] I have no desire that any liabilities of the joint venture companies should, in your words, "be disregarded for the purposes of the accounting between us". However, I cannot see, why any potential liabilities of non-joint venture companies should form part of the accounting between us.
>
> [4] Stoys have prepared the PHPI consolidated accounts and the Shareholders Funds Calculations, as directed by the arbitrator, and on the basis set out in their extensive report. These clearly and unequivocally show an imbalance in my favour of $2,732,042. To proceed with the expeditious implementation of the award, an equalisation payment is required to be made by you, followed by a dissolution of PHPI and its remaining subsidiaries.
>
> [5] I would therefore once again request you to please comply with the award by making the payment of $1,366,021 (plus interest from 1st January 1993 to the date of payment), and arrange for the dissolution

> of PHPI and the remaining joint venture companies as soon as possible.
>
> [6] The situation is very clear and I don't think there is any more room to play games any more; enough is enough. We should be grateful to Vazir Zaher Ahamed who has given maximum time to bring this matter to this stage. All along, before the arbitration panel and Vazir Zaher Ahamed, I have appeared as I would be appearing before Hazar Imam, in speaking the truth and nothing but the truth. As a devoted Mureed we have to respect Vazirsahib, therefore one should close this chapter once and for all. However, if you choose to disrespect the award and the spirit of the arbitration, then I will be compelled to explore other avenues.

A2/74. On 22 September 1995 Mr Ahamed wrote a letter ("the September 1995 expectation letter") to the parties. Incorporating a correction in a fax later that day, it stated:

> [1] I have read your respective faxes of August 15, 1995 and August 31, 1995. Both of you acknowledge that the purchase of the Canadian and USA businesses was made on the basis that the purchaser would be responsible for the tax liability arising from those purchases and the amounts that each of you offered were lower as a result to reflect the fact that later, the successful bidder on the companies acquired and owning the businesses, would have to pay the tax to the relevant revenue authorities. Any tax is of course payable to the tax authorities and not by one party to the other, and therefore the shareholders' funds calculation should not include any potential tax liability payable to the tax authorities.
>
> [2] Accordingly it appears to me that, on the basis of the Stoy Hayward accounts, there is an imbalance of U.S. $1,366,020 as at December 31, 1993 in favour of Sadrubhai, which should be paid by Nurdinbhai promptly. I am willing to give Nurdinbhai 10 days to make representations to me in writing as to why this should not be the case. In the absence of persuasive representations from Nurdinbhai, I expect Nurdinbhai to clear the imbalance plus interest to date of payment by October 2, 1995.

A2/75. On 25 September 1995 Mr Hashwani wrote to Mr Jivraj:

> [1] I refer to Zaherbhai's faxes to us dated September 22, 1995.
>
> [2] Would you now please respect and comply with the Award and make a payment to me of US$1,366,020 by October 2, 1995. My account details were provided to you in my fax of August 15, 1995.
>
> [3] Please do not delay the settlement any longer as it would be a gross disrespect to do so.

A2/76. On 2 October 1995, Mr Jivraj replied that he had been away and would respond to Mr Ahamed shortly. He added:

> As a matter of record, I would just say that your interpretation of Zaherbhai's letter of 22nd September as an "Award" is incorrect. Zaherbhai's letter gives me a period of time to make representations to him as to why the payment should not be made. I have every intention to make such representations.

A2/77. On 5 October 1995 Mr Hashwani wrote to Mr Ahamed. His letter stated:

> [1] Thank you for your fax of September 22, 1995
>
> [2] I am grateful to you for seeing through Nurdinbhai's delaying tactics and for confirming that money is due to me by Nurdinbhai.
>
> [3] I believe, (and trust by now you do too), that Nurdinbhai's intentions are to avoid making the payment for as long as possible.
>
> [4] You have rightly recognised that there is an imbalance of US$2,732,040 as at December 31, 1993, in my favour, which should be equalised by a prompt payment of US$1,366,020 by Nurdinbhai to me, with interest from January 1, 1993, to the date of payment. You had in your letter of September 22, 1995, told Nurdinbhai that in the absence of persuasive representations you expect him to clear the imbalance plus interest by October 2, 1995. Regrettably, Nurdinbhai has failed to make payment.
>
> [5] In the circumstances, so that he is stopped from using his old tactics to delay meeting his obligations and to ensure that there is no further delay in making the financial settlement, I would request you to please confirm your decision for this settlement payment of US$1,366,020 (plus interest from January 1, 1993 up to date of payment), to be made to me and kindly order Nurdinbhai to do so forthwith.

A2/78. In response, on 13 October 1995 Mr Jivraj wrote a letter to Mr Ahamed ("the October 1995 formal response letter"). Mr Jivraj began with an introductory paragraph which I have called "[A]" and which included the following:

> [A] … I am sorry that you should have felt burdened with the need to consider matters that have already been the subject of your adjudication and in accordance with which BDO Stoy Hayward have prepared their Report ("the Report"). I hope that the explanation that I give below will show you that consistently with your adjudication the Report takes into account taxation as part of the Shareholder Fund calculations. Thus I think it is important that I should put the Report into the context of your awards to show that the Report is wholly consistent with and in accordance with them.

A2/79. The explanation which Mr Jivraj then gave was set out in numbered paragraphs 1 to 5. They formed part of a main paragraph which I have called "[B]" and which stated as follows:

> [B] 1. In your award dated 27th December, 1993 you stated in paragraph 7 as follows:
>
> > [Paragraph 7 of the December 1993 schedule was then set out – see section B3 of the main judgment – with the first 9 words of the paragraph 7 (i) underlined.]
>
> [B] 2. In paragraph 15(c)(viii) of that award it was provided as follows:
>
> > [Paragraph 15(c)(viii) of the December 1993 schedule was then set out – see section B3 of the main judgment – underlining the words "after discharging all its liabilities and obligations", and with the words from "should be distributed" to "capital account" also underlined.]
>
> [B] 3. In your letter dated 7 April, 1994 you said that:
>
> > [The first two sentences of paragraph [3] of the April 1994 clarification letter were then set out – see section A2/E above.]
>
> [B] 4. It is clear from your most recent letter of 22 September that after our meeting in Nairobi it is a common point of agreement that the responsibility for discharging the tax liabilities within Jivji Holdings in respect of the Canadian and US investments lies with Sadrubhai. This is, of course, consistent with your letter of 3 February, 1994.
>
> [B] 5. On 19 April, 1995 you wrote requiring that the accounting be finalised. On 5 May, 1995 BDO Stoy Hayward wrote to Naushad, a copy of their letter is attached: the substance of their letter is that BDO Stoy Hayward have prepared their accounts (which had been delayed as Mr. Ruston Kanga had argued for a different interpretation) finally in accordance with the arbitration ruling and sound accounting principles.

A2/80. Mr Jivraj's concluding observations were set out in four further paragraphs which for convenience I have called [C] to [F]:

> [C] While it is true to say that the purchase price paid by Sadrubhai took into account inherent tax liabilities, the fact is that the award related to the American and Canadian companies (see 1 and 3 above), and did not, as you have expressly acknowledged relate to the Jivji companies. The Jivji companies continued to be held as subsidiaries of PHPI until their transfer to Sadrubhai only two months ago (<u>after</u> the arbitration) and had to be dealt with in accordance with your rulings. Anything I have done to oblige Sadrubhai with regard to the Jivji companies was outside the arbitration. Consequently tax liabilities

> arising on the sale of the American and Canadian companies constitute liabilities of the companies "… whose shares have not been purchased by one or the other of the parties…" pursuant to the award dated 23 December, 1993 i.e. the Jivji companies. There is no doubt that a sale of the American and Canadian companies triggered changes to tax within Jivji as has been demonstrated to you by several different opinions from tax advisers. Pursuant to paragraphs 5.7 and 15 of that award you gave me the duty of ensuring the liabilities of these companies be discharged out of the assets of those companies: we are all now agreed that Sadrubhai assumed the responsibility for those (Jivji's) liabilities under his successful tender offer. Unless and until those liabilities are discharged by him, the duties arising under the obligations in paragraph 7 cannot be fulfilled. There are, of course, no surplus assets to be distributed taking into account the liabilities that fall to be paid (specifically tax liabilities). The only way in which the liabilities can be discharged is by taking into account Sadrubhai's obligation for the tax liabilities to be "paid in by the shareholders (as per the shareholders funds balance) paragraph 15(a) and (b) and be reflected in the partnership capital account" in accordance with your rulings. The Report is consistent with your rulings and quite rightly records this obligation of Sadrubhai in the accounts.
>
> [D] In your various rulings you have made it plain that any party held responsible for any of the companies' tax liabilities should discharge those liabilities in accordance with the applicable laws: the tax liability provided for in the Report reflect real tax liabilities that fall to be discharged and which cannot be disregarded as part of the final accounting for shareholders funds in accordance with your awards.
>
> [E] Our transfer of the Jivji companies was, as you have pointed out, simply to oblige Sadrubhai after your arbitration was over. You have been at pains to ensure that neither yourself, as Arbitrator, or ourselves be a party to tax evasion. The sale, therefore of the Jivji companies well after the arbitration, could not alter any tax liabilities which had already arisen or the way in which they had to be included in the accounts and dealt with.
>
> [F] In those circumstances I regard BDO Stoy Hayward's report and accounts to be consistent and in accordance with your awards, and therefore call for no payment from me.

A2/81. On 14 October 1995, Mr Ahamed faxed a letter to Mr Jivraj, apparently not having received Mr Jivraj's letter of 13 October 1995. Mr Ahamed's letter ("the October 1995 'you must convince me' letter") stated that he had not heard from Mr Jivraj since Mr Jivraj's letter of 2 October 1995, and continued:

> [4] This matter must now be settled forthwith and either payment must be made or you must convince me to the contrary …. by October 19, 1995.

> [5] I repeat that this matter must now be settled forthwith.

A2/82. Mr Jivraj's response to Mr Ahamed took the form of a fax dated 16 October 1995 ("the October 1995 personal points fax"). Mr Jivraj attached his letter of 13 October 1995, which he described as his "formal response". He said he had taken great care over it so that his position was fully explained, and he urged Mr Ahamed to review it, along with its enclosures, in detail. His fax of 16 October 1995 continued:

> [3] I am fully aware that this arbitration process has been very long and tiring particularly for you as you have been involved in it purely in an honourary/service capacity. I hope you accept that I have tried to take into account the difficulties faced by someone in your position throughout the arbitration process. However, this last issue is one which I feel very strongly about and felt that I needed to take this opportunity to make several points to you personally:
>
> (i) I am having great difficulty in understanding how you can have formed the view that you have with regard to the equalization payment as it goes against all the previous rulings in the arbitration including your own rulings (please see detail explanation in my formal response).
>
> (ii) Throughout the arbitration process the arbitrators have relied upon the findings and conclusions of the professionals. You will recall that Arthur Andersen were appointed when Sadrubhai made certain allegations against me and the final determinations were based solely on Arthur Andersen's conclusions. I therefore, cannot understand now why the Shareholders Funds Calculation report which BDO Stoy Hayward (as the joint ventures professional accountants), have produced based on your instructions and rulings, is now being ignored.
>
> (iii) Lastly, I am confused as to why having finalized your arbitration some months ago, leaving the implementation aspects to the parties according to your firm instructions (carefully distancing yourself from the Jivji tax issues) that you now presume to reopen the issue.
>
> [4] The issue of the Shareholders Funds Statement is complicated by various issues such as tax and need to be well understood. I hope, therefore, that you will take the above comments in the spirit in which they are meant.

A2/83. Mr Ahamed responded in a faxed letter ("the October 1995 'should make ... payment now' letter") addressed to both parties dated 23 October 1995. The letter said:

> [2] I have considered what [Mr Jivraj] says in his letter. You will recall that the objective of previous rulings has been to seek dissolution of

the joint venture, which in turn envisaged dissolution of PHPI and the distribution amongst the partners of any surplus.

[3] As the Jivji companies have now been disposed of out of the PHPI Group their relevance is now limited to ensuring that the disposal of them has been reflected in the PHPI level accounts.

[4] On the understanding that the figures as per para 18.3 of the Stoy Hayward draft report dated 24 July 1995 reflect the position on the shareholders' funds post the disposal of the Jivji companies, it follows that the equalization payment referred to in my previous letter is the payment required to be made between the parties in order to equalize their shareholders' funds position.

[5] Assuming that is the case, [Mr Jivraj] should make the equalization payment now without further delay.

A2/84. On 15 November 1995 Mr Jivraj stated his position in a fax ("the November 1995 'whiter than white' fax") to Mr Ahamed. The fax said:

…

[2] Rulings were made by you in December 1993. These rulings covered all issues. It was up to the parties to implement your rulings. With regard to the equalisation account, you ruled that BDO Stoy Hayward draw up the accounts as at 31 December, 1992, subsequently varied to 31 December 1993 with the agreement of both parties, in accordance with your instructions. As far as all parties are concerned the Arbitration was over, subject only to implementing your rulings.

[3] Sadrubhai then raised the issue of taking over the Jivji companies out of the joint venture. It is not necessary to reiterate the events and issues relating to this – you are well aware of them. However, you ruled that the transfer of the Jivji companies was <u>outside</u> the Arbitration and was a matter which needed to be dealt with by the parties. You have expressed yourself in writing and at various meetings (including the one held in Nairobi) to the effect:

(i) you were merely a friendly observer in matters concerning the transfer of Jivji

(ii) you had already given your rulings which the parties needed to implement and

(iii) that the implementation meant complying with all tax and other regulations in the various jurisdictions.

[4] When issues relating to Jivji i.e. tax liabilities, non-compliance with authorities etc were brought to your attention, you said that it was not your position to get involved in such matters as you had already given your rulings but that the parties should resolve these matters

between themselves. You advised me "to build the necessary bulwarks in order to protect" myself.

[5] In June 1995, the transfer of the Jivji companies took place (outside the arbitration) between the parties. The transfer of Jivji was made on the basis and understanding that it did not and could not affect your previous rulings and was outside those rulings and did not and could not affect the accounting that BDO Stoy Hayward were carrying out. This clearly showed, most importantly, that tax had to be paid on the basis of your rulings. Ensuring that tax was paid in accordance with your ruling was and remains the only certain way I could do as you advised and protect myself: the effect of what you are now saying is that tax is <u>not</u> being taken into account and paid in accordance with your rulings.

[6] With all due respect, therefore, Sadrubhai's acquisition of the Jivji companies does not mean that the tax liabilities were not there in 1989. The facts are that the tax liabilities have been there since 1989 and the party responsible for paying them (as per your rulings) has not paid them. It is this non-payment of tax since 1989 by Sadrubhai which creates the problem not just for the joint venture companies but also for their directors and shareholders. Clearly, the transfer of the Jivji companies to Sadrubhai does not absolve any of the above parties from liability. This is also the advice and conclusion of the joint venture advisers and is reflected in the BDO Stoy Hayward report.

[7] Finally, throughout, you have followed the policy that in the face of the relevant international authorities the parties should be whiter than white. You know that this has been my policy also and that the transfer of the Jivji companies always caused me concern. Your recent letters seek informally to sanction a different policy to the one that you have adopted throughout and one that certainly I cannot be a party to.

[8] In conclusion, therefore:

(i) the BDO Stoy Hayward report is as per your rulings. The report shows that no money is due from me to Sadrubhai in fact it reflects the contrary.

(ii) the Jivji transfer was (in accordance with your admonitions to bring matters to a close) outside your Arbitration remit and your rulings. If you give any relevance to the mere transfer of the Jivji companies (after your final rulings) you both misdirect yourself and take into account matters that you should not have done; and lastly

(iii) I do not wish to be a party to sanction any other policy than that which is whiter than white.

A2/85. On 9 December 1995 Mr Hashwani wrote to Mr Ahamed. Among other things, his letter ("the December 1995 freedom request letter"), which was headed "Private & confidential", stated:

> [1] I wrote to you last on 30 October 1995 informing you that I had sent a reminder to Nurdinbhai requesting that the equalisation payment be made as directed by you. I had also asked for your help in applying moral pressure to induce Nurdinbhai to pay the funds due to me.
>
> [2] Since then, neither have I received payment, nor have I heard from you. Is there nothing our community can do to ensure we abide by the directions we are given?
>
> [3] I have been convinced for years, (and this is now clearly apparent), that Nurdinbhai has no intention of equalising the joint venture account, by making the payment which has been due to me for all these years. He no doubt believes that by simply using his delaying tactics and excuses, those concerned will run out of steam and ultimately give up pursuing him.
>
> [4] If nothing is done, and this man is allowed to flout the authority and ignore its direction in this way, he will have succeeded with his devious plan. I have no doubt others will in future use this as a precedent. The system we so proudly and faithfully follow will lose value, and the directions we are given will go unheeded. Such a loss must surely be avoided and every effort made to protect what we value so much as devout followers.
>
> [5] If our community is unable to resolve this issue, I kindly request that I am granted the freedom to pursue other alternatives to recover my money.

A2/86. A letter dated 14 December 1995 ("the December 1995 PHPI winding up letter") was faxed by Mr Ahamed to both parties. It referred to Mr Jivraj's November 1995 'whiter than white' fax, and continued:

> [2] The purpose of the arbitration has been to wind up the joint venture between the two parties, and to distribute to them the surplus arising upon the joint venture in the appropriate shares. Ultimately, this must be dealt with at PHPI level. Equalisation payments are, in practice, part of the process of distribution of the surplus to the shareholders.
>
> [3] Attention has rightly been paid to assets and liabilities at lower levels in the corporate structure as this has been necessary in order to facilitate the determination of the surplus at PHPI level. However, we must not lose sight of the ultimate purpose in this consideration of values at lower levels.

[4] As long ago as in my order of 27 December 1993, I set out a timetable both for the winding-up of PHPI and the distribution of any surplus and for the making of equalisation payments.

[5] I firmly believe that the winding up of PHPI must be expedited in order to enable this matter to be concluded.

[6] In order to wind up PHPI, all its assets and liabilities will need to be established taking proper account of all transactions and dealings that have occurred up to winding-up and providing properly also, for all its liabilities.

[7] The transactions to be taken into account will, of course, include the disposal of the Jivji companies. The price and terms upon which the Jivji companies were disposed of is something that the parties agreed upon. No doubt, you both did so on terms with regard to tax that you both considered appropriate, including such protection for yourselves (whether in regard to tax or other matters) as you both considered appropriate. I have left this to you both and have not in any way been involved in this. As Arbitrator, my only concern is that whatever terms were agreed are properly reflected in PHPI's accounts and properly taken into account for the purpose of determining PHPI's assets and liabilities.

[8] Nurdinbhai's fax of 15 November 1995 makes certain allegations or references which I must specifically comment upon.

[9] Nurdinbhai suggests that I am saying that tax liabilities should not be taken into account. Quite the contrary, nothing I have said seeks to (or indeed could) absolve any person of any tax liabilities. I have been quite clear throughout that all fax, legal and regulatory compliance is the responsibility of the parties. That remains my position. I reject any allegation to the contrary.

[10] Moreover, as the winding up of the joint venture must take account of transactions and dealings upto the time of winding up, I fail to see how the disposal of the Jivji companies can be ignored. On the contrary, it must be properly reflected in the assets and liabilities of PHPI. I reject the allegation that this constitutes a misdirection or a taking into account of matters not to be taken into account.

[11] I repeat that my concern is to ensure that the position of the joint venture is determined after properly taking into account assets and liabilities and all transactions and dealings. It should be clear that this means that matters which do not properly fall to be taken into account should not be taken into account.

[12] The shareholders' funds statements are statements of the position of each shareholder vis-à-vis the joint venture companies. They are not statements of the position of one shareholder vis-à-vis the other. They

> should not, therefore, reflect matters which do not represent part of the position between a shareholder and the joint venture companies.
>
> [13] Could Nurdinbhai therefore, please arrange for the immediate winding up of PHPI in accordance with this letter?
>
> [14] I understand this can be substantially completed within three months. In order to enable equalisation to be effected by reference to the figures up to the time of winding up, I am willing to suspend the requirement for equalisation at this stage; but if substantial progress has not been made by the end of that period, I shall revert to the requirement for an interim equalisation payment.

A2/87. In a letter to Mr Ahamed dated 8 January 1996 Mr Hashwani identified, among other things, 5 specific orders which he requested Mr Ahamed to make.

A2/88. Mr Ahamed on 19 January 1996 sent the parties a fax ("the January 1996 'cannot get involved' fax") acknowledging receipt of Mr Hashwani's letter dated 8 January 1996 and a further letter dated 17 January 1996 sent on Mr Hashwani's behalf. In that regard Mr Ahamed said this:

> [2] The matters contained in this correspondence relate to the implementation of the Award. I have already pointed out to the parties before now that the Arbitrator cannot get involved in the implementation and I do not intend to do so. However, I am happy to note that the parties are getting together to get a mutual agreement on the winding up timetable. I would warmly support this approach and encourage both of you to bring this matter to a speedy conclusion.

A2/89. On 24 January 1996 Mr Hashwani wrote to Mr Ahamed. His letter complained, among other things, that over a period of close to 7 years he had done all that he was directed to do, but his request for payment of the imbalance of equity on the shareholder account remained disregarded. Mr Hashwani's letter continued:

> [2] … I do not think this was the intention or spirit behind putting both the parties before you, where finally you are washing your hands off and not ensuring (directly or indirectly) the implementation of the Award.
>
> …
>
> [4] The spirit behind referring this matter to you was to bring the dispute to a final conclusion and to close the chapter once and for all. Please do let me know what my next course of action should be, because my hands are tied. I need your direction.
>
> …

A2/90. Mr Ahamed responded by letter dated 26 January 1996. His letter was copied to Mr Jivraj. It included the following:

> [2] As you know, I have made determinations, which include timescales. I was pleased to hear that the two parties are liaising with each other to ensure that these orders are implemented in the required timescales. I look to (indeed expect) the constructive effort and co-operation of both parties, as this will undoubtedly greatly assist in ensuring that this matter is concluded swiftly.

A2/91. Mr Jivraj responded by a fax which was misdated "31.11.95". In fact it was sent on 31 January 1996. In his fax Mr Jivraj referred to what he described as Mr Ahamed's "instructions of 14th December, 1995 to arrange for the immediate winding up of the PHPI Group…". In that regard he attached a progress report. The fax then repeated a number of points made in earlier correspondence in answer to Mr Hashwani's contentions. Among other things, the fax stated:

> [3] … notwithstanding my own personal misgivings I have made all the necessary arrangements for the dissolution of the Group companies.
>
> [4] With regard to your letter of 19th January and Sadrubhai's various letters, the sales of the USA and Canadian subsidiaries to Sadrubhai triggered substantial tax liabilities for the Group. This is a fact which you accept and have confirmed. Furthermore, these tax liabilities have been independently quantified by BDO Stoy Hayward in their Report. I was directed by the arbitration panel to pay over my share of those taxes to Sadrubhai in 1989 when the sale of those shares took place. Again this is not in dispute. Since that time Sadrubhai has not paid over the taxes to the relevant authorities and incorrect tax returns have been filed by Sadrubhai in those jurisdictions. All of this was brought to your attention and was discussed fully at the meeting held in Nairobi. At that meeting you were made aware of these facts as well as my grave concerns that various third parties outside the arbitration are well aware of the real facts throughout. Through no fault of my own I was being exposed to attack from the various regulatory authorities involved.
>
> [5] According to the advice that I have received, there is a material risk that the unmet tax liabilities will follow me through my directorships of the various companies as well as through my ultimate ownership of the joint venture. You yourself understood this when we met in Nairobi. The simple transfer of the Jivji companies as late as 1995 provides no protection.
>
> [6] The arbitration directed that I pay over my share of the taxes to Sadrubhai who was supposed to have paid it over to the relevant tax authorities. He has not. Had I not paid over those funds to Sadrubhai (which amounted to millions of dollars) at that time, I would have no hesitation to pay them over to the tax authorities as my share of the taxes today. Why is Sadrubhai not personally also to pay over taxes to the various authorities worldwide? The general duty to meet all taxes is

> part of your ruling as is the responsibility of the purchaser to pay the taxes.
>
> …
>
> [8] The arbitration panel received cast iron advice that the sales of USA and Canada would result in tax and you personally confirmed that "the sales did indeed take place in 1989 and were not held in abeyance." This is exactly why I had to pay over my share of taxes to Sadrubhai. Having paid over the funds to Sadrubhai he cannot be allowed to hold me responsible for non-payment.
>
> [9] In the light of the above I simply cannot understand how and why I am expected to pay over additional sums to Sadrubhai when clearly I have everything to lose. From your letter to me of 14th December, 1995 it is clear that you believe that I have received an indemnity. That is not the case because Sadrubhai refused to give one … Surely it cannot be right that I pay over further sums of money to Sadrubhai without any protection against anything that has gone before and without Sadrubhai himself being equally directed to make payments that you have held to be his responsibility.
>
> [10] In the meantime, as I have said when I started this letter the winding up procedures for the joint venture companies continue but I remain extremely anxious because by itself the dissolution of the companies will not resolve the obvious problems.

A2/92. On 19 February 1996 Mr Ahamed sent a fax ("the February 1996 PHPI and clarification fax") in reply to Mr Jivraj:

> [2] I am glad that progress is being made on the distribution of the joint venture companies. I did not see anything in your fax regarding dissolution of PHPI, and I would be grateful if you could update me on the progress with this. You will no doubt bear in mind the timetable contained in my determinations.
>
> [3] As regards the other matters referred to in your fax, I would like to make two points of clarification:
>
> [4] First, my understanding is that the determination of the Panel with regard to tax in relation to the sale of the US and Canadian jurisdictions centred around the valuation of the subsidiaries. … my understanding is that they simply determined what the Net Asset Value of the subsidiaries was for establishing the purchase price payable. In making their determination no doubt they had such regard as they thought appropriate to the effect on the Net Asset Value of potential tax liabilities. I do not see any purpose in going through your fax on a line by line basis. Suffice it to say that my understanding is not the same as that set out in your fax both as to the situation with regard to

> the sale of the USA and Canadian subsidiaries and as to what I am supposed to have accepted and confirmed with respect to it.
>
> [5] Second, I have not assumed anything with regard to the terms on which the parties concluded the sale of Jivji. This was a matter negotiated between the parties and agreed on such terms as they thought appropriate.

A2/H. 20 February 1996 to 16 July 1997 inclusive

A2/93. On 19 July 1996 Mr Ahamed sent a fax ("the July 1996 implementation for the parties fax") to Mr Jivraj and Mr Hashwani, following correspondence from them on whether Mr Jivraj was right to say that PHPI could not be dissolved until tax on the sales of the US and Canadian assets was properly dealt with. Mr Ahamed's letter stated:

> [2] It is clear that the matters under consideration are ones relating to the implementation of determinations made, which as I have pointed out previously is a matter for the parties to effect.
>
> [3] It is also clear to me that the implementation can and will be achieved if both parties take a co-operative, constructive and practical approach.
>
> [4] Therefore I urge both of you to resolve the outstanding details between you quickly and constructively.

A2/94. On 1 October 1996 Mr Ahamed wrote a letter ("the October 1996 proposed indemnity letter") to the parties. It concerned a proposed indemnity from Mr Hashwani against which Mr Jivraj would pay the equalisation amount. Mr Ahamed's letter stated:

> [2] I am pleased to hear that you are agreeing a way forward with the dissolution of the joint venture companies.
>
> [3] As you know this is an implementation matter, and I therefore believe the appropriate course is for you to settle the form of any indemnity between you and to agree between yourselves how it is to be held as well as any other arrangements regarding it.
>
> [4] I do not therefore propose to review or comment upon the terms of any indemnity or to hold it.
>
> [5] I look forward to hearing from you as soon as possible that the dissolution of the joint venture companies has been completed.

A2/95. On 22 October 1996 Mr Hashwani wrote a letter ("the October 1996 request for freedom letter") to Mr Ahamed. Mr Hashwani enclosed correspondence with Mr Jivraj, and asserted that Mr Jivraj was "determined to play games." The last three paragraphs of Mr Hashwani's letter stated:

> [3] With respect, you have so far not helped the situation by stating that implementation and dissolution of the joint venture companies is for the parties to handle themselves. You do not appear to appreciate that my ex joint venture partner has no intention of voluntarily parting with my money. He has been sitting on it for more than seven years and clearly desires to somehow never have to pay me.
>
> [4] I will not accept this situation. The community conducted an arbitration, asked me to withdraw my court case, (which I did), and now after seven years, you are saying that your job is done and the parties to the dispute need to resolve the main issue amongst themselves. The main issue is my money, he has it and is refusing to hand it over, making excuse after excuse. Dissolution of the companies is a logical conclusion to the termination of the partnership. Any tax issues which may pertain to companies now under my control, is nobody's business but mine, and in spite of your having said so to the other side, they continue to deploy the same tactics. But all that has nothing to do with the fact that Nurdin Jivraj has had my money in his bank account for over seven years. I have respected your decisions and guidance and have followed the Community's directions throughout this dispute. This is a blatant case of injustice and you are not taking any action to correct the situation. Rather the position you are taking is in fact assisting the other side to continue to exploit the situation with maximum effect.
>
> [5] As you will have seen, I have offered an indemnity and they are still playing games. If this matter regarding the equalisation of the capital accounts cannot be resolved by the end of this month, I request you to please submit before higher authority, if appropriate issue a certificate to confirm that the community was unable to resolve the dispute by conciliation/arbitration and that I am free to pursue this matter in a court of law.

A2/96. On 30 October 1996 Mr Jivraj sent a fax ("the October 1996 'I cannot stop you' fax") to Mr Hashwani, with a copy to Mr Ahamed. Mr Jivraj's fax reiterated his version of events, asserted that Mr Hashwani had refused to provide a "commercially solid indemnity", and asserted that the next step was for Mr Hashwani to pay "the necessary tax bills" after which Mr Jivraj would "make the necessary equalisation payment". Mr Jivraj added:

> [5] Bear in mind that you have pocketed the funds that I placed with you as an agent so that you could pay the taxes that were due in 1989 as a result of the sales of Canada and USA. You have unilaterally, for your own personal gain and against the advice of all the joint venture's professional advisers decided not to pay over the tax to the relevant authorities. The accounts of the joint venture, prepared by BDO Stoy Hayward reflect that the taxes remain unpaid and that the responsibility for those taxes are yours. BDO Stoy Hayward's report also states that before any equalisation can occur, you must pay into the joint venture

> the necessary funds so that first of all the tax liabilities can be extinguished.
>
> [6] These are the facts. Please do not sidetrack or ignore the issues at hand. Please deal with them. Of course, if your basic lack of understanding induces you to commence litigation, then I cannot stop you.
>
> [7] Lastly, I note your comment that the arbitration has failed. I do not agree with you. Vazir Zaher Ahamed has spent some five years resolving all the issues quite successfully, in my view. The last outstanding issue is the dissolution of the joint venture companies. Unfortunately, this cannot be done quite simply because you do not want to give an indemnity nor do you want pay the taxes. I am afraid that you cannot have it both ways.

A2/97. On 6 November 1996 Mr Hashwani sent a fax ("the November 1996 guidance and pressure fax") to Mr Ahamed. His fax stated, among other things:

> [2] In my fax to you of October 22, 1996 I expressed my feelings with regard to the arbitration and the present situation quite openly, to which you have not yet responded. As you will have seen from Nurdinbhai's fax, he has no intention of paying me my money and is making the same lame excuses presented previously. Not only is the draft indemnity I prepared unacceptable to him, he is also not willing to let me see a draft of the indemnity that would be acceptable to him.
>
> [3] In these circumstances, I can not see any options other than to request the Community to give me a free hand to recover the money he owed me through the courts. I realise that this will entail everything becoming public knowledge and will cause adverse publicity for the Community. For these very reasons I was directed by the Community to withdraw from court action against him all those years ago, which direction I respectfully obeyed. Subsequently I accepted the Arbitration rulings and followed your directions. Regretfully, I am still where I was seven years ago with regard to this matter, and face the dilemma that Nurdinbhai is still in possession of my money and the Community, which prevented me from having this matter tried in court, is not taking any action to resolve this injustice. I would request you to please take guidance from Hazar Imam and put pressure on this man to pay me my funds. As always, I am ready and willing to provide a reasonable indemnity to facilitate a resolution of this matter. For this purpose, you may wish to request Nurdinbhai to send you a draft of the indemnity he has in mind. I sincerely believe that this matter can be settled out of court, only with Hazar Imam's intervention and guidance, and your assistance will be imperative in this regard.

A2/98. In response on 12 November 1996 Mr Ahamed sent a fax ("the November 1996 facilitation fax") to both parties. He said that resolution of the form of indemnity was causing a blockage which if resolved would enable dissolution of the joint venture

group companies and the joint venture itself. In the third main paragraph of his letter he set out a four stage procedure, allowing ten days at each stage for a proposed wording from Mr Jivraj, comments from Mr Hashwani, counter comments from Mr Jivraj, and communications in order to seek to resolve any differences. In this paragraph (which I have called "[C]") and two further paragraphs ("[D]" and "[E]") Mr Ahamed expressed the matter in this way:

> [C] In order to facilitate agreement being reached between you on this matter, I wish to see the following procedure adopted by the parties:
>
> [stages 1 to 4 were set out]
>
> …
>
> 5. If at the end of that period a text has not been agreed, I will review the position with a view to proposing a way forward.
>
> [D] Everyone is anxious to resolve this matter as swiftly as possible. I would ask you both therefore to implement the above procedure without delay and in a constructive manner with a view to agreeing a mutually acceptable form of indemnity and thereby enabling progress to be made.
>
> [E] Finally, I would like to remind you that I was appointed as arbitrator by both of you, in terms of an agreement which you signed. I have endeavoured to work within the framework of that agreement. I, therefore, do not think that there is warrant for any suggestion that I should look outside that agreement in order to bring this matter to finality. With respect, the answer to your problem lies in both of you undertaking to follow a course of action either by mutual agreement, or alternatively, by accepting judgement of a competent third party as suggested in this letter.

A2/99. On 19 December 1996 Mr Ahamed wrote a letter ("the December 1996 third party letter") to both parties. He referred to recent correspondence between them which had been copied to him, and continued:

> [2] I regret to note that the matter of indemnity is becoming very subjective and acrimonious and is not being taken forward.
>
> [3] I believe it is necessary for both of you to realise that this protracted matter has now to be brought to a finality. As you are unable to agree to the terms of the indemnity amongst yourselves, the only other alternative left is to have the terms settled by an independent third party such as a lawyer, a tax counsel (or QC) or a firm of accountants. I would prefer such third party to be chosen by two of you jointly. Alternatively, each one of you should submit to me (with notification to the other) names of two persons acceptable to you to settle the terms of indemnity. If there is a name acceptable to both parties, he should be appointed to draw the indemnity. If there is no

> such name, and assuming that there is no objection by either party to the names submitted, I shall then select one (or possibly two) persons to settle indemnity. The terms of indemnity settled by such a person (or persons) will be final and binding upon both of you. The cost of drawing up the indemnity will be borne by the parties.
>
> [4] I would, therefore, like you to let me have the names suggested by you, within seven days of today, so that the matter can proceed further.

A2/100. In a letter to the parties dated 8 January 1997 Mr Ahamed noted that they had identified potential names of counsel to settle the form of the indemnity. The names proposed by Mr Jivraj included Mr Graham Aaronson QC. Mr Ahamed asked the parties to confirm that none of those proposed had been previously involved in matters relating to the arbitration, and that neither party had any objection to any of the names submitted. He added:

> [3] I shall upon hearing from you give further directions on the appointment of the person who should undertake the task of settling the terms of indemnity.

A2/101. Mr Hashwani advised in response that those he had previously suggested had had involvement with matters relating to the arbitration. In a fax to Mr Ahamed dated 10 January 1997 alternative names were proposed accordingly. No objection was made by Mr Hashwani to the individuals whose names had been proposed by Mr Jivraj.

A2/102. On 13 January 1997 Mr Ahamed wrote to both parties setting out the revised names, comprising the names originally proposed by Mr Jivraj and the substitute names proposed by Mr Hashwani. Mr Ahamed asked each party to confirm that neither had any objection to any of the names listed. Each side duly confirmed that there was no objection.

A2/103. By letter dated 17 April 1997 to the parties Mr Ahamed advised that he proposed to select Mr Graham Aaronson QC "as the Referee". Mr Ahamed attached a draft letter of instructions to Mr Aaronson, and invited comments from the parties.

A2/104. The correspondence which followed included a letter from Mr Hashwani to Mr Ahamed dated 27 June 1997 ("the June 1997 'arbitration has become a joke' letter"). Paragraphs [2] to [6] stated:

> [2] Zaherbhai, frankly, I am totally disgusted and frustrated at the outcome of, what will soon be, 10 long years of arbitration. This matter is not coming to any resolution and no one is taking any decisive action to ensure that justice is done.
>
> [3] I have made repeated requests that Nurdinbhai should pay me the amount due to me to equalize our capital accounts (an amount of approx $1.5m). If he does not wish to do so, the only alternative is for him to deposit twice that amount into the PHPI bank account and thereby equalize the imbalance in our capital accounts.

> [4] I do not understand why in spite of the background to this dispute, this man has been allowed to retain the Company's funds in his personal accounts, and why you as the Arbitrator and others prior to your appointment, have not considered it necessary to (a) ensure that the Jivrajs immediately hand over control of the joint venture's funds to independent fiduciaries, and (b) insist that the partners capital accounts be equalized, if not by a payment to me, then at least by reimbursing the amount of the imbalance to PHPI. Are these not fundamental issues which have been ignored for so long?
>
> [5] With such issues left open for all these years, this arbitration has become a joke and is regrettably setting a very undesirable precedence for others in our community.
>
> [6] I feel great anger and disappointment that you, in spite of your position and qualification, have not taken the decisive actions required of you. Please reconsider your approach to these fundamental issues and the matter as a whole, and let me have your decision. I know you are very busy and have many responsibilities and therefore I do not want to take up any more of your valuable time. If you are unable to make the hard decisions, please let me know, so that I can take up this matter directly with the appropriate Authority when I am in Europe next month.

A2/105. On 8 July 1997 Mr Ahamed wrote a letter ("the July 1997 arbitration reference letter") to both parties as follows:

> …
>
> [2] Some time ago it was resolved that the issue of the tax indemnity and its terms be referred to an expert. Suggestions have been made of a suitable expert. I have indicated the proposed selection of Mr Aaronson QC.
>
> [3] Drafts have been submitted to you of a letter to Mr Aaronson for comments. The letter is of course a letter written on behalf of the arbitration and not on behalf of the parties.
>
> [4] I now propose as follows:
>
> [5] A letter will be sent on behalf of the arbitrator to Mr Aaronson QC along the lines of the draft submitted to you and taking account of such of your respective comments as I consider appropriate.
>
> …

A2/106. In the remainder of his letter of 8 July 1997 Mr Ahamed said he proposed that Mr Aaronson would indicate the terms on which he would undertake the task, which would then be signed by him and the two parties. Mr Ahamed also identified confirmations in relation to three aspects of the procedure, asking that these confirmations be supplied during the course of August 1997.

A2/107. On 16 July 1997 Mr Hashwani sent a fax ("the July 1997 top priority fax") to Mr Ahamed. In his fax Mr Hashwani repeated three things which he had said previously:

(i) As Mr Jivraj had expressed concern about a possible liability to tax, he was prepared to provide a personal guarantee, but he was not prepared for that guarantee to be secured by a cash deposit or letter of credit. In that regard Mr Hashwani commented:

> … this fundamental issue needs to be clearly understood and resolved accordingly.

(ii) As the former joint venture companies were now in Mr Hashwani's control, it was nobody else's business as to what liabilities they might or might not have.

(iii) Irrespective of any unresolved issues, Mr Jivraj should be immediately ordered to pay the appropriate amount into PHPI's bank account to equalise the partners' capital account. Mr Hashwani added:

> This matter should be given top priority given that the implementation of the Award is being unduly prolonged.

A2/J. 16 July 1997 to 31 August 1999 inclusive

A2/108. As regards the position during the period August to December 1997, Mr Hashwani stated at paragraphs 105 and 106 of Hashwani 2013:

> 105. On 20 August 1997 I wrote to an important Community leader, Vizir Shafeeq Sachedina, explaining that I was very disappointed in the way that the arbitration had dragged on for years and that, if had I been allowed to go to a court of law, the matter would have been resolved years ago. I said that Mr Ahamed had allowed the matter to drag on and that basic principles of justice had been violated in this case. I said I was hopelessly frustrated by the whole matter. I asked Vizir Shafeeq Sachedina to consult the community leadership again about the matter.
>
> 106. Although Mr Ahamed had been minded to refer Mr Jivraj's complaint that there was a tax liability to a specialist counsel to assist in its resolution, he (Mr Ahamed) never had sufficient grip of the arbitration to enable firm directions to be given or implemented, and the idea of referring the tax issue to an expert came to nothing. Nor did Mr Ahamed decide the issue of the phantom tax liability himself. Nor did he insist further that PHPI was would up.

A2/109. The next stage in the history of events given in Hashwani 2013 was that on 1 January 1998 Mr Hashwani wrote a letter ("the January 1998 deadline letter") to Mr Ahamed. His letter stated:

> [1] I have been patiently waiting to hear from you but you have continued to maintain silence. You were chosen as the community arbitrator to resolve the dispute expeditiously. This has not happened and I am being made to suffer for no fault of mine.
>
> [2] … Nurdinbhai has my money and as the community appointed arbitrator your job is not completed until my funds have been returned to me.
>
> [3] I am again requesting you to consult the authority which appointed you, for guidance to finally settle this dispute, by ordering Nurdinbhai to pay my money over to me immediately. Alternatively, please obtain permission from the authority to allow me to take this matter to a court of law.
>
> [4] Please let me know what you propose to do. If I do not hear from you by January 15 1998, I shall approach the authority directly and request intervention to settle this matter once and for all.

A2/110. In paragraphs 108 and 109 of Hashwani 2013 Mr Hashwani described the next stage in the history of events as follows:

> 108. In July 1998, I was given guidance from the community leadership to try again to resolve matters with Mr Jivraj and, on 17 July 1998, I wrote to him to propose an attempt to start a new relationship … On 23 August 1998, Mr Jivraj wrote to me, agreeing …
>
> 109. In September 1998, I met with Mr Jivraj in London, in the presence of Shaffeeq Sachedina, and asked Mr Jivraj to pay the balance of the capital account. Nothing came of this. I then asked Vazir Shaffeeq Sachedina to intervene further to secure payment for me … Nothing happened.

A2/111. I shall refer to Vazir Shaffeeq Sachedina as "Dr Sachedina". Mr Hashwani's request to him for further intervention was set out in a letter ("the October 1998 end to misery letter") dated 1 October 1998. The letter included the following:

> [2] After your gracious intervention in the settlement of the dispute between myself and Nurdin Jivraj, and the successful meeting we had in your office, I took Hazar Imam's guidance in the true spirit, and was extra courteous to Nurdin, both on the telephone as well as at our meeting in Lisbon. I was sure that with Imam's guidance Nurdin will also reciprocate the same.
>
> [3] I flew into London last Friday on route to Houston. The only reason for my stopover was to meet Nurdin and resolve the pending issue. … I met Nurdin and his son Naushad. They confirmed the guidance of Hazar Imam and that they were all for resolving this issue. They had a simple solution to resolve the dispute. Both father and son confirmed that they were willing and able to conclude this matter, provided I

> would forego the equalization payment due to me. This amounts to approximately $1.4 million plus interest from January 1994 (at 10% interest pa this will now exceed approximately $2.2 million). This was a repetition of the offer Nurdin made to me in Nairobi in the presence of Zaher Ahamed, when I was summoned there for 24 hours in 1994.
>
> [4] … Both father and son are attempting, by hook or crook, to exploit the shortcomings in the manner in which the bidding process was managed (more than 10 years ago). They have so far succeeded in neither paying a penny to me, nor returning the funds Nurdin owes to the joint venture company in order to equalize the imbalance in the capital accounts.
>
> …
>
> [7] … I leave this matter entirely to you. Please bring an end to this misery. If you feel this is not going to be possible, I would request to be released by Imam.
>
> [8] I know you are very busy and doing a great service to humanity and the Jamat. I feel I should be helping you in this regard rather than imposing on your valuable time with my problems, but this matter must come to an end. I would be truly grateful for your help.
>
> …

A2/K. 1 September 1999 to 23 October 2000 inclusive

A2/112. On 1 September 1999 Mr Jivraj, acting as a director of Naaz Holdings, wrote a letter ("the September 1999 Naaz Holdings PHPI letter") addressed to Mr Hashwani and to Mr Luc Hafner, a lawyer in Switzerland who acted for Hira. The letter concerned PHPI. It stated, among other things:

> [1] We write in connection with the affairs of the above-mentioned company.
>
> [2] In 1989, under the terms of the agreements through which you acquired the interests in Rushlake Hotels (USA), Inc and Naaz Investments (Canada) Limited from the Park Hotels & Properties International group, you took on the responsibility to pay all taxes that were due or would be triggered as a result of these sales by the Park Hotels & Properties International group. The completion accounts and the payments by you for these interests reflected a deduction for taxes that would be due as a result of the transfers.
>
> [3] We understand that you have not paid the taxes that were triggered as a result of the sale by the Park Hotels & Properties International group. As such, we can only assume that no taxes were due as result of the transfers. We, therefore, demand that you refund the amount of

> money that you deducted from the sale proceeds on completion for taxes together with all accrued interest to date forthwith.
>
> …
>
> [5] In the event that you have paid the taxes, please provide full details as soon as possible. Kindly respond within 14 days, failing which we will pass on the matter to our legal advisers.

A2/113. In response Mr Hashwani wrote a letter ("the September 1999 'kindly search your soul' letter") on 8 September 1999. It was addressed to Mr Jivraj personally and to Naaz Holdings. The letter stated, among other things:

> [2] As you well know, the joint venture dispute arose between the two of us, and the ensuing dissolution arrangements, conciliation and then arbitration involved us personally and not some company or trust entity. Hence, I was somewhat puzzled by this latest facade of yours.
>
> [3] You are also well aware that there is a substantial imbalance in my favour, in the partnership capital accounts, which you have as yet failed to make good. More than 10 years have elapsed and the money owed to me has been wrongly withheld by you. As you know, one of the major causes of the dispute, was the fact that you wrongly and improperly took advantage of my trust, and helped yourself to partnership funds as if they were your personal assets. The huge imbalance in the capital accounts is evidence of this and can not be refuted.
>
> [4] With regard to the dissolution of the partnership, the arrangements between us involved one of us buying out the other's share. In calculating the purchase price, an allowance was made for inherent capital gains tax, which has accrued, in the underlying property. You are absolutely right in that no tax liabilities arose or were triggered by virtue of the dissolution. However, as mentioned above and on numerous earlier occasions, the adjustment made to the purchase price for inherent accrued capital gains tax, was nothing to do with any tax liabilities which could have resulted from the dissolution. Your request for a refund of those adjustments to the purchase price is therefore totally without merit.
>
> [5] I once again request you to kindly search your soul and pay me the amount owed to equalize the capital accounts. Beware, you may succeed in dodging me, but there is no getting away from "Judgement Day" when we shall all have to answer for our deeds.

A2/114. On 14 June 2000 GSC Solicitors in London ("GSC"), instructed by Naaz Holdings, wrote a letter ("the June 2000 $4m demand letter") to Mr Hafner on behalf of Hira. They set out their instructions at numbered paragraphs 1 to 5 of the letter:

> 1. Our client and you were the joint shareholders of Park Hotels & Properties International Limited ("the Company").
>
> 2. Under the terms of an agreement dated 30 October 1988 you acquired the interests in two companies, Rushlake Hotels (USA) Inc ("Rushlake") and Naaz Investments (Canada) Limited ("Naaz Canada"), from the Company. Our client was entitled to receive one half of the net asset value of Rushlake and Naaz Canada, net of the taxes applicable to the transaction. The responsibility of paying all taxes that were due or would be triggered was on you and our client duly received completion accounts and payments which included a deduction for these taxes.
>
> 3. Our client understands that you have deliberately failed to discharge these taxes by incorrectly filing misleading returns and/or making misrepresentations to the appropriate authorities in the USA, Canada and Holland. Clearly, these are matters of the utmost seriousness and out client is understandably most concerned about your actions.
>
> 4. Our client wrote to you on 1 September 1999 and asked for an explanation of the above, failing which it would consult its legal advisers. No response was received from you but Sadruddin Hashwani wrote to our client by letter dated 8 September 1999 (copy attached) stating that no tax liabilities arose or were triggered.
>
> 5. The said tax liabilities are due and payable as advised and confirmed by Pannell Kerr Forster (USA), Deloitte Haskins & Sells (Canada) and BDO Stoy Hayward (UK).

A2/115. In the remainder of their letter GSC said that their client repeated what they described as "its demand for the payment of the sum of US$4,000,000.00 that was wrongly deducted from the payments made in respect of your acquisition" of Rushlake USA and NI Canada.

A2/116. On 7 July 2000 Mr Hafner on behalf of Hira wrote a letter in answer to GSC. The letter said:

> [1] Hira Foundation has asked us to answer your letter dated June 14, 2000.
>
> [2] Our client refutes Naaz Holdings Limited and Mr Jivraj's allegation in its entirety. Your client's demands are totally without merit. Please note that all official communications should be made to the Hira Foundation, 36 Staedtle, 9490 Vaduz, Principality of Liechtenstein.

A2/117. On 5 October 2000 GSC replied in a letter ("the October 2000 'you will have no objection' letter") which was sent to Mr Hafner on behalf of Hira, and was copied to Mr Hashwani and to Hira at its address in Vaduz. In their letter GSC stated that they had taken their client's instructions, and continued:

> [2] It is noteworthy that you appear to refute our client's allegations and regard their demands as being unmeritorious without providing any explanation or reasoning whatsoever. In that case, you will have no objection to our client providing full details of the transactions and the joint venture to the Pakistani authorities who have requested details of Sadruddin Hashwani's dealings with our client. We therefore reiterate the contents of our letter to you of 14 June 2000.
>
> [3] We are instructed to and hereby demand payment of the sum of US$4 million together with interest by return, failing which our client intends to institute proceedings forthwith.
>
> [4] All our client's rights are reserved.

A2/118. On 18 October 2000 Zaiwallas, London solicitors acting on behalf of Mr Hashwani, wrote a letter ("the October 2000 'outrageous professional conduct' letter") to GSC. The letter stated:

> [1] We have been specifically instructed by Mr Sadruddin Hashwani in respect of your outrageous professional conduct and accompanying undisguised threat of your clients providing "full details of the transactions and the joint venture to the Pakistani authorities". This threat was made in your letter of 5th October 2000 to Hira Foundation and which was copied to our client.
>
> [2] You will appreciate that this is both unethical and unlawful and we express surprise and disappointment that you should have so candidly allowed yourselves to be placed on the record uttering such opprobrium. No monies are owed by either Hira Foundation or Mr Sadruddin Hashwani to your clients.
>
> [3] We do not enter into a learned legal discourse about the law of blackmail. It would however be sufficient for us to say that clearly this type of behaviour is disingenuous, and we are no doubt on the authorities cited that both you and your clients would be properly convicted under s.21 of the Theft Act 1968; this conduct is also in clear breach of the Administration of Justice Act 1970 s.40(i)(a) together with the Malicious Communication Act 1988 s.1(a)(ii). Besides we would remind you of your clients' duty of confidentiality under the English Arbitration Law which duty requires your clients to maintain strict confidentiality. See Ali Shipping Corp Case (1999) 1 WLR 314.
>
> [4] We ask that you and your clients forthwith provide to us and our client with written confirmation that you and your clients objectionable and menacing threat is unreservedly withdrawn.
>
> [5] If either you or your client fails so to do, within the next 72 hours, then our client has instructed us to take all appropriate steps to safeguard their interest.

A2/119. On 20 October 2000 GSC sent a fax ("the October 2000 'will consider the matter further' fax") to Zaiwallas. It stated, among other things:

> [1] We write in response to your letter of 18 October 2000, the contents of which we find outrageous and wholly unacceptable.
>
> [2] If your client was aggrieved by our letter of 5 October 2000, your response is hardly designed to lower the temperature. Indeed, you state that you are in no doubt that there would be convictions under the following:
>
> (1) Section 21 of the Theft Act 1968;
> (2) Section 40(1)(a) of the Administration of Justice Act 1970; and
> (3) Section 1(a)(ii) of the Malicious Communications Act 1988.
>
> In view of the nature of the assertions that have been made against us and our client, it is appropriate to set out a brief response to those accusations.
>
> Theft Act 1968
>
> [3] There was no unwarranted demand with menaces. Your client was informed that legal proceedings would be instituted if the sums that our client claims from him were not paid. Any demand was made in respect of a genuine commercial dispute.
>
> Administration of Justice Act 1970
>
> [4] For an offence to have been committed under this section, there must have been a demand for payment and/or threat which, by way of its frequency, manner or occasion, is calculated to cause alarm, distress or humiliation. A letter before action in respect of a genuine commercial dispute does not fall within this definition. Furthermore, there was no intention to cause alarm, distress or humiliation.
>
> Malicious Communications Act 1988
>
> [5] There must have been a threat with the intention of causing distress or anxiety. You are wrong to categorise the letter as a threat and further err in assuming that there was an intention to cause distress or anxiety.
>
> [6] … Furthermore, it is clear that you did not have the evidence to make the allegations in your letter. Regardless of whether the other elements of the offences were made out, you had no evidence of the intention that is required. In the circumstances not only would you have been unjustified in suggesting that these offences may have been committed, but you were undoubtedly wrong to go further and state that there would be convictions for these offences. Your letter is clearly defamatory of us and our client and we require the immediate and unequivocal withdrawal of your assertions.

> [7] As for the confidentiality issues, the confidentiality obligation is not absolute. Furthermore, we would point out that we asked whether there was an objection to the disclosure to the tax authorities and we have now received your client's answer. If the authorities press our client for the disclosure of information, our client will consider the matter further and will, of course, bear its obligations under the arbitration process in mind.
>
> [8] Finally, now that you have been instructed by Mr Hashwani, perhaps you could provide a reasoned and substantive response to our previous letters setting out why our client's case is, in his view, without merit.

A2/120. Zaiwallas responded the same day, stating among other things:

> [2] We note the purported explanations which you have given in your letter under reply, but do not accept these to be either accurate or correct.
>
> [3] Furthermore, you fail to deal with the proportionality issue which must be a factor to be properly addressed. We do not accept that your explanation is a proper one in all of the circumstances.
>
> [4] We are taking our client's instructions on your inadequate response, and reserve their position generally. Please do not take this as an indication that the matter is closed, it is not.
>
> [5] Clearly as solicitors you are agents of your clients who instructed you to write such an opprobrious letter. Kindly confirm the date upon which such instructions were given and the text approved, together with their individual identity.
>
> [6] We shall seek instructions on the matters raised in the final two paragraphs of your letter, but however it would assist maters if you focused on dealing with matters in a proper and proportionate way and not allowing your wilder excesses to clearly and most unprofessionally get the better of you.

A2/121. This led to a reply by GSC on 23 October 2000, stating among other things:

> [2] We do not intend to respond to the queries in your letter. We are trying to deal with a commercial dispute and, indeed, have invited you to respond to various matters relating to this dispute.
>
> [3] As solicitors you have a duty to refrain from writing offensive letters. Indeed, you should deal with your fellow solicitors with good manners and courtesy, no matter how bitter your client may be towards our client. However, in your letter you describe our conduct as "opprobrious" and "most unprofessional" and in your last letter you asserted that we and our client had committed criminal offences. We trust that from now the correspondence can be devoted to the

> commercial issues between the parties and that you will not make such unwarranted claims. Furthermore, we await your withdrawal of your extremely serious allegations that we and our client have committed criminal offences.
>
> [4] We look forward to hearing from you in respect of the matters that our client is trying to address to your client. In the meantime we expressly reserve all of our rights and the rights of our client.

A2/L. 24 October 2000 to 31 July 2008 inclusive

A2/122. As regards the position from October 2000 onwards, Hashwani 2013 commented on GSC's October 2000 'you will have no objection' letter in paragraphs 116 and 117:

> 116. What was very concerning about this was that at the time there was a military government and innocent private citizens were being harassed and unnecessarily being investigated. I recall instances where individuals were put behind bars pending investigations. On this basis I considered that it was not sensible to give the Military Government any opportunity to harass me without due cause. The purpose of Mr Jivraj's threat was clearly to deter me from pursuing the equalization payment on the capital accounts due to me, by the implicit threat to cause trouble for me in Pakistan. …
>
> 117. Because of this threat, for the duration of the Military Government, I felt that I could not pursue further steps for the time being to recover the balance of the capital account due to me, but I continued to wish to press forward my claim as soon as I could. …

A2/123. Zaiwalla 2008 had also dealt with the position from October 2000 onwards. After referring to Mr Hafner's letter of 7 July 2000, Mr Zaiwalla continued in paragraphs 16 to 19:

> 16. In addition, the Defendant has substantial business interests in Pakistan and is prominently known there; he is, for instance, the owner/operator of the Marriott Hotels chain in Pakistan, including the 5 star Marriott in Islamabad which was recently bombed by Islamist terrorists. In 2000, the Claimant deliberately set out to deter the Defendant from commencing, or re-commencing, arbitration proceedings by a letter dated 5 October 2000 from the Claimant's previous solicitors to the Hira Foundation, which is associated with the Defendant. This letter contained a veiled threat that the Claimant would make a report to the Pakistan's then ruling Military authority about the activities of the joint venture (i.e. outside Pakistan). The Claimant had no business of informing anyone, let alone the Pakistani then Military authorities as this would have been in any event a breach of the confidentiality agreement contained in the Joint Venture. Such a threat was designed to smear the Defendant's name with the Pakistan

> Military junta and to cause him possible understandable difficulties in Pakistan.
>
> 17. This point was addressed in my firm's letter dated 19 August 2008 to the Claimant's solicitors, to which the letter of 5 October 2000 was attached.
>
> 18. In the years since 2000, the Defendant had hoped and expected that the Ismaili hierarchy, which knew of the outcome thus far and that Claimant owed the Defendant a substantial sum of money, would be able to use its good offices and exert its influence over the Claimant and bring an end to the matter. Eminent members of the community have been involved informally over several years, but to no avail. The Claimant is a very prominent and influential member of the Ismaili community and, as one sees from his lawyers' letter in 2000, he does not shrink from use of blackmail threats if that will advantage him.
>
> 19. The Defendant, Mr Hashwani had in good faith over the years attempted to resolve the matter amicably by the Ismaili community members. That however has not worked because the Claimant, Mr Jivraj by his actions has indicated that he has no intention to respect the community representative, Mr Ahamed's recommendation. By this conduct, the Defendant, Mr Hashwani believes that Mr Jivraj has insulted the community leadership who no longer wishes to be involved in resolving this dispute.

A2/124. Mr Hashwani, in paragraph 117 of Hashwani 2013, immediately after saying that he continued to wish to press forward his claim as soon as he could, continued:

> On 5 June 2001 I wrote to Dr Shafik Sachedina, … asking for his help and advice to get Mr Jivraj to repay the balance of the capital account … However, nothing happened.

A2/125. On 1 April 2002, as described in section B4.7 of the main judgment, a certificate of closure of investigation was issued by the National Accountability Bureau of Pakistan.

A2/126. In March 2008 there were elections in Pakistan. After the elections General Musharraf was impeached and resigned in August 2008.

A2/127. In paragraphs 120 to 122 of Hashwani 2013, when describing the position in 2008, Mr Hashwani said this:

> 120. There came, however, a time when the Military Government in Pakistan was dissolved. I now felt that I could pursue the matter again.
>
> 121. However, I still felt obliged, because Mr Ahamed had been selected by the community leadership, to go back to him, if he was willing to continue to act. My solicitors, Zaiwalla & Co, contacted Mr Ahamed and I am told by Mr Zaiwalla that Mr Ahamed was no longer

> practicing with his accountancy firm, and said he was in ill health and was unable to, or unwilling, to deal with the matter by acting as arbitrator.
>
> 122. Zaiwalla & Co also approached members of the Community to see if they would act as an arbitrator to resolve the dispute. However, Zaiwalla & Co could find none who would act.

A2/128. As to the contact between Zaiwallas and Mr Ahamed described in paragraph 121 of Hashwani 2013, Mr Zaiwalla provided further information in paragraphs 12, 13 and 28 of Zaiwalla 2013:

> 12. … Mr Hashwani has informed me that he never agreed for Mr Ahamed to be released by the parties. In fact when Mr Hashwani instructed my firm in 2008, my firm made several attempts to contact Mr Ahamed and persuade him to resume the reference and produce a valid enforceable award. Mr Ahamed told us that he did not want to get involved in this matter as he was not in good health. I also recall that I had organized a trip to travel to the United States with an English Counsel, Mr Tony Baldry MP (now Sir Tony Baldry MP) where I was informed by Mr Hashwani, that Mr Ahamed would be so that we could meet him personally and explain to him that not much effort would be required from him to produce a valid enforceable final Award. However, I recall that this visit to the United States did not materialize because he had already indicated to Mr Hashwani that he was not prepared to have anything more to do with this case.
>
> 13. … It was only after Mr Ahamed made clear his inability to complete the reference with an enforceable final Award that I considered the alternative approach of commencing the reference under the Arbitration Agreement in the 1981 JVA. The intention was to ask a new Tribunal simply to make an enforceable Award in the terms of Mr Ahamed's decision, which had been communicated to the parties. The reason why Sir Anthony Colman was appointed is because, despite the best efforts my firm, could not find any Ismaili Holder of High Office willing to accept appointment as Arbitrator in this case. I cannot now recall the name of an English Counsel, who is an Ismaili, with whom I spoke but the response I got from him was that this case was a "hot potato", and I would not get an Ismaili Holder of High Office to accept appointment. Furthermore, before Sir Anthony Colman was proposed as an Arbitrator my firm had also asked Mr Jivraj's Solicitors to put forward the name of an Ismaili Holder of High Office who would be prepared to accept appointment. But no names were put forward by Mr Jivraj.
>
> 28. … No release was given by the parties. In fact, as Mr Hashwani's First Witness Statement shows, Mr Ahamed continued to act for several years afterwards; in particular, after 26 November 1994 and after 19 April 1995. There was no agreement in the Agreed Statement

> of Facts before the Supreme Court to the effect that Mr Ahamed was released.

A2/129. A second account of this aspect of the matter was given by Mr Zaiwalla at paragraphs 19 to 22 of Zaiwalla 2014:

> 19. After the military rule in Pakistan ended in 2008, Mr. Hashwani once again instructed my firm to take steps against Mr Jivraj for the return of his capital as determined by Mr Ahamed.
>
> 20. The first thing my firm did upon being reinstructed was to contact Mr Ahamed and request him to finish the arbitration by producing a final monetary award. Mr. Ahamed told my firm that he was "*sick and tired*" of this matter and did not want to get involved any further. He also told my firm that he was no longer active, and that he was in ill-health and should not be troubled with this request. I reported this to Mr Hashwani. I was then told by Mr Hashwani that he had also contacted Mr Ahamed who was in New York during this period, but Mr Ahamed was not prepared to budge from his refusal to be further involved.
>
> 21. Mr. Hashwani then asked me if I would travel to New York to meet Mr Ahamed and suggested that I should go with Counsel who would have the ability to persuade Mr Ahamed to complete his task and produce an award. At my suggestion, he agreed that I speak with Tony Baldry MP, who is a barrister, and see if he would undertake this task and go along with me to New York to persuade Mr Ahamed. I contacted Mr Baldry for this purpose and he indicated that he was willing to travel to New York with me. However, I was then told by Mr Hashwani that he had spoken with Mr Ahamed and that Mr Ahamed was not prepared to meet us.
>
> 22. At this stage, Mr Hashwani did not consider it appropriate to apply to the Court for the removal of Mr Ahamed. Mr Ahamed had been appointed at the personal initiative of the Aga Khan, and seeking his removal might be seen as a slight. My firm therefore had to consider an alternative approach to complete the task left unfinished by Mr Ahamed.

A2/130. On 31 July 2008 Zaiwallas on behalf of Mr Hashwani wrote to Mr Jivraj, giving notice of the 2008 purported appointment. Section B4.7 of the main judgment recites additional matters set out in that letter.

A2/M. 1 August 2008 to 27 July 2011 inclusive

A2/131. By fax dated 8 August 2008 Hill Dickinson LLP ("Hill Dickinson") responded on behalf of Mr Jivraj. Their fax set out numbered objections to the 2008 purported appointment, among them an objection that Sir Anthony Colman was not an eligible arbitrator. Before doing so, it stated:

> [2] … the matters sought to be raised by your client, for the purposes of Arbitration, are in fact, matters that have been previously referred to Arbitration by Mr Zaher K Ahamed. We understand an award was issued by Mr Ahamed in December 1993 and that consequential correspondence came to an end over 10 years ago in 1997. In the circumstances, we put on record that our client objects to your client's attempt to seek to re-arbitrate matters that have already been arbitrated upon.

A2/132. Hill Dickinson's fax of 8 August 2008 then added that the numbered objections were without prejudice to Mr Jivraj's position "that your client has no right to commence new Arbitration proceedings …".

A2/133. The fax of 8 August 2008 was the subject of a reply by Zaiwallas on 11 August 2008. In response to that reply Hill Dickinson by fax on 13 August 2008 stated, among other things:

> [2] … Mr Ahamed arbitrated the matters upon which your client claims and produced a final award which was open to your client to seek to enforce or ask the Court to adjudicate upon.
>
> [3] You are wrong to take our silence in respect of the matters your clients complain about as an admission. For the avoidance of doubt our client does not admit your client's claim but does not comment upon it as, our client remains of the view that the claim is in any event time barred.

A2/134. Zaiwallas then faxed Hill Dickinson on 14 August 2008. Their fax stated, among other things:

> [2] Mr Ahamed could not have acted as an arbitrator. He is a Chartered Accountant and would have known that if he had to assume the role of an Arbitrator under English law then he would not have been permitted to meet one party to the arbitration without the presence of the other party as he appears to have done. The fact of the matter is that the arbitration agreement under the Joint Venture Agreement dated 29th January 1981 has never come to an end because the disputes under the agreement have never been referred to arbitration under Article 8 of the Joint Venture Agreement.
>
> [3] What the parties were attempting to do is to find a route map to settle the account through the intervention of their religious head, The Aga Khan, with a view to avoiding the need of invoking judicial arbitration. That has regrettably proved to have been futile so far despite continuous efforts.
>
> [4] Furthermore, after Mr Ahamed had provided the route map Mr Jivraj had requested our client to postpone equalisation, until the alleged potential tax liabilities for Mr Jivraj in Canada had ceased to

> exist. That is what our client did. These alleged tax liabilities would now have ceased to exist.
>
> [5] You have not proposed any alternative name to that of Sir Anthony Colman. We are sure that our client would be prepared to consider any such alternative names for appointment as Sole Arbitrator. May we invite you to do so. Once the arbitration Tribunal is formed all your client's alleged defences can be considered by the Tribunal.
>
> …
>
> [7] … we are prepared to agree your client having 60 days from receipt of our letter of 31st July 2008 to nominate your client's arbitrator. We agree your said request on the basis that this extension of time puts to rest any issue concerning the applicability of the correct Arbitration Act.
>
> [8] By our client's agreement to this extension, your client in fact will get the time he would have been entitled to both under the Arbitration Act 1996 to appoint his arbitrator, as well as the time you say he requires under article 8(3) and (5) of the 1981 Joint Venture Agreement.

A2/135. A letter from Zaiwallas dated 4 September 2008 made reference to a custom under which a Community arbitrator would report to the Aga Khan. This letter is described in section B4.8 of the main judgment.

A2/136. On 3 October 2008 Zaiwallas wrote to Hill Dickinson stating, among other things:

> [4] … we specifically write to invite you to indicate the availability of members of the Ismaili community who according to you would qualify for nomination and who would be available to accept appointment as Arbitrator. We would request you to give at least four names of such persons so that we could consider the same with our client on a without prejudice basis.

A2/137. Also on 3 October 2008 Mr Jivraj issued a claim ("the October 2008 claim") under s 72 of the Arbitration Act 1996 seeking a declaration that the nomination of Sir Anthony Colman as arbitrator was not valid, and consequential relief. A witness statement in support of the application was made by Mr Berkson of Hill Dickinson on 2 October 2008. I shall refer to this witness statement as "Berkson 2008". It stated, among other things:

> 11. By an agreement dated 14 July 1990 (pages 23 to 26), Mr Zaher Ahamed, a member of the Ismaili community based in Nairobi, was appointed as arbitrator. Given the lapse of time, my client has not been able to find an executed copy of this agreement, but it is clear from later documents that it was indeed executed. By this appointment Mr Ahamed was explicitly appointed as an arbitrator and the parties again

agreed to resolve all disputes "wholly within the context of the Jamat" (clause 1). Notwithstanding the terms of this agreement, as I will explain below, Mr Hashwani now contends that Mr Ahamed was not acting as an arbitrator but only as a conciliator.

12. In any event, Mr Ahamed entered into the disputes between parties, appointed Clifford Chance and Coopers & Lybrand Deloitte to assist him and received submissions from both sides. On 27 December 1993 Mr Ahamed issued a determination (pages 27 to 32), which he later referred to as his award (for example in his letter of 21 October 1994 at pages 33 to 35). On 26 November 1994 (pages 36 to 39) Mr Ahamed sent both parties a 'Deed of Arbitrator's Release' which he requested them to execute and return to him. My client does not know if this deed was executed. Nonetheless, and although he has had occasional communications with the parties since, Mr Ahamed has treated himself as having completed his task by the end of 1994.

13. For a period after 1994 there were continued exchanges between the parties (sometimes involving Mr Ahamed) on two subjects in particular. The first was that Mr Hashwani alleged that there was a balance due to him on the capital accounts between the parties. This claim was made in, for example, a letter from Mr Hashwani to Mr Jivraj of 8 September 1999.

14. The second subject on which there were continuing exchanges between the parties concerns the disposition of properties held by the joint venture in Canada and the United States. Those properties were held through various subsidiaries under companies known as Naaz Investments Ltd ("Naaz") and Rushlake Holdings Inc ("Rushlake"), which were themselves held by Jivji Holdings BV ("Jivji"). Under a process followed under the aegis of the Panel and Mr Ahamed, the parties each made bids to buy Naaz and Rushlake from Jivji with the winning bid coming from Mr Hashwani. The Jivraj family thereupon withdrew from the management of these properties and their holding companies and control of Naaz and Rushlake passed to Mr Hashwani, although it appears that this change of ownership was not formally documented, as Mr Hashwani advised it would be tax advantageous for him.

15. The Panel and the parties were advised that, under the tax law applicable in the United States and Canada, a change in ownership of a property company triggers a tax charge as if on the disposal of the property. Under the determinations made by the Arbitrator any such tax liabilities were payable by the purchaser, in this case Mr Hashwani, and the sum equal to the estimated tax liability was deducted from the payment made. The liabilities were estimated at about US$4.5m by BDO Stoy Hayward in April 1995. However, the Jivrajs were (and remain) concerned that these tax liabilities have not been discharged and that, given their previous role in the relevant companies, they and other previous directors may have a secondary liability. Various

attempts to obtain a satisfactory indemnity from Mr Hashwani proved unsuccessful. An allied point is that it was a term of the bids that the purchaser would discharge any tax liabilities arising and Mr Haswani's failure to meet the tax liability calls into question his bid. In June 2000, solicitors for a Jivraj company asserted a claim for US$4m against the Hira Foundation, which is associated with Mr Hashawni, arising out of this tax issue and the validity of the bid. This claim was not pursued at that time.

16. In the recent correspondence which I refer to below, Messrs Zaiwalla & Co, for Mr Hashwani, have asserted in letters of 19 August and 4 September 2008, that their client was compelled to wait to assert his claim until the change of the political scene in Pakistan occasioned by the end of the military government there and that my client had sought to blackmail Mr Hashwani by threatening to embarrass him by bringing the joint venture to the attention of the governing Pakistani military authorities because of the then restriction on a Pakistani national being involved in a foreign joint venture. The correct position is that Mr Hashwani was engaged in a dispute with the tax authorities in Pakistan over the extent of his assets which were liable for a wealth tax. My clients were informed that the Pakistani authorities were seeking information in this connection and this point was raised in a letter of 5 October 2000 from GSC Solicitors (then acting) to the Hira Foundation. This letter led to a heated exchange between Zaiwalla & Co and GSC with Zaiwalla & Co alleging various criminal offences and GSC making the point that they were seeking to deal with a commercial dispute. Further by letter of the 14th August 2008, Messrs Zaiwalla & Co, for Mr Hashwani asserted that the potential tax liabilities in Canada for our client had ceased to exist. I have caused enquiries to be made of the Canadian and US tax authorities and have ascertained that liabilities continue indefinitely if a return was not made or if a fraudulent return was made.

17. The exchanges on both these subjects came to an end in 2000 and matters remained undisturbed until the recent developments which I describe below.

Recent developments

18. On 31 July 2008, Messrs Zaiwalla & Co, acting on behalf of Mr Hashwani, wrote to Mr Jivraj. This letter came after years of inactivity. Amongst other things, it:

(1) Alleged that the joint venture accounts remained unsettled;

(2) Asserted that Mr Ahamed had assumed the role of a conciliator (rather than an arbitrator) and that if the 'route map' suggested by Mr Ahamed had been followed then, on equalisation of the accounting position in the joint venture,

> Mr Jivraj would have had to pay the sum of US$1,412,494 to Mr Hashwani;
>
> …
>
> (5) Stated that Mr Hashwani did not consider himself bound by the requirement of Article 8 that arbitrators should be members of the Ismaili community on the ground that such a requirement "would now amount to religious discrimination which would violate the Human Rights Act [1998] and therefore must be regarded as void".
>
> …

19. My firm replied on behalf of Mr Jivraj on 8 August 2008 making the points that there had been a previous arbitration before Mr Ahamed …

21. In subsequent correspondence Zaiwalla & Co have reiterated the claim that Mr Ahamed did not act as an arbitrator …

22. In their letter of 4 September 2008, Zaiwalla & Co put forward what they say is an additional ground for the claim that the requirement in the arbitration agreement for the arbitrators to be members of the Ismaili community would be *"unworkable and void under public policy for English arbitrations"*. In this regard Zaiwalla & Co rely upon a letter from Mr Ahamed of 19 April 1995. Zaiwalla & Co say that it is apparent from this letter that an arbitrator from the Ismaili community is required under the community custom to report from time to time to the religious head of the community and that this would breach the confidentiality requirement which, they say, is an essential element for arbitration under English law.

23. In his letter Mr Ahamed says that the arbitration has dragged on for too long and that regrettably he has exhausted all his patience. He then says:

> I am mandated to complete my assignment or else to report that I have failed to resolve the dispute. I must thus finally admit defeat.

24. I respectfully suggest that there is nothing here to justify the conclusion that any arbitrator from the Ismaili community would breach the confidentiality of an arbitration. Indeed, there is nothing to suggest that Mr Ahamed was reporting to anybody other than the parties themselves, to whom he addressed his letter and, as it happens, his patience did extend to further correspondence with the parties. This argument also sits oddly with Zaiwalla & Co's contention that Mr Ahamed was not acting as an arbitrator.

A2/138. On 9 October 2008 Zaiwallas sent a fax to Hill Dickinson. Their fax stated, among other things:

> [5] The present position is this that our client is happy and willing to comply with the requirement of the Arbitration Agreement to appoint a member who holds high office in the Ismaili community as their Arbitrator in place of Sir Anthony Colman. Our client is prepared to do this even though it is his belief that this requirement is now void for reasons stated in our earlier letters if such a person is available.
>
> [6] We therefore, in our letter of 3rd October 2008 invited you to indicate the availability of members of the Ismaili community who would qualify for appointment as an Arbitrator in London in respect of what is an English Arbitration. We ourselves are investigating the availability of such person.
>
> [7] In the circumstances, may we invite you to agree that no further steps be required to be taken in the Arbitration Application which you have issued and for this purpose we give our client's undertaking that they will take no steps in the arbitration before Sir Anthony Colman unless the question of his qualification is either resolved by Agreement by appointment of a substitute by our client or decided by the court.

A2/139. On 23 October 2008 Ziawalla & Co wrote to Hill Dickinson referring to their letter of 3 October and their fax of 9 October, and stating that they looked forward to hearing from Hill Dickinson on, among other things, the availability of members in the Ismaili Community who would qualify as an arbitrator and on alternatives in the event that Mr Jivraj was not happy with the nomination of Sir Anthony Colman.

A2/140. On 13 November 2008 Mr Hashwani issued a claim ("the November 2008 claim") under s 18(2) of the Arbitration Act 1996 that Sir Anthony Colman be appointed sole arbitrator. Zaiwalla 2008 was made the following day, both in response to Mr Jivraj's October 2008 claim, and in support of Mr Hashwani's November 2008 claim. It referred to Mr Hashwani as "the Defendant" and to Mr Jivraj as "the Claimant". Among other things, it included the following:

> 4. I have read the Witness Statement of Jonathan Berkson made on 2 October 2008 on behalf of the Claimant.
>
> 5. The only issue which is before the Court for determination on Claimant's application is whether Sir Anthony Colman, a retired High Court Judge, is qualified to act as an Arbitrator in what is plainly a commercial dispute relating to a Hotel chain in North America, to be resolved under an English Arbitration agreement.
>
> 6. In addition, the Court has before it Defendant's application to appoint Sir Anthony Colman as a Sole Arbitrator. I make this witness statement on behalf of the Defendant, Mr Hashwani, to deal with both these issues.

> …
>
> 8. Secondly, it is common ground there is a Joint Venture Agreement dated 29 January 1981 and made between the Claimant and the Defendant which is governed by English law and which contains, in Clause 8, an arbitration agreement as set in paragraph 5 of Mr Berkson's Witness Statement. The joint venture was a commercial one and with no relationship of any kind to the Ismaili Muslim community, other than the Claimant and the Defendant are each members of it and have been since birth, like their parents. I deal further with the features of this community below.
>
> 9. Thirdly, it is also common ground that the said arbitration agreement was executed in London and is still subsisting.
>
> …
>
> 12. But, by way of background, it will be helpful if I briefly describe some of the matters in dispute. Without the need to consider whether Mr Ahamed (a Kenyan practising Chartered Accountant) was or was not acting as a sole arbitrator or a sole facilitator, the remaining issues over liabilities as between the two parties were supposed to be resolved by the accountants as Mr Ahamed directed in paragraph 8 of his letter dated 27 December 1993. He agreed that the Claimant should appoint Messrs BDO Stoy Hayward following the decisions of principle by Mr Ahamed. It is common ground that Mr Ahamed eventually admitted in his letter dated 19 April 1995 that he was "defeated" and after that he was released by the parties. As things turned, therefore, his 'route map' did not resolve the outstanding disputes. It is therefore now for the English Tribunal to do so.

A2/141. On 11 March 2009 Hill Dickinson sent a fax to Zaiwallas. It stated among other things:

> [2] With a view to resolving this matter, our client is prepared to allow your client to withdraw his notice to commence arbitration on the basis that if your client wished to continue in his pursuit of his claim against our client, he may do so either:
>
> a. through the High Court of England and Wales on the basis that our client will not seek to stay the action on the grounds that the Joint Venture Agreement contained an arbitration clause or
>
> b. (as our client prefers) by way of Ismaili arbitration in accordance with the JV agreement.

A2/142. The October and November 2008 claims were argued before Steel J on 6 to 8 April 2009. Mr Rhodri Davies QC and Ms Schona Jolly appeared for Mr Jivraj. Mr Stephen Nathan QC and Mr Tom Hickman appeared for Mr Hashwani. Judgment was reserved.

A2/143. Steel J's judgment was handed down on 26 June 2009. He held that the arbitration agreement in the 1981 JVA did not constitute unlawful discrimination on any of the grounds relied on and that, if it had constituted discrimination under the Employment Equality (Religion and Belief) Regulations 2003, then the discrimination would have been justified. He added that, if the requirement for arbitrators to come from the community had been invalid, then the remainder of the clause could not have been severed, and thus in consequence the whole clause would have been void.

A2/144. Argument on consequential orders took place on 16 July 2009. Permission to appeal was sought by Mr Hashwani. Steel J refused permission for reasons which he summarised in writing as follows:

> (i) No realistic prospect of success.
>
> (ii) Underlying claim prima facie time barred rendering any appeal academic.

A2/145. The transcript records that Steel J said that even if realistic prospect of success had been "a marginal consideration":

> … at the moment, I see no answer to the point that this claim is time barred. The cause of action seemed to have accrued somewhere around 1994 and yet proceedings did not get under way until 2008. There may be some anser to the point but, as presently advised, it seems to me, however interesting the issues are, and they have been I do not deny, the dispute is somewhat academic and, accordingly, I refuse leave to appeal.

A2/146. However on 22 October 2009 Buxton LJ, on consideration on the papers of an application seeking permission to appeal from the Court of Appeal, granted permission on limited grounds. Berkson 2013 described the appeal and its outcome, and the stance of the parties in relation to that outcome, in this way:

> 68. The appeal was heard by the Court of Appeal (Lords Justices Moore-Bick and Aikens and Sir Richard Buxton) over one day on 2 March 2010. On 22 June 2010 the Court of Appeal handed down a single judgment of the Court ([2010] EWCA 712) by which it held that the arbitration agreement in the 1981 JVA had become unlawful as contrary to the anti-discrimination legislation, but that the unlawful part could not be severed so that the whole arbitration agreement was void. … the effect of this appeared to be that, the 1981 arbitration agreement being void, Mr Hashwani's only option would be to start proceedings in Court. No suggestion was made that he might be able to revive an arbitration before Mr Ahamed under an arbitration agreement made in 1990.

A2/147. Applications from each side for permission to appeal were refused by the Court of Appeal. However permission was granted to each side by the Supreme Court on 22

November 2010. An agreed statement of facts and issues for the Supreme Court was prepared by the parties. The final version, agreed by the parties on 16 March 2011, recorded at paragraphs 8 and 9 that:

> 8. … Mr … Ahamed … issued a determination in December 1993 (although he continued to be concerned with further exchanges between the parties until 1995) and then declared himself as "defeated". There is an issue between Mr Jivraj and Mr Hashwani as to whether Mr Ahamed acted as an arbitrator or as a conciliator. This difference is not material to the present issues.
>
> 9. Following Mr Ahamed's determination, the principal matters which remained outstanding were, on the one hand, a claim by Mr Hashwani that there remained a balance due to him on the capital accounts and a claim, on the other hand, by Mr Jivraj that Mr Hashwani had failed to pay certain tax liabilities which exposed him (Mr Jivraj) to secondary liability. … In the event, matters remained unresolved over the next several years.

A2/148. The hearing before the Supreme Court took place over 2 days on 6 and 7 April 2011. The Supreme Court gave judgment on 27 July 2011 when, as described in section A of my main judgment in the present case, it rejected Mr Hashwani's contention that the requirement for the arbitrator to be a member of the Ismaili community had become void.

A2/N. 28 July 2011 onwards

A2/149. On 1 August 2011 Zaiwallas wrote to Hill Dickinson. Their letter stated:

> [1] We are writing this letter to see if we can agree costs and also to determine the next step in the Arbitration.
>
> …
>
> [8] There is one further matter on which we would invite you to consider and revert to us, which is in respect of our client's claim.
>
> [9] The amount belonging to our client which your client is holding represents the amount which Mr Ahamed the Arbitrator had required your client to give back to our client as part of equalisation of capital. Mr Ahamed, who was an Ismaili holder of high office, was nominated by the HH Prince Aga Khan Arbitration Board and parties had agreed to accept his decision under a signed Arbitration Agreement which was to be governed by English law.
>
> [10] Mr Ahamed conducted the Arbitration reference over five years and he gave his decision. He disallowed several claims made by both your client and ours, of which included no doubt any alleged indemnities for parties' secondary tax liability.

> [11] It has always been our client's position that no such tax liability exists and your client's allegations in this respect are simply fictitious. This is further confirmed by the fact that, in the Statement of Fact which your client produced for the Supreme Court, it was said that "Mr Hashwani had failed to declare certain tax liabilities which left Mr Jivraj with a potential for a secondary liability". However after the draft judgment was circulated, when your firm was challenged to confirm to the Supreme Court if these were indeed correct facts, you quite properly accepted in your letter dated 26 July 2011 that there was no secondary liability in existence but that instead your client now sais that there was only "a potential" for secondary liability.
>
> [12] We now invite you kindly to provide details to us as to how it is alleged that there is a potential for your client for secondary liability. The Joint Venture ceased several years ago, and our client has never been approached by any tax authorities, leave alone received a demand for payment.
>
> [13] We need your response soonest so that we know where our client stands with regards to his outstanding claim and consider what further steps he should take to protect his interest.

A2/150. Hill Dickinson's reply dated 5 August 2011 included the following:

> …
>
> [E] With regard to your client's purported claim against our client, as you are well aware that claim is Statute barred and we therefore see no reason to correspond with you with regard to its merits or otherwise.
>
> [F] For the avoidance of any doubt our Email to the SC of 26 July should not be misinterpreted. Our client stands by the original wording of "… Mr Hashwani had failed to discharge certain tax liabilities…". It is also correct to say that our client claims "… Mr Hashwani had failed to declare certain tax liabilities…". There is no significance to be attached to the inclusion of the word "potential". The Statement of Fact was agreed between the parties, and we have not resiled from it.

A2/151. Meanwhile on 2 August 2011 Zaiwallas wrote to Clifford Chance, who had acted in the Supreme Court on behalf of the Aga Khan Shia Imami International Conciliation and Arbitration Board ("ICAB"). Zaiwallas' letter stated, among other things:

> [9] After the Supreme Court Judgment our client is back in the same position that he was in October 2008. We are now writing this letter to seek your client Board's assistance to get Mr Jivraj to pay back to him his monies which he has not paid back.
>
> [10] There is in effect no dispute as to the amount which Mr Jivraj is obliged to pay to Mr Hashwani because that was the amount which Mr

> Zaher Ahamed and holder of high office had determined after he was appointed as an Arbitrator…
>
> [11] Mr Ahamed had conducted the Arbitration reference for over five years. …
>
> [12] The Sole Arbitrator Mr Ahamed disallowed a substantial part of both sides' claims and counterclaims, and he gave a decision under which Mr Jivraj, for the purpose of equalisation of capital, was required to pay back Mr Hashwani USD 1,412,494. Mr Ahamed's decision is in the Supreme Court appeal bundles. Mr Jivraj in breach of the Arbitration Agreement did not honour his obligation.
>
> …
>
> [14] There is absolutely no substance to Mr Jivraj's alleged claim that he faces secondary tax liability because of Mr Hashwani. There is no truth whatsoever in that suggestion. Mr Ahamed had decided all the issues and had given his final decision which Mr Jivraj should honour in keeping with the community tradition and ethos.
>
> [15] The purpose of this letter is to enquire from your client how they propose to get Mr Jivraj to honour Mr Ahamed's decision and hand over Mr Hashwani's capital with accrued interest which Mr Ahamed said Mr Jivraj should pay to our client Mr Hashwani.

A2/152. On 12 August 2011 Zaiwallas wrote to Hill Dickinson. In this letter Zaiwallas, among other things, invited Hill Dickinson to propose three or four names of holders of high office in the Ismaili community who would be suitably independent and from whom both parties could select a sole arbitrator.

A2/153. On 25 August 2011 Mr Hashwani's written submissions on costs were lodged in the Supreme Court. Paragraph 4 of those submissions recited the parties' agreement in the Pre-Conditions that all disputes must be referred to the arbitrator, and the provisions in the 1990 agreement under which Mr Ahamed's determinations would be final and binding. It continued:

> (4) Mr Ahamed made a determination dated 27 December 1993. Critically, Mr Ahamed determined that the balance of the capital accounts of the parties was to be equalised and that appropriate payments should be made to or by the parties to equalize the accounts. Mr Ahamed therefore made what one may call a first partial award on liability, but without determining the quantum of the sum which was to be paid. He also ordered that Mr Jivraj should instruct Stoy Hayward (accountants) to draw up the accounts in accordance with his determination and that both parties should then comment on those accounts and the final account balances and Stoy Hayward should then take those comments into account and that Mr Jivraj should make payment as reflected in the capital accounts;

> (5) Following this, Mr Ahamed intended that the arbitration should in due course be brought to finality;
>
> (6) Pursuant to the determination by Mr Ahamed, Stoy Hayward concluded that, on the reconciliation account between the parties as at 27 December 1993, Mr Jivraj owed Mr Hashwani the sum of US$1,412,494 plus interest from that date. If it is assumed that the correct interest rate is 8%, the total sum now owed on the basis of this determination is over US$5 million: even at a lower rate (such as 1% above base) Mr Jivraj would still have to pay a sum in the millions.
>
> …
>
> (8) In April 1995 Mr Ahamed "admitted defeat" and withdrew from further carrying out his role as arbitrator.

A2/154. By letter dated 5 October 2011 Clifford Chance, while noting that ICAB was not an enforcement body, indicated that Mr Hashwani should contact the chairman of ICAB, Mr Noordin Nanji, with details of what he saw as the matters in dispute with which he wished ICAB to assist.

A2/155. Also on 5 October 2011 Zaiwallas wrote to Hill Dickinson. Among other things, their letter stated:

> [2] Our client needs to know whether or not your client is going to honour his Obligation as directed by the Sole Arbitrator, Mr Ahamed, who was appointed at the instance of no-lesser person that the Hazar Imam himself.
>
> [3] In your letter you allege that our client is indebted to your client under the joint venture ("JV") agreement. This can only be an ill-conceived allegation. Clause 3 of the Arbitration Agreement dated 14 July 1990 provided that any disputes not raised in the course of the reference may never be raised. Both parties raised all their disputes before Mr Ahamed and Mr Ahamed gave his decision. How, then, does the possibility arise of our client Mr Hashwani being indebted to your client Mr Jivraj?
>
> [4] We have now obtained specialist leading Counsel's advice on the Arbitration Agreements.
>
> [5] There are two Arbitration Agreements. It is not uncommon for parties to have agreed two freestanding and different Arbitration Agreements, both with the same object. The first is included in the JV agreement of 1981, clause 8 of which agreement was debated before the Supreme Court. The Second Agreement was to appoint Mr Ahamed as Sole Arbitrator to act ex aequo et bono. As between the first and the second it is arguable that the second was intended to supersede/amend the first, and that it was under this agreement that Mr Ahamed proceeded. This question really does not matter in the

> commercial sense because the object of the parties remained the same, to have their claims and disputes decided by Arbitration.
>
> [6] The second agreement was an ad hoc Arbitration Agreement. It provides for no restrictions on the qualification of the Arbitrator and is governed by English Law. The applicable English Law at the time of the second agreement was the Arbitration Act 1950.
>
> [7] Mr Ahamed did not complete the reference. He came to a view on liability, but not on quantum. In all events, he did not conclude the reference.
>
> …
>
> [12] We would be grateful if you would take your client's instructions and revert to us soonest. Please treat this as Notice to appoint a substitute Arbitrator under Section 10 of Arbitration Act 1950, which provides that if the appointment is not made within seven clear days from the service of Notice, then either party can make an application to the Court for the appointment of the Arbitrator. For the purpose of this notice we are prepared to extend the seven day period under section 10 to close of business Wednesday 19th October 2011.

A2/156. By fax dated 19 October 2011 Hill Dickinson responded to Zaiwallas' letter of 5 October 2011. In their fax Hill Dickinson stated, among other things:

> [A] … The claim you allege on behalf of your client is now 17 years old. The time when it could be fairly or properly pursued in any forum is now long past. Three years ago, in 2008, you scorned the idea that, in 1990, Mr Ahamed had been appointed as an arbitrator. In your letter of 31 July 2008 you said that Mr Ahamed had "assumed the role of a Conciliator" and in your letter of 14 August 2008 you said that "Mr Ahamed could not have acted as an arbitrator". No doubt this stance was consciously adopted so as to clear the way for your client's attempt to start a fresh arbitration by the appointment of Sir Anthony Colman.
>
> [B] We note that, having spent three years and three rounds of proceedings contending that the appointment of Sir Anthony Colman was valid, your client has now performed a complete volte face and wishes to contend that Mr Ahamed was appointed as an arbitrator after all and, what is more, that, after 12 years, his arbitration remains unfinished and should be revived by the appointment of a replacement arbitrator under s.10 of the Arbitration Act 1950. As to that proposal, our client's position is as follows:
>
> (1) Mr Ahamed's appointment was personal to him. As you say, Mr Ahamed was nominated for the task by HH The Aga Khan. By the Agreement of 14 July 1990, the parties specifically agreed not to refer their disputes to any person or body other

than Mr Ahamed and they further agreed that the arbitration would not be a formal arbitration, that Mr Ahamed would make such decisions as he considered just and equitable and that he would not be obliged to give reasons for his decisions. The role and the powers given by this agreement to Mr Ahamed are not transferable. Within the meaning of section 10(b) of the Arbitration Act 1950, the arbitration agreement shows that it was intended that a vacancy should not be supplied. Accordingly, there is no scope for the Court to appoint a replacement for Mr Ahamed;

(2) In any event, the jurisdiction under s.10 is discretionary and the Court will not make an appointment in cases of serious delay, even without proof of prejudice (*Frota Oceanica Brasiliera SA v Steamship Mutual Underwriting Assoc* [1996] 2 Lloyd's 461, CA). In the present case the delay is egregious and, if it is necessary, Mr Jivraj is plainly prejudiced by the difficulty of taking up again a dispute which has not progressed since 1994;

(3) Any arbitrator who was appointed would inevitably dismiss the claim for delay under s.13A of the Arbitration Act 1950; it is therefore pointless to make an appointment.

(4) It is an abuse of process for your client to have required our client to litigate for three years and incur substantial costs on the premises that there was no existing arbitration and then to change tack and claim that there was, all along, an existing arbitration. It would be a further abuse for your client to pursue any fresh proceedings without first paying or securing the costs orders which we expect that the Supreme Court will shortly make in our client's favour.

[C] In addition to these points, our client believes that, as he had requested, Mr Ahamed was released by the parties in 1994, so that no arbitration remains in existence.

[D] In these circumstances, our client does not propose to concur in the appointment of a fresh arbitrator under the agreement made in July 1990.

A2/157. Zaiwallas responded on the same day. They asserted that in the litigation Mr Jivraj had not taken issue with regard to the continued validity of the arbitration clause in the JVA. The only objection by Mr Jivraj in that litigation, they said, was that the arbitrator to be appointed should be an Ismaili holder of high office. Zaiwallas repeated their invitation of 12 August 2011 to propose names of Ismaili holders of high office suitable to be selected as a sole arbitrator. They then added that they had been in touch with Mr Nanji, and continued:

[7] Our client wishes to give the Ismaili Community leaders a short opportunity to have his claim against your client resolved without his

> having to knock at the door of the Court again. In view of that, our client will wait for a period of two weeks to receive and consider Mr Nanji's response before making his Application to Court.

A2/158. A complaint dated 24 November 2011 was lodged by Mr Hashwani with the European Commission. It concerned the issue of whether the religious qualification in clause 8 of the JVA was binding. The complaint said that, acting through the instrumentality of the Supreme Court, and its failure to refer the issue to the Court of Justice of the European Union, the United Kingdom was in breach of its obligation to refer under Article 257 of the Treaty on the Functioning of the European Union ("TFEU"). In December 2012, the European Commission notified Mr Hashwani that it had transmitted the complaint to the United Kingdom to be answered.

A2/159. At paragraph 128 of Hashwani 2013 Mr Hashwani stated:

> If, as I hope, an infringement is proved in due course before the European Court of Justice, and my Article 257 rights have been violated by the Supreme Court, my intention is to seek a reopening of the case before the Supreme Court on the grounds that there has been a serious failure in procedure of the Supreme Court, and seek a reversal of the decision, since the United Kingdom will be bound to rectify the infringement. So, as far as the Supreme Court proceedings are concerned, the case of Jivraj v Hashwani is not finished.

A2/160. Returning to Clifford Chance's indication in their letter of 5 October 2011 that Mr Hashwani should contact Mr Nanji, Mr Hashwani set out at paragraphs 136 and 137 of Hashwani 2013 an account of what was done by Mr Nanji:

> 136. I wanted again to give the Community a further opportunity to bring this matter to a close and therefore gave Mr Nanji an opportunity to intervene. Mr Nanji was active by way of seeking resolution of this matter up to about August 2012 by intermediating, for which I am grateful, but he was not able to resolve the matter at all.
>
> 137. Mr Nanji informs me that Mr Jivraj's position is that the sum of the clause 4 (c) adjustment which had been made to my bids should be paid to the tax authorities and that, if this is not so paid, it is an asset of the partnership which should be distributed between myself and Mr Jivraj on a 50/50 basis. Mr Nanji told me that Mr Jivraj's position is, therefore, that such sum as he owes me in respect of equalization of capital should be set off by half of the clause 4 (c) discount which was applied to my bids, and that Mr Jivraj was not willing to have any further discussions with me unless I agreed to this. Mr Nanji told me that, based on this, he was not confident that the gap between Mr Jivraj and myself could be bridged

A2/161. The information referred to in paragraph 137 of Hashwani 2013 was contained in an email dated 28 March 2012 from Mr Nanji to Mr Hashwani. Mr Hashwani replied the following day saying that he looked to community leaders to ensure that Mr Jivraj:

> honours his obligation and pays me my claim which has been determined by the arbitrator, Mr Zaher Ahamed.
>
> … I would respectfully suggest that the most appropriate course would be to get Mr Zaher Ahamed to complete the arbitration reference and publish an enforceable arbitration award which he can still do. …

A2/162. On 9 April 2012 Mr Nanji advised that he did not believe that getting Mr Ahamed to publish an enforceable award was an option: the conclusion Mr Nanji had reached was that Mr Ahamed's role had "ended with his determination letter". On 13 April 2012 Mr Hashwani responded asking for further guidance from the Aga Khan. Mr Nanji replied on 23 May 2012:

> …
>
> Unfortunately, it is impossible to predict if guidance… will be forthcoming, and if so, when that guidance might be received. I will certainly let you know as soon as I have anything that I can report to you. In the meantime, you should not prejudice yourself if any deadlines are upcoming from a legal point of view that must be addressed.

A2/163. On 2 August 2012 Mr Hashwani emailed Mr Nanji, stating that he had asked his lawyer not to proceed for the time being as he had left the matter to the guidance of the Aga Khan. Mr Nanji replied on 4 August 2012:

> I am afraid I have nothing new to report at this time. I would therefore reiterate my earlier advice that you not hold back your legal counsel if it will in any way prejudice your legal position.

A2/164. On 12 March 2013 Mr Hashwani's present claim was issued.

A2/165. On 11 July 2013 Mr Jivraj issued an application to strike out Mr Hashwani's application as an abuse of the court.

A2/166. At a case management conference on 12 July 2013 I ordered that Mr Hashwani should serve a statement of the remedies sought and the grounds relied upon in respect of each such remedy, and that Mr Jivraj should serve an answer addressing those remedies and grounds. Mr Hashwani's statement of remedies and grounds was served on 2 August 2013.

A2/167. Remedy 3 was described by Mr Hashwani as an order "Order to appoint new arbitrator to replace Mr Ahamed in the arbitration pursuant to section 25 (2) (a) and/or (3) of the Arbitration Act 1950, appointment to be made in accordance with directions to be given by the Court". The grounds in support of remedy 3 were:

> [3A] If Mr Ahamed is removed by the Court or permission is given to revoke his authority, the Court should appoint a new arbitrator in his place in the arbitration because:

- [3A.1] The issue of the finalization of the capital account of the joint venture was referred to Mr Ahamed within the Limitation period.

- [3A.2] Mr Ahamed determined that the capital account of the joint venture should be equalized but never made an award as to what sum should be paid to whom and by whom in order to effect the equalization.

- [3A.3] The joint venture company is still extant and needs to be dissolved and a final account reached on the capital account so that the capital returned to the parties.

- [3A.4] The arbitration is still afoot but Mr Ahamed is unwilling to complete it.

- [3A.5] The matter should be brought to final resolution.

- [3A.6] A new arbitrator should be appointed to bring the arbitration to a conclusion and there is no personal reason associated with Mr Ahamed's appointment why such a new arbitrator should not be appointed.

[3B] The Court should in the first instance give directions in relation to the identification of a new arbitrator before making the appointment because there has been difficulty up to now for various reasons in identifying an Ismaili community arbitrator or arbitrators willing to act despite efforts to identify one or more to act.

A2/168. Remedy 5 sought by Mr Hashwani was described as an order "pursuant to section 24 (3) of the Arbitration Act 1950 that there be no stay of any legal proceedings to resolve the parties' dispute". The grounds in support of remedy 5 were:

[5A] This remedy will be sought only if Mr Jivraj were to apply for a stay of any legal proceedings which are brought in circumstances in which Remedy 3 is not granted. The grounds on which such relief should be granted are:

- [5A.1] if the remaining issues are not to be resolved in the arbitration, they should be resolved in court;

- [5A.2] the arbitration agreement dated 29 January 1981 was superseded with regard to this dispute by the arbitration agreement pursuant to which Mr Ahamed acted;

- [5A.3] in any event, Mr Jivraj has waived the application of the arbitration agreement dated 29 January 1981;

- [5A.4] in all the circumstances, whether as aforesaid or by virtue of any order granted under section 25 (2) (b) of the Arbitration Act 1950, there is no operative arbitration agreement which prevents legal proceedings.

A2/169. Mr Jivraj's answer was served on 27 September 2013.

A2/170. On 9 September 2014 Zaiwallas wrote a letter to Bermans. This letter referred to the forthcoming hearing of Mr Hashwani's application, and continued:

> [2] We have very recently learnt that Mr Zaher Ahamed has passed away. It has therefore become necessary to appoint a replacement arbitrator in place of Mr Ahamed. For this purpose we request you to concur with the appointment of one of the following retired English Judges as a sole arbitrator to fill the vacancy created by Mr Ahamed passing away. The names which we propose are as follows:
>
> 1. Sir Philip Otton
> 2. Sir Anthony Evans
> 3. Sir Tom Morrison.
>
> [3] The purpose of this letter is to give your client formal notice under Section 10(b) to concur in the appointment of an arbitrator to replace Mr Ahamed. We must give you further notice that if your client fails to concur in the appointment of a replacement Arbitrator within 7 days of the receipt of this notice, our client will apply to the High Court to appoint an arbitrator under the terms of the Arbitration Act 1950.

A2/171. Mr Jivraj declined to concur with any appointment of an arbitrator to replace Mr Ahamed. The hearing of the present application accordingly proceeded on 6 and 7 October 2014.