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

[2023] SGHC 61

Originating Application No 419 of 2022

Between

CWP

… *Claimant*

And

CWQ

… *Defendant*

JUDGMENT

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

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CWP
v
CWQ

[2023] SGHC 61

General Division of the High Court — Originating Application No 419 of 2022
S Mohan J
24 November 2022

16 March 2023 Judgment reserved.

S Mohan J:

1 It is well-established that the principle of party autonomy undergirds the arbitration regime in Singapore. A facet of party autonomy is that the disputing parties select the arbitrators they wish to make up the tribunal or, at the least, agree on the process by which the tribunal is to be constituted. The flipside of this autonomy is that parties take the arbitrators as they are.

2 It is also well-established that our courts firmly maintain a policy of minimal curial intervention in arbitral disputes, subject to a narrow and exhaustive list of exceptions. A court will not intervene in an arbitral award on the mere allegation by a party that the tribunal got the decision wrong. Under the statutory regime in Singapore governing international arbitrations, a party dissatisfied with a tribunal's award has no recourse to the court's appellate jurisdiction to overturn the decision on its merits. A court may however

intervene if, for example, there has been a failure of *process* resulting in a breach of natural justice.

3 A complaint that a breach of natural justice has been occasioned in the making of an arbitral award can take different forms – one instance where a court may intervene is if it can be demonstrated clearly that an arbitral tribunal completely failed to consider or apply its mind to an important issue or argument that was raised for its consideration and decision. However, for a court to be so satisfied, that conclusion or inference must, as the Court of Appeal reminds us, be a virtually inescapable one (*AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN*") at [46]):

> 46 … It will usually be a matter of inference rather than of explicit indication that the arbitrator wholly missed one or more important pleaded issues. However, the inference – that the arbitrator indeed failed to consider an important pleaded issue – if it is to be drawn at all, must be shown to be clear and virtually inescapable. If the facts are also consistent with the arbitrator simply having misunderstood the aggrieved party's case, or having been mistaken as to the law, or having chosen not to deal with a point pleaded by the aggrieved party because he thought it unnecessary (notwithstanding that this view may have been formed based on a misunderstanding of the aggrieved party's case), then the inference that the arbitrator did not apply his mind at all to the dispute before him (or to an important aspect of that dispute) and so acted in breach of natural justice should *not* be drawn.
>
> [emphasis in original]

4 The passage quoted above demonstrates that the bar an aggrieved party needs to cross is necessarily set high.

5 In many a case that has come before our courts, parties have sought to confuse the court's role (some cynics might argue, as a deliberate strategy) by presenting what is effectively a backdoor appeal on the merits in the guise of a process breach, and painting the tribunal's disagreement with an argument as a

failure by the tribunal to even consider or understand that argument or the issue at hand. Time and again, the Court of Appeal has warned that the courts must be wary of attempts by an aggrieved party to mount what is, in effect, an appeal in disguise: see, *eg*, *AKN*; *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2021] 2 SLR 1279.

6 In this application, CWP is the claimant and CWQ is the defendant. The claimant seeks a partial setting aside of a final award dated 4 May 2022 (the "Award") rendered by a three-member arbitral tribunal (the "Tribunal"). For reasons I elaborate upon below, I dismiss the claimant's application.

Factual background

7 The substantive dispute between the parties centres around the defendant's entitlement to compensation for stoppages and delays in respect of various vessels it had employed to carry out dredging works in the claimant's project. As an order has been made for any judgment published in this action to be redacted, the identities of the parties and other pertinent details relevant to the dispute have been redacted or anonymised.

8 The claimant, a construction company incorporated in Ruritania, was engaged to carry out dredging and land reclamation works in certain areas of Ruritania City Port. By means of an agreement dated 12 May 2017 (the "Contract"), the claimant sub-contracted the dredging works to the defendant, a marine engineering company specialising in offshore construction.[1] The governing law of the Contract was English law, and the dispute resolution clause

[1] Affidavit of SSJ dated 3 August 2022 ("SSJ's affidavit") at paras 5–8; Affidavit of KFB dated 21 September 2022 ("KFB's affidavit") at paras 4–5.

provided for arbitration seated in Singapore under the rules of the Singapore International Arbitration Centre.[2]

9 Under the Contract, the defendant was to deploy four vessels to carry out the dredging works: a trailing suction hopper dredger (the "Hopper"), a cutter suction dredger (the "Cutter") and two split hopper barges (the "Barges") (collectively, the "Vessels"). The Hopper would be used to dredge loose and soft soils like sand, gravel, silt or clay. Harder soils and rocks which could not be cleared by the Hopper would be dredged by the Cutter and discharged onto the Barges. The Barges would then dispose of the dredged material at a designated dumping area.[3]

10 Pursuant to Art 6.1 of the Contract, the works were to be completed within a 90-day period (the "Time for Completion") from the commencement date. It is undisputed that the commencement date was 26 May 2017, such that the works were to be completed by 24 August 2017.[4]

11 Central to the dispute was Art 3.9 of the Contract, which states:

> 3.9 Stoppages of the dredging and/or reclamation works for any reason other than mechanical breakdown (except for breakdown and/or damage to the Hopper as a result of dredging boulders in all Areas) or any other reasons that are specified in the Contract as being attributed to the Contractor [*ie*, the defendant] or any negligence or misconduct of the Contractor, shall entitle the Contractor to extension of time and to compensation on the basis of the standby rates stated in Article 4 for any commenced hour.

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2 SSJ's affidavit Tab 1 at p 51.

3 SSJ's affidavit at para 9; Defendant's Bundle of Documents ("DBD") Tab 5 at pp 111–112 (Final Award).

4 SSJ's affidavit at paras 9–10; DBD Tab 4 at pp 85 and 89.

12 Over the course of the engagement, there were several stoppages to the operation of the Vessels owing to various incidents. The defendant subsequently sought an extension of time and, more significantly, compensation from the claimant under Art 3.9 in respect of these stoppages. For present purposes, the relevant incidents were (a) delay in the mobilisation of the Cutter and Barges arising from problems in obtaining the required permits, and (b) the evacuation of the Vessels from the work site to avoid a typhoon. It is also apposite to mention at this point that notwithstanding the delays, the defendant completed the works on 26 August 2017, exceeding the Time for Completion by two days.[5]

The arbitration proceedings

13 Disputes arose between the parties in relation to the defendant's entitlement to compensation and an extension of time under Art 3.9 for the various delays and disruptions to the operation of the Vessels. On 26 October 2018, the defendant commenced arbitration proceedings against the claimant under the Contract (the "Arbitration").[6] After some complications with the appointment of arbitrators arising from the demise of the arbitrator initially nominated by the claimant, the Tribunal was constituted.

14 The defendant (*ie*, the claimant in the Arbitration) sought, *inter alia*, compensation under Art 3.9 in respect of several incidents: (a) the delay in procuring import permits for the split hopper barges (the "Import Delay Claim"), (b) the evacuation of the Vessels to evade a typhoon (the "Typhoon Claim"), (c) a change in the reclamation sequence for the project, and (d) the claimant's failure to maintain access to the dumping area for the split hopper

5 SSJ's affidavit at para 11.

6 SSJ's affidavit at para 13.

barges.[7] The claimant (as the respondent in the Arbitration), completely denied any liability under Art 3.9.

15 The claimant locked horns with the defendant on several aspects of the Art 3.9 claim. Firstly, the claimant disagreed with the defendant on the proper interpretation of Art 3.9, namely whether (as the defendant argued) the provision entitled the defendant to compensation for stoppages, regardless of whether they prevented the defendant from completing the works within the Time for Completion (the "Interpretation Issue"). I simply note at this point that the claimant has sought to argue in this application that the defendant did not initially advance this interpretation of Art 3.9. I will elaborate on this below. Secondly, the claimant disputed each of the four incidents of delay, essentially on grounds that they either did not amount to a "stoppage" under Art 3.9, were caused by reasons falling within one of the exceptions in Art 3.9, or otherwise constituted *force majeure* events under Art 22 of the Contract.

16 For completeness, the claimant also made a counterclaim in the Arbitration against the defendant for breaching its obligation to endeavour to complete the works within the Time for Completion.[8] As the Tribunal's decision on the claimant's counterclaim is of no relevance for the purposes of the application before me, I say no more on it.

The Award

17 The Tribunal issued the Award on 4 May 2022.[9] On the defendant's claim under Art 3.9, which is the only part of the Award relevant to this

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7 DBD Tab 5 at pp 114–115 (Final Award para 9).

8 DBD Tab 9 at pp 457–533 (Statement of Defence & Counterclaim).

9 DBD Tab 5 at p 105 (Final Award).

application, the Tribunal was split. The majority of the Tribunal (the "Majority") agreed with the defendant's interpretation of Art 3.9, *viz*, that it entitled the defendant to compensation regardless of whether the stoppages prevented it from completing the works before the Time for Completion expired. The Majority decided that the claimant was liable to pay compensation (together with interest and costs) to the defendant in respect of all the incidents that caused stoppages.

18 The presiding arbitrator issued a dissenting opinion (the "Dissenting Opinion"). He disagreed with the Majority's interpretation of Art 3.9, and consequently found that the claimant was not liable to pay compensation for any of the stoppages. As the claimant relies heavily on the Dissenting Opinion in its objections to the Majority's decision on the interpretation of Art 3.9, I will discuss the Dissenting Opinion in greater detail below.

The parties' cases

19 Counsel for the claimant, Mr William Ong, argues that the Majority's decision to allow the defendant's Art 3.9 claim should be set aside pursuant to Art 34(2)(*a*)(iii) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") and/or s 24(*b*) of the International Arbitration Act 1994 (2020 Rev Ed). The claimant bases its case on three grounds:

> (a) first, in determining the Interpretation Issue in the defendant's favour, (i) the Majority exceeded the scope of the parties' submission to arbitration by accepting arguments which the defendant did not plead in its Notice of Arbitration, and (ii) the Majority did not apply its mind to

consider the arguments and evidence presented by the claimant, in breach of the fair hearing rule;[10]

(b) second, in holding the claimant liable in respect of the Import Delay Claim, the Majority made a finding that the claimant's failure to obtain the requisite security clearances on time had a "flow on effect" leading to delays in obtaining import permits for the split hopper barges. In doing so, the Majority (i) exceeded the scope of the parties' submission to arbitration by accepting the defendant's unpleaded arguments and (ii) breached the fair hearing rule by not giving the claimant a full opportunity to present its case on the "flow on effect";[11] and

(c) third, in finding the claimant liable to pay compensation to the defendant in respect of the Typhoon Claim, the Majority breached the fair hearing rule by failing to address a gap in the evidence and failing to address a crucial issue of whether the stoppage was attributable to the claimant.[12]

20 Counsel for the defendant, Professor Tan Cheng Han SC, submits that there is no basis for any part of the Award to be set aside. The defendant responds to the claimant's grounds in the following manner:

(a) in relation to the Interpretation Issue, the defendant's arguments were sufficiently pleaded and ventilated in the course of the Arbitration,

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10 Claimant's Written Submissions ("CWS") at paras 38–47; SSJ's affidavit at para 47.

11 CWS at paras 48–66.

12 CWS at paras 67–70.

the Majority had considered the claimant's arguments and simply disagreed with them;[13]

(b) in relation to the Import Delay Claim, the Majority had considered the claimant's arguments and the defendant's arguments (which were sufficiently pleaded), and was entitled to make its findings based on them;[14] and

(c) in relation to the Typhoon Claim, the claimant's grounds were a bare attempt to argue that the Majority's decision was wrong, which is not a basis for setting aside the Award or any part of it.[15]

Issues

21 In light of the submissions advanced by the parties, the following issues arise for my determination:

(a) whether the Majority's decision on the interpretation of Art 3.9 was a decision on an issue that went beyond the scope of submission to arbitration and/or was made in breach of natural justice;

(b) whether the Majority's decision to award compensation for the Import Delay Claim exceeded the scope of submission to arbitration and/or was made in breach of natural justice; and

(c) whether the Majority's decision to award compensation for the Typhoon Claim was made in breach of natural justice.

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13 Defendant's Written Submissions ("DWS") at paras 5–14.

14 DWS at paras 15–19.

15 DWS at paras 20–23.

Issue 1: The Interpretation Issue

Whether the defendant's arguments were unpleaded

22 I first deal with the claimant's pleading objection. The claimant takes issue with the Majority's decision to award compensation to the defendant under Art 3.9 without the need to prove a critical delay, *ie,* a delay preventing it from completing the works within the Time for Completion.[16] Essentially, the claimant argues that the defendant had framed its claim in its Notice of Arbitration as one for "demurrage", and that this required the defendant to prove a critical delay. However, the defendant subsequently and belatedly changed its case on Art 3.9 to the effect that it was entitled to compensation and extension of time regardless of whether there was a critical delay.[17] In other words, the Majority's decision to award compensation under Art 3.9 without proof of critical delay was beyond the scope of submission to arbitration.

23 The claimant relies heavily on the Dissenting Opinion to support its case. In the Dissenting Opinion, the dissenting arbitrator cited *TYN Investment Group Pte Ltd v ERC Holdings Pte Ltd and another* [2020] 5 SLR 894 ("*TYN Investment*") as authority for the proposition that the notice of arbitration exhaustively defines the parameters within which the arbitration must operate. I reproduce the passage relied on by the dissenting arbitrator:

> 21 … A Statement of Claim and a Statement of Defence in an arbitration governed by the rules of the Singapore International Arbitration Centre ('SIAC') are obviously pleadings. But a notice of arbitration is more fundamental than the pleadings and in fact operates on a higher plane. A notice of arbitration is constitutional in nature. The notice of arbitration alone exhaustively defines the parameters within

16 CWS at para 8.

17 SSJ's affidavit at para 23.

> which the pleadings, the parties, the tribunal and its award must operate. …

24 On this basis, the dissenting arbitrator took the view that the defendant was bound by its case as stated in the Notice of Arbitration (*ie*, a claim for "demurrage"), and could not change its claim without amending the Notice of Arbitration:[18]

> 10. … Thus, even though [the defendant] uses the words or terms 'stoppage(s)' or 'stoppage(s) of work' in the pleadings or submissions, based on the trite proposition set out above in *TYN Investment Group*, these stoppages must be construed as delays as described by it in … the NOA and for which [the defendant] is claiming demurrage. For the records, *no application has been made by [the defendant] to amend this head of claim or the 'demurrage entitlement for delay/disruption' basis upon which this head of claim is advanced or made in the NOA*. That is to say, there is no application made by [the defendant] that this head of claim in the NOA is to be based on other basis other than delay to the Time for Completion of the Works. …
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> [emphasis added]

Analysis & Decision

25 With respect, the reliance placed by the dissenting arbitrator (and by extension the claimant) on *TYN Investment* is, in my view, misplaced. *TYN Investment* was decided before the Court of Appeal's guidance in more recent cases.

26 For instance, in *CDM and another v CDP* [2021] 2 SLR 235, the Court of Appeal stated that in determining the scope of the parties' submission to arbitration, the court may have regard to five sources: the parties' pleadings (*ie*, the Notice of Arbitration, Statement of Claim, Statement of Defence (and

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[18] DBD Tab 5 at pp 325–326 (Dissenting Opinion of Tan Liam Beng at para 10).

Counterclaim), and Reply (and Defence to Counterclaim), *etc*), any Agreed List of Issues, the parties' opening statements, the evidence adduced, and closing submissions in the arbitration (at [18]). These five sources are not discrete or independent sources: *CAJ and another v CAI and another appeal* [2022] 1 SLR 505 at [50]. It thus follows that, conversely, one cannot merely look at only one of the five sources to determine if an issue was within the scope of submission to arbitration.

27 In *CJA v CIZ* [2022] 2 SLR 557 (at [38]), the Court of Appeal warned against taking an overly narrow view as to what the live issues in the arbitration were:

> 38 … [I]n considering whether the jurisdiction has been exceeded, the court must look at matters in the round to determine whether the issues in question were live issues in the arbitration. In doing so, *it does not apply an unduly narrow view of what the issues were*: rather, *it is to have regard to the totality of what was presented to the tribunal* whether by way of evidence, submissions, pleadings or otherwise and consider whether, in the light of all that, these points were live. [emphasis added]

Instead, and as reiterated in the recent decision of the Singapore International Commercial Court in *CFJ and another v CFL and another and other matters* [2023] SGHC(I) 1 (at [245]), a practical view must be taken regarding the substance of the dispute being referred to arbitration.

28 Therefore, it is clear that there is no single source which determines, to the exclusion of all others, what issues the parties have placed before the tribunal for its determination. Instead, the court must take a practical and not an unduly narrow view in considering whether the five sources, *taken together*, indicate that the parties *contemplated and understood* that the issue in question was to be properly submitted for determination by the tribunal.

29 Turning to the present case, the claimant's argument that the Majority's decision on Art 3.9 was outside the scope of submission to arbitration is, in my judgment, a non-starter. Looking first at the Notice of Arbitration, Art 3.9 is pleaded in its entirety, and a plain reading of the provision makes clear that what the defendant was entitled to under the provision was an extension of time and compensation. However, the defendant also prefaces its reproduction of Art 3.9 with a reference to "demurrage":[19]

> **Demurrage Entitlement for delays/disruptions to the vessel operations**
>
> 6.6 Agreement, Article 3.9 – **Demurrage provides** – '*Stoppages of the dredging and/or reclamation works for any reason other than mechanical breakdown … or any other reasons that are specified in the Contract as being attributed to the Contractor or any negligence or misconduct of the Contractor, shall entitle the Contractor* ***to extension of time and to compensation*** *…*'
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> [emphasis in italics in original; emphasis in bold added]

I note that Art 3.9 in the Contract does not have a heading, much less the heading "demurrage". Nor does the word "demurrage" appear in Art 3.9. Nevertheless, it is apparent from the dissenting arbitrator's reasoning (at paras 10 and 11 of the Dissenting Opinion) that the framing of para 6.6 of the Notice of Arbitration was enough, in his mind, to cast the defendant's claim in stone as one where it could only claim compensation for delay beyond the 90-day Time for Completion. In other words, the dissenting arbitrator understood the defendant's claim to be akin to demurrage as it was understood in the shipping industry, *ie*, where a voyage charterer's liability to pay demurrage accrues only after the vessel has been detained or delayed in either loading or discharge operations beyond the agreed laytime allowance in the charter contract. However, nowhere

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[19] DBD Tab 6 at p 361.

in the Contract, the Notice of Arbitration, or any of the defendant's subsequent pleadings is the term "demurrage" defined in this manner, or indeed in any manner at all. In my view, even construing the Notice of Arbitration on its own as a "constitutional" document (*per TYN* at [21]), it was wide enough to encompass the claim that was subsequently advanced by the defendant via, *inter alia*, its pleadings.

30 Moving to the rest of the pleadings, the Statement of Claim makes no reference to "demurrage" at all. Instead, the defendant elaborates on its Art 3.9 claim as being one for extension of time and compensation irrespective of whether there was any delay beyond the Time for Completion:[20]

> 28.4 In the premises, any stoppage or other event entitling [the defendant] to an extension of time would entitle [the defendant] to an appropriate extension of the Time for Completion of the Works whether or not that event in fact prevented [the defendant] from completing the Works within the Time for Completion of the Works.
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> …
>
> 28.6 [The defendant] was entitled to be so compensated in respect of such stoppages whether or not those stoppages prevented [the defendant] from completing the Works within the Time for Completion of the Works.

31 In fact, it was the *claimant* which sought to maintain the characterisation of the claim as one for "demurrage" in its Statement of Defence and Counterclaim:[21]

> 13. As regards paragraph 13.2 of the SOC, [the claimant] denies that [the defendant] is entitled to invoke Article 3.9 of the Contract and/or to claim for demurrage. …

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20 DBD Tab 8 at pp 427–428.

21 DBD Tab 9 at p 463.

Notwithstanding this, the claimant raised no objection that the defendant had changed its case in the Statement of Claim. In fact, the claimant responded to the defendant on the merits of its claims, in terms that make it clear that it fully understood the defendant to be making a claim for compensation under Art 3.9 without having to prove delay beyond the Time for Completion:[22]

> 40. As regards paragraphs 28.4 to 28.6 of the SOC:
>
> (1) On a proper construction of the Contract, *[the defendant] is not entitled to any 'standby fees' based on the 'standby rates' under Article 4.1 of the Contract where any stoppages did not cause [the defendant] to require more than the agreed 90-days period to complete the works under the Contract.*
>
> (2) In any event, [the defendant] is not entitled to any 'standby fees' under Article 3.9 of the Contract based on the 'standby rates' under Article 4.1 of the Contract where there could not be said to be any '[s]toppages of the dredging and/or reclamation works' for any 'commenced hour' at all, and/or if such stoppages were due to 'reasons that are specified in the Contract as being attributed to the Contractor or any negligence or misconduct of the Contractor'.
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> [emphasis in original omitted; emphasis added in italics]

32 Looking next to the parties' Joint List of Agreed Issues, it is also clear that the parties were entirely *ad idem* as to the nature of the defendant's claim for compensation and extension of time under Art 3.9:[23]

> **1 General issues relating to [the defendant's] position that it is entitled to extensions of time and entitled to work as and when it saw fit**
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> …

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22 DBD Tab 9 at p 476.

23 DBD Tab 10 at pp 535–536.

> 1.5 Do stoppages of the dredging and/or reclamation works for any reason, save for the three excluded categories of event explicitly set out in Article 3.9, *entitle [the defendant] to both and [sic] extension of time and compensation on the basis of the standby rates in Article 4 for any commenced hour?*
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> …
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> 1.7 Would any stoppage of the dredging and/or reclamation works under Article 3.9 entitle [the defendant] to an extension of the Time for Completion of the Works *whether or not that event in fact prevented [the defendant] from completing the Works within the Time for Completion of the Works?*
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> 1.8 Would any stoppage of the dredging and/or reclamation works under Article 3.9 entitle [the defendant] to compensation *whether or not that event in fact prevented [the defendant] from completing the Works within the Time for Completion of the Works?*[24]
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> [emphasis in bold in original; emphasis in italics added]

33 Tellingly, as the defendant points out in its written submissions in this application, at no point during the Arbitration did the claimant raise any objection to the Tribunal that the defendant was presenting a different case to that contained in the Notice of Arbitration, such that it was outside the scope of submission to arbitration.[25] Nor could Mr Ong point me to any such objection in the Arbitration record during the hearing for this application.

34 Thus, it is clear to me beyond peradventure that notwithstanding the use by the defendant of the word "demurrage" in the Notice of Arbitration, there was never any doubt between the parties and the Tribunal as to what was in play in the Arbitration. "Demurrage" was used by the defendant as a convenient shorthand to describe broadly the nature of the Art 3.9 claim for compensation and extension of time, and was not intended to be used in any technical sense or as a term of art. By latching onto a single use of the word "demurrage" in the

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[24] DBD Tab 10 at p 536.

[25] DWS at para 7.

Notice of Arbitration as rigidly defining the limits of the defendant's claim, ostensibly in ignorance of how the rest of the Arbitration proceeded, the dissenting arbitrator, with respect, missed the forest for the trees. It is also clear that the claimant, which had not raised this objection at any time before this present application, opportunistically latched onto the dissenting arbitrator's reasoning as a means to attempt to set aside the Award.

35 In oral arguments, Mr Ong focused on the fact that the defendant had claimed only a two-day extension of time in the Notice of Arbitration. Mr Ong argued that it follows that the defendant itself understood its entitlement to compensation as being tied to an extension of time only beyond the Time for Completion. Again, taking a practical view of the pleadings as a whole, this understanding was clearly not maintained in the rest of the Arbitration.

36 I therefore find that there is no basis to set aside the Award based upon this objection.

Whether the Majority failed to consider the evidence and the claimant's arguments

37 Next, the claimant contends that the Majority, in deciding the Interpretation Issue, failed to consider its arguments and the evidence presented.

The applicable law on breach of natural justice

38 Before addressing the claimant's submissions on this point, I briefly discuss the applicable law, which is uncontroversial.

39 The principles that apply where a party challenges an award on the basis of a complaint that there was a breach of natural justice in the making of the award are well established. That party must establish (a) which rule of natural

justice was breached; (b) how it was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced its rights (*Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [29] ("*Soh Beng Tee*"); *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 at [86]).

40 In this case, the claimant, in arguing that the Majority failed to consider or apply its mind to the claimant's arguments, relies on the fair hearing rule. It bears mentioning here that while a tribunal must ensure that all essential issues are dealt with, it need not address each and every argument raised by a party: *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM Division*") at [72]–[73]. As I mentioned above at [3], for the court to arrive at a conclusion that an arbitral tribunal failed to consider an argument or issue at all or completely failed to apply its mind to it, the inference (if it is to be drawn at all) must be "clear and virtually inescapable": *AKN* at [46].

41 In this respect, I note the following statements in the Award:[26]

> 30. At the outset, the Tribunal would like to state that it has given consideration to all submissions presented by the Parties. *The fact that a specific submission or authority is not expressly referred to in this Final Award does not mean that it has been overlooked or not been considered by the Tribunal* - the Tribunal only discusses the Parties' submissions which it considers most relevant for its decisions. …
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> …
>
> 131. The Majority has carefully considered the Parties' submissions and authorities and summarises these in the sections which follow. *The Majority's omission to expressly refer to any specific submission or authority should not be taken to mean that it has not considered them. …*

[26] DBD Tab 5 at pp 125 and 158.

[emphasis added]

While I do not take these generic statements to be conclusive evidence that the Majority had indeed considered all the arguments, they may nonetheless be taken into account when considering the substance of the Award as a whole.

42 The claimant argues that in determining the interpretation of Art 3.9, the Majority failed to consider two arguments made by the claimant. I will term them the Prevention Principle Objection and the Commercial Justification Objection. I deal with each in turn.

The Prevention Principle Objection

43 The claimant argues that in arriving at its interpretation of Art 3.9, the Majority had failed to consider its submissions on the prevention principle. The prevention principle is a contractual principle to the effect that a promisee cannot insist upon the performance of an obligation which it has prevented the promisor from performing: *Ng Koon Yee Mickey v Mah Sau Cheong* [2022] 2 SLR 1296 at [60], citing *Chitty on Contracts* (Hugh Beale gen ed) (Sweet & Maxwell, 34th Ed, 2021) at para 39-115. As applied in construction law, it operates such that "the employer cannot hold the contractor to a specified completion date, if the employer has by act or omission prevented the contractor from completing by that date" (*Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No. 2)* (2007) 111 ConLR 78 ("*Multiplex*") at [48]).

44 The prevention principle had been raised in the claimant's closing submissions in the Arbitration, by reference to Hamblen J's explanation in *Adyard Abu Dhabi v SD Marine Services* (2011) 136 ConLR 190 ("*Adyard*") (at [264]) that the rationale behind the principle necessarily meant a delay in

fact and not a notional or hypothetical delay.[27] Relying on *Adyard*, the claimant argued that Art 3.9 ought to be interpreted to require a link between the defendant's entitlement to extension of time and its entitlement to compensation under the provision. In a footnote to that argument, the claimant further cited *Multiplex* in support of the proposition that the purpose of an extension of time clause is to avoid the operation of the prevention principle.[28] This point was repeated in its Reply Closing Submissions.[29]

45 In this application, the claimant highlights a particular statement from the Award where the Majority indicated that it did not consider the prevention principle to be relevant to Art 3.9 as neither party appeared to be arguing for its application in the present circumstances, notwithstanding that the claimant was clearly relying on it.[30] The relevant part of the Award reads as follows:[31]

> 105. The Majority does not consider the prevention principle to be relevant to the interpretation of Article 3.9 given that (i) neither Party appears to argue that the prevention principle applies in the circumstances; …

The claimant submits that the portion of the Award quoted above is clear evidence that the Majority failed to consider the prevention principle.[32]

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27 SSJ's affidavit Tab 19 at pp 1231–1232 (Respondent's Closing Submissions para 22).

28 SSJ's affidavit Tab 19 at p 1231 (Respondent's Closing Submissions para 22).

29 SSJ's affidavit Tab 21 at p 1430 (Respondent's Reply Closing Submissions para 4).

30 CWS at para 45.

31 DBD Tab 5 at p 151.

32 CWS at para 46.

Analysis and decision

46 I am not persuaded that this was in fact the case. The Majority had summarised the claimant's argument on the prevention principle at various points in the Award, and the authorities it had relied on in support of that argument, including *Adyard*.[33] The Majority also expressly accepted at para 103 of the Award that "it is not uncommon for construction and engineering contracts to link extensions of time to proof of delay to completion of the Works". It is clear to me that the claimant's arguments were not lost on the Majority.

47 However, in interpreting Art 3.9, the Majority ultimately took the view that, applying English law principles on contractual interpretation as laid down in UK Supreme Court cases such as *Arnold v Britton and others* [2015] 2 WLR 1593 ("*Arnold v Britton*"), the language of the provision itself was clear and unambiguous in its meaning, and thus under English law, that meaning was to be applied.[34] The Majority found that based on the clear wording, as long as there was a qualifying stoppage and none of the three exceptions in Art 3.9 applied, the defendant was entitled to compensation without proof of delay to the Time for Completion. Thus, in the Majority's view, the key issue was whether any of the exceptions applied.[35]

48 The Majority also made an express finding that notwithstanding the common trend in construction contracts to link extension of time with proof of

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33 DBD Tab 5 at pp 134 and 150 (Final Award paras 55 and 103).

34 DBD Tab 5 at p 146 (Final Award paras 92–93).

35 DBD Tab 5 at p 153 (Final Award para 112).

delay to overall completion, this was not what the parties had agreed to in the Contract.

49 Turning to the claimant's case, I find that the Majority *did* substantially address the claimant's arguments in the Award. It addressed, and distinguished, the authorities which had been cited by the claimant in support of the prevention principle.[36] As for the claimant's complaint that the Majority had wrongly found that it was not relying on the prevention principle, I set out what the Majority said in fuller context:[37]

> 104. Noting the Parties' engagement with [the claimant's] submissions on the prevention principle, the Majority briefly addresses this point. [The claimant] relies on *Adyard* in support of the proposition that there must be a causal requirement in relation to the EOT [*ie*, extension of time] provision [*ie,* Article 3.9].
>
> [The claimant] contends that:
>
> > *'It is plain that in construction contracts, an extension of time is with reference to the completion date, and the very purpose of an extension of time clause is to relieve a contractor from liability for damages, when there is a delay to completion and to avoid operation of the prevention principle'*
>
> 105. The Majority does not consider the prevention principle to be relevant to the interpretation of Article 3.9 given that (i) neither Party appears to argue that the prevention principle applies in the circumstances; and (ii) the Majority has found above that if the Parties had intended Article 3.9 to contain a causal requirement in relation to the EOT provision, the Parties would have included wording to express this subjective intention.

Clearly, the Majority understood the claimant to be arguing that Art 3.9 should be interpreted to require a critical delay preventing the defendant from

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36 DBD Tab 5 at pp 148–149 (Final Award paras 98–101).

37 DBD Tab 5 at pp 150–151.

completing the works within the Time for Completion. I therefore cannot accept the claimant's contention, based on a single sentence in the Award and without regard to the rest of the Majority's analysis, that the Majority completely failed to consider its argument.

50 Even if the claimant can establish a breach of the fair hearing rule on the basis that the Majority failed to consider its argument, that would not be sufficient to justify the Award (or any part of it) being set aside. It is not the case that every breach of natural justice will justify a setting aside of the award. The breach, even if established, must have caused actual or real prejudice to the party seeking to set aside the arbitral award (*Soh Beng Tee* at [86]). To establish actual or real prejudice, the aggrieved party must be able demonstrate that the breach could reasonably have made a difference to the outcome of the arbitration (*L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 at [81]), and the prospect of a difference being made must be real and not fanciful. Applying these principles to the case at hand, I do not find that the claimant would have been prejudiced by such a breach in any event, even assuming the breach as alleged had in fact occurred. This is because the Majority effectively found (at para 105(ii) of the Award) that, in any case, the prevention principle would have had no impact on its interpretation of Art 3.9. The Majority had already found the wording of the provision to be clear and unambiguous, and in the specific context of the prevention principle, that the parties would have used different wording if they had in fact intended to have a causal requirement between stoppages and delays to the Time for Completion. In my view, this indicates a rejection by the Majority (even if not explicit, implicit at the least) of the claimant's arguments that were based on the prevention principle; in essence, the Majority concluded that even if the prevention principle was relied on by the claimant, it could not

affect the clear meaning of Art 3.9. Therefore, even if it could be said that there was a breach by the Majority of the fair hearing rule in this instance, I am not satisfied that the claimant has been prejudiced in any way.

51 It was evident that the claimant was dissatisfied with how its argument was addressed (and seemingly brushed away) by the Majority. Mr Ong took pains to explain to me how the Majority's analysis was flawed and did not actually address the claimant's arguments at all. In my judgment, this was an unvarnished attempt to challenge the Majority's conclusions on Art 3.9 and, in effect, challenge the decision on its merits. As I noted above at [2], such a challenge affords the claimant no basis upon which to set aside the Award.

52 I accordingly dismiss the Prevention Principle Objection.

The Commercial Justification Objection

53 The claimant next alleges that the Majority, in agreeing with the defendant that its interpretation of Art 3.9 was commercially sensible, had committed a breach of the fair hearing rule. The relevant portion of the Award is set out here:[38]

> 108. The Majority agrees with [the defendant] that the vessels deployed to generate revenue, either by dredging and reclaiming material (and generating income according to volumes dredged) or being paid the standby rate in accordance with Article 4 for any commenced hour. The Majority accepts that vessels are likely to be expensive in terms of running costs and taking into account crew and spread. It makes commercial sense for the Contract to contain a provision entitling the Contractor to compensation at standby rates when the vessels are stopped due to delay that is not caused by the Contractor.

[38] DBD Tab 5 at p 152 (Final Award para 108).

54 The claimant's first complaint is with what it says was the Majority's acceptance of the defendant's arguments on the commercial sensibility of its interpretation of Art 3.9 – arguments which it adds were only raised in the defendant's Opening Statement. Specifically, the defendant had in the Arbitration argued that it was sensible for it to be able to claim compensation for stoppages irrespective of their impact on the Time for Completion because the Vessels were its revenue producing equipment. The defendant would suffer substantial losses if the Vessels were to be tied up in the project but unable to generate revenue due to a stoppage.[39] The claimant raised several circumstances (as enumerated below) which it says would have negated the defendant's arguments on commercial sensibility but which the Majority failed to properly consider and address:[40]

(a) the defendant's remuneration was based on volumes dredged and not time spent;

(b) the Vessels could not have been "tied up" during the 90-day period as there was no evidence that the adjacent Arcadia City Port Project, which was the only other project the defendant had committed the Vessels to, provided remuneration based on time spent; and

(c) the defendant expected to complete the project within the 90-day period before moving onto the Arcadia City Port Project, hence the parties would not have contemplated "losses" within this period.

55 The claimant also takes issue on a related point – the Majority's acceptance that the Vessels were likely to incur substantial expenses in terms of

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39 SSJ's affidavit Tab 15 at p 774 (Claimant's Opening Submissions para 22(3)).

40 CWS at pp 17–18 at para 41.

running costs. It argues that there was no evidence that Art 3.9 was agreed upon in order to compensate the defendant for the idle running costs of the Vessels.[41] At the hearing, Mr Ong further contended that this was essentially a new argument on profitability (as opposed to mere failure to generate revenue) which was made late in the day, in the defendant's Reply Closing Submissions, such that the claimant had no opportunity to seek discovery from the defendant or cross-examine the defendant's witnesses on the operating expenses and profitability of running the Vessels.

Analysis and decision

56 In my judgment, the claimant's arguments here seek to isolate a single paragraph of the Award, without context, and nitpick at it. The claimant was clearly aware of the defendant's contentions on the commercial sensibility of its arguments, and had responded substantively to them in its arguments which were noted by the Majority.[42] In responding to those arguments, the Majority expressly qualified that its comments on commercial sense were essentially ancillary to its conclusion that the wording of Art 3.9 was clear, and that the claimant's arguments on the commercial sense (or lack thereof) of various interpretations could not justify a departure from the plain meaning of the words.[43] This, as the Majority explained, was in accordance with the principles in *Arnold v Britton*, which both parties had cited and relied upon in the Arbitration – *viz*, that while commercial common sense is an important factor to take into account when interpreting a contract, a court or tribunal should be slow to reject the natural meaning of a provision as correct simply because it

41 CWS at para 44.

42 DBD Tab 5 at pp 140–141 (Final Award para 75).

43 DBD Tab 5 at p 151–152 (Final Award paras 107, 109).

appears to be a surprising term for a party to have agreed to. It is worth reproducing para 109 of the Award, which followed immediately after the paragraph that the claimant singled out (at [53] above):[44]

> 109. While commercial common sense is an important factor to take into account when interpreting a contract, a court (or Tribunal) should be slow to reject the natural meaning of a provision as correct simply because it appears to be a 'surprising' term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. In any event, the Majority's views on the correct interpretation of Article 3.9 remain the same applying a 'business common sense' approach. Even if the premise (judged at the time the Contract was entered into) was never that [the defendant] would suffer substantial losses if its vessels stopped working during the [Ruritania City Port Project], as [the claimant] suggests, the Parties' chosen wording suggests otherwise. Article 3.9 demonstrates that the Parties objectively intended for [the defendant] to be entitled to an EOT and compensation at the standby rates, as a form of compensation for delay arising from Qualifying Stoppages. Noting [the claimant's] submissions that [the defendant] has not suffered losses in the [Arcadia City Port Project], the Majority does not consider this factor to be material to the question of interpretation, which is to be considered at the time the Contract was entered into and not with the benefit of hindsight.

57 The claimant has sought in its submissions before me to paint the situation as one where the Majority had the simple task of picking the more commercially sensible choice between two competing interpretations, and that it somehow chose wrongly. No doubt the claimant had presented this same dichotomy to the Tribunal in the Arbitration. However, reading the Award in context and in a reasonable and commercial way, it is clear to me that the Majority rejected this as a false dichotomy. The Majority found in effect that commercial common sense ultimately *did not come into play* because of the clear wording of Art 3.9 – that much is made clear in para 109 of the Award reproduced above. While the Majority provided brief comments on the

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[44] DBD Tab 5 at p 152 (Final Award para 109).

commercial sensibility argument, those comments did not form part of its critical reasoning or conclusions. Put another way, the comments of the Majority on commercial common sense – which the claimant trained its guns on in this application – constituted *obiter dictum*, and did not form part of the *ratio decidendi* of the Majority's decision.

58 Turning to the claimant's second complaint that it was not afforded an opportunity to obtain discovery or cross-examine the defendant's witnesses on the operating expense of the Vessels, I find that there is no basis for arguing any breach of natural justice here. Reading the Award in context, the Majority only made a passing observation that the Vessels were *likely* to be expensive to run, and it was therefore sensible to have standby rates to ameliorate the running costs. It bears mentioning that the Majority consisted of very experienced construction arbitration practitioners – there is nothing objectionable in their making such a comment based on their experience. But more importantly, in my view, nothing ultimately turned on this remark. The Majority did not arrive at any conclusion that the Vessels were running profitably or that the standby rates were meant to ensure that they were profitable, nor did it embark on any detailed analysis of the operating expenses and running costs of the Vessels in respect of which the claimant was not afforded an opportunity to comment or adduce evidence on. The remark in para 108 of the Award that vessels were likely to be expensive to run must also be read in the context of what the Majority said in para 109:[45]

> 109. … Even if the premise (judged at the time the Contract was entered into) was never that [the defendant] would suffer substantial losses if its vessels stopped working during the [Ruritania City Port Project], as [the claimant] suggests, *the Parties' chosen wording suggests otherwise.*

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[45] DBD Tab 5 at p 152 (Final Award para 109).

[emphasis added]

Unpacking this sentence, the Majority was of the view that even if the defendant's submission on the commercial sensibility of its interpretation was *ignored* entirely, such that the Majority found that there was no understanding between the parties that the defendant would suffer substantial losses if the Vessels were idle before the Time for Completion expired, that would still not detract from the clear wording of Art 3.9 which entitled the defendant to compensation regardless of whether the stoppages prevented it from completing the works before the Time for Completion expired. Properly understood, the Majority was simply disagreeing with the claimant that Art 3.9, *on its plain meaning*, contained any requirement to prove a delay to the Time for Completion. That key finding and conclusion, whether arrived at rightly or wrongly, cannot be impugned in this court.

59 Reading the Award in context, the Majority was keenly aware that, under the principles of contractual interpretation in English law, commercial common sense is only an interpretative tool to be used where the wording of the clause is ambiguous. As the Majority had found the wording of Art 3.9 in this case to be clear and unambiguous, commercial common sense faded into the background. This point pertaining to the clear and unambiguous wording of Art 3.9 was emphasised by the Majority repeatedly throughout the Award in relation to each of the four claims for stoppages advanced by the defendant. In my judgment, there was no failure by the Majority to consider or apply their minds to the claimant's arguments on commercial sensibility. The Majority understood those arguments but ultimately disagreed that they would make any difference to the interpretation of Art 3.9. I therefore also reject the Commercial Justification Objection.

Whether the tribunal failed to consider the claimant's argument on ownership of the float

60 Before I conclude on this issue, I will deal briefly with the claimant's argument that the Majority also breached the fair hearing rule in relation to the issue of the float in the Contract. In the construction industry, float, or more specifically end float in this case, refers to a built-in buffer time between the date for completion in the project programme and the contractual date for completion: Stephen Furst and Vivian Ramsey, *Keating on Construction Contracts* (Sweet & Maxwell, 10th Ed, 2016) at para 8–062. The Tribunal had asked the parties, in their respective closing submissions, to address it on the issue of the float in the Contract and which of the parties had ownership of the float or, in other words, which party was entitled to the benefit of it.[46] The claimant's case is that it had submitted in its closing submissions that the question of extension of time under Art 3.9 did not arise until the float was fully exhausted, and therefore the defendant could not have been entitled to such extension of time and the corresponding compensation unless there was a critical delay impacting the Time for Completion.[47] This argument, the claimant says, was not considered by the Majority in its interpretation of Art 3.9.

61 I disagree with the claimant. The Majority had set out the parties' submissions on the float in the Award, including the claimant's argument on how this supported its interpretation of Art 3.9 and the requirement to prove a critical delay. The Majority then concluded that given its finding that the plain meaning of the provision would apply, no proof of critical delay was required and consequently it was *not necessary* to decide the float issue.[48] In view of this,

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46 DBD Tab 5 at p 153 (Final Award para 113).

47 CWS at para 47.

48 DBD Tab 5 at pp 153 and 156 (Final Award paras 114 and 126).

the claimant's argument on exhausting the float would have made no difference to the Majority's analysis. I am therefore not satisfied that there was any breach of natural justice here or any prejudice caused to the claimant.

Conclusion on the Interpretation Issue

62 In summary, none of the claimant's arguments on the Interpretation Issue forms any basis upon which to set aside the Majority's decision on Art 3.9. This aspect of the Award was not in excess of the scope of submission to arbitration and no breach of natural justice was occasioned by it.

Issue 2: The Import Delay Claim Issue

63 With regard to the issues raised in relation to the Import Delay Claim, some explanation of the background to this claim is necessary to place matters in their proper context.

64 The Cutter and split hopper barges were based overseas and had to be deployed to Ruritania to execute the dredging works. For the split hopper barges to operate in Ruritanian waters, two permits were required from the Ruritanian authorities – a Work Permit and an Import Permit.[49] Under Art 3.11 of the Contract, it was the defendant's obligation to "appoint [an] agent and timely arrange [*sic*] all clearance, importation and exportation requirements and pay all customs, (temporary) import and export duties …",[50] but the claimant was obliged to provide the defendant with required supporting evidence no later than the commencement date of the Contract (*ie*, 26 May 2017) to enable the import

49 SSJ's affidavit at para 26.

50 DBD Tab 4 at p 87.

and export of the barges.[51] The claimant averred (and the defendant did not dispute) that pursuant to Art 3.11, the defendant appointed Agent X to make arrangements to obtain the permits, and Agent X in turn appointed Agent Y to make arrangements for customs clearance on behalf of the defendant, but that notwithstanding this division of duties, the parties had come to an arrangement where the claimant would assist Agent Y in paying any customs duties first.[52]

65 The key piece of supporting evidence which had to be provided by the claimant was a National Security Clearance which had to be obtained before the Work Permit could be issued.[53] These were in turn the two steps which had to be completed before the Import Permit could be issued.[54] It was not in dispute that the claimant mistakenly informed the defendant on 24 May 2017 that a National Security Clearance was not required for the barges, and which resulted in the Ruritanian authority rejecting the defendant's first application for the necessary permits. The National Security Clearance was only obtained on 23 June 2017, which was the scheduled date for the Vessels to commence the voyage to Ruritania.[55]

66 As it turned out, both the Work Permit and Import Permit had been issued by the time the Vessels arrived in Ruritania on 6 July 2017. However, the final step, *ie*, the payment of the customs duties, was only completed on 12 July 2017, following which the Vessels were permitted to commence work.

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51 DBD Tab 4 at p 87.

52 DBD Tab 5 at p 175 (Final Award paras 168–169); SSJ's affidavit Tab 5 at pp 204, 208 (Statement of Defence and Counterclaim paras 72, 85), Tab 19 at p 1262 (Respondent's Closing Submissions paras 93–94).

53 SSJ's affidavit at para 27.

54 CWS at para 13(1); DBD Tab 5 at p 182 (Final Award para 193).

55 DBD Tab 5 at pp 161–163 (Final Award para 137).

The defendant claimed compensation under Art 3.9 for the stoppage in respect of the Cutter and split hopper barges during this period which, on its case, did not fall within any of the exceptions in Art 3.9.

67 The claimant challenges the Majority's decision to allow this claim on the grounds that the Majority (a) exceeded the scope of submission to arbitration, (b) breached the fair hearing rule by denying the claimant the opportunity to obtain discovery as to the defendant's case, and (c) breached the fair hearing rule by failing to consider the claimant's key arguments. I consider each of these contentions in turn.

Whether the Majority's decision exceeded the scope of submission to arbitration

68 Mr Ong argues that the defendant's pleaded case in the Statement of Claim was that the Vessels had arrived on site and were ready to commence operations on 6 July 2017, but could not do so until 12 July 2017 because the claimant took seven days (instead of the usual one or two days) to finalise the customs clearance and payment procedure. The claimant contends that, based on the Statement of Claim, the defendant's claim was that the delay was caused by the claimant arguing with the customs authorities over the revenue generated by the barges (as this affected the computation of the deposit payable on import), as well as the claimant's long and bureaucratic internal payment procedures.[56] In response, in its Statement of Defence and Counterclaim, the claimant denied arguing with the customs authorities and pointed out that it only received the invoice for payment from the defendant's Agent Y on 11 July 2017,

[56] CWS at para 51; DBD Tab 8 at pp 438–439 (Statement of Claim para 93.5).

after which it promptly arranged for payment the very next day.[57] In other words, the claimant argued that fault for the delay lay with the defendant's agents and not the claimant.

69 Mr Ong submits that the defendant then changed its case in its Opening Statement to contend that the delay was instead caused by the claimant's failure to provide the National Security Clearance in a timely manner. The Majority's decision in effect was that there was insufficient evidence that the claimant had caused delay by arguing with the customs authorities or because of its slow payment processes, but found that the claimant's original delay in obtaining the National Security Clearance had a "flow on effect" which delayed the subsequent steps in the process.[58] The claimant contends that the Majority, in doing so, exceeded its jurisdiction by basing its determination on this "flow on effect", which it contends was unpleaded.[59]

Analysis and decision

70 Applying the principles discussed above on determining whether an issue fell within the scope of the dispute submitted to arbitration (see above at [26]–[28]), I find that the Majority's decision on the Import Delay Claim was within the scope of submission to arbitration.

71 The claimant's delay in obtaining the National Security Clearance was clearly pleaded by the defendant in the Notice of Arbitration[60] and Statement of

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57 CWS at paras 15–16; DBD, Tab 9 at pp 502–503 (Statement of Defence & Counterclaim para 89).

58 DBD Tab 5 at pp 185–187 (Final Award paras 201–205).

59 CWS at para 60(1).

60 DBD Tab 6 at p 362 (Notice of Arbitration paras 6.9–6.14).

Claim[61]. Looking at the Statement of Claim in particular, the defendant had set out *both* the National Security Clearance delay and the delay in payment of customs duties, and explicitly attributed its claim to be "a result of [the claimant's] failure to procure required permits and complete importation".[62] This was clearly not lost on the claimant, given that it has cited those same portions of the Statement of Claim in its own written submissions in this application. Reading the Statement of Claim in context, it is plain that the defendant was relying on both incidents for its delay claim. While the Majority did not agree with the defendant regarding the claimant's alleged arguments with the customs authorities and the claimant's allegedly slow payment processes, this does not mean the defendant's case was solely based on those incidents. In my view, this was yet another attempt by the claimant to take certain portions of the pleadings out of context in order to support its case, and I accordingly reject it.

Whether the claimant was denied an opportunity to seek discovery and present its case

72 The claimant raises a related objection that it was deprived of an opportunity to obtain discovery from the defendant on the "flow on effect" of the National Security Clearance delay and present its case accordingly.

Analysis and decision

73 I find this complaint to be completely unfounded. As discussed above, the delay in obtaining National Security Clearance was not a new and unpleaded claim by the defendant. However, even if I were to accept the claimant's case

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61 DBD Tab 8 at pp 437–438 (Statement of Claim paras 81–92).

62 DBD Tab 8 at pp 437–439 (Statement of Claim paras 81–94).

that the defendant had raised the National Security Clearance delay as a completely new argument in its Opening Statement, the Opening Statement was submitted *well before* the evidentiary hearing, which in this case only took place more than one year later.[63] During this intervening time, the claimant had ample opportunity but did not take any steps to seek discovery from the defendant relating to its "new" claim, or apply to the Tribunal for discovery against the defendant. Nor did the claimant object to this "new" claim, if indeed it was unpleaded. It does not now lie in the claimant's mouth to complain that it was deprived of an opportunity which it had but failed to take advantage of.

Whether the Majority failed to consider the claimant's key arguments

74 The claimant further submits that, in awarding the defendant compensation on the basis that the claimant's failure to obtain the National Security Clearance in a timely manner had a "flow on effect" leading to the 6–12 July 2017 delay, the Majority breached the fair hearing rule. Specifically, the claimant contends that the Majority failed to consider and apply its mind to the claimant's key arguments on the cause of the 6–12 July 2017 delay, and arrived at its decision without any evidence.[64]

Analysis and decision

75 Having reviewed the parties' submissions and the Arbitration record, I disagree with the claimant.

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63 DBD, Tab 5 at p 124 (Final Award paras 26–27).

64 CWS at paras 60(3)–62.

76 In order to better appreciate the arguments raised, I reproduce below the relevant sections of the Award:[65]

> 201. The Majority of the Tribunal accepts that the cause of the stoppage was [the claimant's] delay in obtaining the [National Security Clearance] required by Article 3.8 until 23 May, which had a flow on effect in delaying the subsequent steps required to obtain the import permits under Article 3.11. The Parties accept that [the National Security Clearance] had to be obtained before the [Work Permit], which is then followed by the [Import Permit]. Thus, delay in obtaining the first step, being [the National Security Clearance] would hold up the remaining steps. While [the defendant] had the primary obligation to arrange the import permits, [the claimant] was also obliged to timely provide [the defendant] with the required supporting evidence to enable the temporary import / export of the barges, under Article 3.11. [The claimant] as the main contractor was the only entity entitled to apply for [the National Security Clearance]. On 27 June 2017, Mr [P] of [the claimant] advised Mr [Q] of [the defendant] that:
>
> > 'Regarding to the importation [redacted] its required [*sic*] that the non-national security hazard the un-authorized [redacted] split barge importation permit be applied through [the claimant] company, which means importation has to be done by [the claimant] (as well as exportation' [*sic*]
>
> 202. There is merit in [the defendant's] position that the supporting document was therefore not provided timeously and by the commencement date (26 May 2017), but was instead given to [the defendant] on 23 June 2017, being the date [the National Security Clearance] was obtained. Thus, even before [Agent X's] alleged refusal to submit a special import application, there was already delay of 16 days to this process. To the extent that [the claimant] argues that the delay was caused by [Agent X], the Majority finds that this was not the root cause of the delay in circumstances where [Agent X] agreed to submit a special permit application by the time [the National Security Clearance] was obtained on 23 June 2017. In the premises, the Majority does not accept that the stoppage was caused by a reason attributable to [the defendant] under the Contract.
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> 203. In terms of the Parties' dispute regarding the delay by [the claimant] to pay the customs fees, the Majority does not

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65 DBD Tab 5 at pp 185–187.

> accept that there is sufficient evidence that [the claimant] caused delay due to argument with customs authorities or that there was delay in paying the customs fees promptly. However, this finding against [the defendant] is not in any event fatal to [the defendant's] claim for stoppage until 12 July 2017, because the barges were idle until that time and critically, the reason for the stoppage was not one of the three Exceptions. The fact that the customs payments were paid on 12 July 2017 was not the fault of [the defendant].
>
> 204. [The defendant] also made clear to [the claimant] that it would mobilise the barges on the basis that any standby time when they arrived at [Ruritania City Port] as a result of the unavailability of the permits would entitle [the defendant] to the standby rate and an EOT. The Majority refers to the following exchange during Day 3 of the Hearing:
>
> > *'Q. Yes, but Mr [P], [the defendant] only agreed to mobilise the barges on the basis that any standby time for the vessels when they arrived at [Ruritania City Port] as a result of the unavailability of the permits would entitle them to an extension of time and the standby rates; they were making that clear to you?*
> >
> > *A. Based on [the defendant's] letter, that was their statement, that's true.*
> >
> > *Q. At all times you insisted that the vessels be brought to [Ruritania City Port] as soon as possible?*
> >
> > *A. Of course, because we were forecasting some delay in our schedule at that time.'*
>
> 205. Finally, the Majority acknowledges [the claimant's] submissions on its indulgence. However, the Majority is not persuaded by this submission given that [the claimant] had subsequently agreed that the [Cutter] would commence dredging earlier, and [the defendant] relied upon this position in mobilising the barges.
>
> [emphasis in original]

The claimant's contentions

77 In an attempt to make good the claimant's case, Mr Ong contended as follows. First, the claimant had submitted in the Arbitration that there was no evidence of it arguing with the Ruritanian customs authorities or delaying its

payment of customs dues. This was in fact accepted by the Majority. However, the Majority's failure, according to Mr Ong, was that it did not go on to draw the crucial inference which the claimant had argued for – that the 6–12 July 2017 delay was caused by the defendant's agent, Agent Y. Agent Y only provided the invoice for customs payment to the claimant on 11 July 2017, such that the defendant's claim would have been largely excluded under Art 3.9 as a stoppage attributable to the defendant. Instead, the Majority's finding – which the claimant challenges as being made in breach of natural justice – was that the defendant was not at fault for the customs payments being paid only on 12 July 2017, and therefore that reason for the 6–12 July 2017 stoppage did not fall within one of the three exceptions under Art 3.9.[66]

78 Mr Ong's second argument was directed at the Majority's finding that the claimant's initial omission regarding the National Security Clearance had a "flow on effect" leading to the vessels standing idle in the period of 6–12 July 2017. He argued that this decision was made without considering the claimant's arguments, and without any evidential basis. On the claimant's case as presented in its closing submissions in the Arbitration, the initial delay in obtaining the National Security Clearance was ultimately irrelevant because the barges departed on schedule and the work permits for which the clearance was needed were issued by the time the vessels arrived in Ruritania.[67] Instead, the claimant argued, the defendant (through Agent X) was responsible for delays in the process. Briefly, the argument was that Agent X's insistence on using the wrong process (or application code) to apply for the Import Permit – against the claimant's advice to use a special import application route – resulted in import

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66 DBD, Tab 5, p 186 (Final Award para 203).

67 SSJ's affidavit Tab 19 at pp 1264–1267, paras 100–107 (Respondent's Closing Submissions).

approval only being obtained on 5 July 2017.[68] Mr Ong argued that the Majority, in making its finding that the National Security Clearance delay had a "flow on effect", failed to consider and address the claimant's arguments as well as the circumstances and evidence raised. Highlighting the delay by Agent X specifically, Mr Ong pointed to the Majority's finding that this was not the root cause of the delay as another failure by the Majority to address a key issue, because it did not go on to make a finding as to what the root cause was and who was responsible for it.

79 Mr Ong's third argument was that the Cutter and split hopper barges were not even intended to commence operations until after 12 July 2017; rather, operations were only to commence on 14 July 2017. Mr Ong referred to the claimant's Reply Closing Submissions in the Arbitration, where the claimant had argued that the Cutter would only commence dredging after the Hopper had completed its scope of work, and that the Hopper had still not done so as of 6 July 2017.[69] On the claimant's case, the Cutter and split hopper barges were only permitted to commence works on 12 July 2017 as an indulgence granted by the claimant to the defendant out of goodwill, and not because there was a contractual entitlement to do so. Therefore, the claimant submitted to the Tribunal that there was no basis for the defendant's claim for compensation for stoppage from 6–12 July 2017. Mr Ong submitted that the Majority only discussed the indulgence point in a single paragraph (at para 205) which, firstly, did not address the claimant's argument, and secondly, erroneously stated that the defendant did not rely on that indulgence in mobilising the barges.

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68 SSJ's affidavit Tab 19 at pp 1267–1269, paras 108–112 (Respondent's Closing Submissions).

69 SSJ's affidavit Tab 21 at pp 1441–1443, paras 27–29 (Respondent's Reply Closing Submissions).

Analysis and decision

80 I will deal with Mr Ong's first two arguments together, but as a preliminary point, I do not accept the claimant's arguments in so far as they concern the Majority's decision being made against the weight of the evidence. This argument seeks, in effect, to challenge the merits of the decision, which is impermissible. Next, reading the Award in context, I am not satisfied that the Majority did not consider or properly understand any of the claimant's arguments with regard to the Import Delay Claim. The Majority had accurately set out the claimant's arguments on causation, including the details of the incidents it had based those arguments on, as well as the provisions of the Contract (Arts 3.9 and 3.11) that the claimant was relying on to ground those arguments.[70]

81 Beginning with the claimant's second argument in relation to the permit delays, I note as a starting point that the Majority was alive to the fact that there were two permits in play – the Work Permit and the Import Permit[71] – and correctly understood the flow of the entire importation process:[72]

> 192. … [The defendant] emphasises the order in which the permits must be acquired: [National Security Clearance], [Work

[70] DBD Tab 5 at pp 171–175 (Final Award paras 160–171).

[71] DBD Tab 5 at p 177 (Final Award para 177).

[72] DBD Tab 5 at pp 181–182 (Final Award paras 192–193).

> Permit], then [Import Permit] (and thereafter the customs payment). …
>
> 193. Thus, before the importation process can be commenced, the [National Security Clearance] and [Work Permit] approval are required.

82 The claimant's case that its omission in relation to the National Security Clearance caused no delay caused to the issuance of the work permit was expressly set out by the Majority in the Award:[73]

> 161. In terms of work permits, [the claimant] submits the following:
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> …
>
> (c) Parties attended a meeting on 8 June 2017, pursuant to which it was agreed that the [Cutter] would depart from [redacted] on 23 June 2017 and the barges soon after that, and approval from the [Ruritanian authority] would be finalised best before 23 June 2017.
>
> …
>
> (e) On 23 June 2017, the [Ruritanian authority] confirmed the [National Security Clearance] for the two split hopper barges, which [the claimant] then informed [Agent X] and [the defendant] of. On the same day, [Agent X] wrote to the [Ruritanian authority] for approval of the work permit application, which was granted on 3 July 2017.
>
> (f) Therefore, by 23 June 2017, the [National Security Clearance] for the two split hopper barges were obtained.

The claimant's further argument that it was in fact the defendant's Agent X which was responsible for delays to the import permit was similarly set out:[74]

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73 DBD Tab 5 at pp 171–172 (Final Award para 161).

74 DBD Tab 5 at pp 173–174 (Final Award paras 164–165).

> 164. [The claimant] submits that any allegation by [the defendant] that [the claimant] is in breach of Article 3.11 by failing to provide the [National Security Clearance] before the Commencement Date of 26 May 2017, is neither here nor there as it ignores the cause and effect of the delays caused by [Agent X] ([the defendants'] agent). [The claimant] submits that the [National Security Clearance] was obtained on 23 June 2017 but as late as around 20 June 2017, [Agent X] was still insistent on avoiding the special import application route and using their own method of application. [The claimant] therefore argues that [the defendant] breached Article 3.11 of the Contract in failing to timely arrange (or procure [Agent X] to arrange) the special import application.
>
> 165. [The claimant] states that it is telling that [the defendant] has remained silent on the reasons behind [Agent X's] delay in proceeding with the special import application. Neither has [the defendant] called [Agent X's] representatives to give evidence in this arbitration.

83 Turning now to the claimant's first argument on the delayed payment of customs duties, I am also satisfied that the Majority understood the claimant's contention that the defendant's Agent Y had delayed the provision of the customs invoice to the claimant until 11 July 2017. The Majority was also aware that the Import Permit was granted on 5 July 2017 – the parties were in agreement on this.[75] On this basis, the Majority would have been aware that the invoice would have been with Agent Y on or around that date. It understood the claimant's case that there was no argument between the claimant and the customs authorities which led to delays, contrary to what was alleged by the defendant in its pleadings. This was set out in the Award as follows:[76]

> 169. [The claimant] submits that in the case of the customs fees, it assisted [Agent Y] by making payment first (as the special import application had been made under [the claimant's] name). However, *[Agent Y] only provided the invoice for the customs fees to [the claimant] on 11 July 2017*, following from which [the claimant] promptly made payment on 12 July 2017. *[The claimant] argues that there was no argument between*

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75 DBD Tab 5 at pp 184–185 (Final Award paras 197(d) and 198).

76 DBD Tab 5 at p 71.

> *[the claimant] and Customs as alleged by [the defendant]*, and [the defendant] has not led any evidence of this allegation whether from [Agent X] or [Agent Y's] representatives. Indeed, *no explanation has been given for [Agent Y's] delay in providing the relevant invoices to [the claimant].*
>
> [emphasis added]

84 From the portions of the Award set out above, it is quite apparent that the Majority was aware of both of the claimant's arguments and understood their implications on the question of causation with respect to the 6–12 July 2017 delay.

85 Upon a close reading of the Award, I am also of the view that the Majority addressed these two arguments, even if not to the claimant's satisfaction. The Majority started out by summarising the claimant's main argument on causation, which was framed in a manner wide enough to encompass the claimant's objections based on delays by Agent X and Agent Y:[77]

> 200. [The claimant] therefore argues that it was [the defendant] or its agent's own failure to timely arrange the relevant clearance, importation requirements and/or pay the relevant customs and import duties as set out above, any thus any [*sic*] stoppages would be attributed to [the defendant].

86 The Majority proceeded (at para 202) to address the claimant's argument in relation to Agent X's delay, finding in effect that this delay did not ultimately cause the 6–12 July 2017 delay for which the defendant claimed compensation:[78]

> 202. There is merit in [the defendant's] position that the supporting document was therefore not provided timeously and by the commencement date (26 May 2017), but was instead

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77 DBD Tab 5 at p 185.

78 DBD Tab 5 at p 186.

> given to [the defendant] on 23 June 2017, being the date [the National Security Clearance] was obtained. Thus, even before [Agent X's] alleged refusal to submit a special import application, there was already delay of 16 days to this process. *To the extent that [the claimant] argues that the delay was caused by [Agent X], the Majority finds that this was not the root cause of the delay in circumstances where [Agent X] agreed to submit a special permit application by the time [the National Security Clearance] was obtained on 23 June 2017*. In the premises, the Majority does not accept that the stoppage was caused by a reason attributable to [the defendant] under the Contract. [emphasis added]

To that extent, and returning to the language of Art 3.9, the Majority found that the stoppage was not caused by a reason attributable to the defendant. Critically, that was a conclusion arrived at by the Majority based on findings of fact, which even if wrongly made, cannot now be challenged.

87 The Majority then addressed (at para 203) the claimant's argument that it was Agent Y's delay in providing the customs invoice which led to the delayed customs duties payment by the claimant. In this respect, the Majority found that that this delay was not the fault of *the defendant*:[79]

> 203. In terms of the Parties' dispute regarding the delay by [the claimant] to pay the customs fees, the Majority does not accept that there is sufficient evidence that [the claimant] caused delay due to argument with customs authorities or that there was delay in paying the customs fees promptly. However, this finding against [the defendant] is not in any event fatal to [the defendant's] claim for stoppage until 12 July 2017, because the barges were idle until that time and *critically, the reason for the stoppage was not one of the three Exceptions. The fact that the customs payments were paid on 12 July 2017 was not the fault of [the defendant].*
>
> [emphasis added]

One could conceivably and not unreasonably understand the Majority's reasoning above to mean that it disagreed with the claimant's argument that the

[79] DBD Tab 5 at p 186.

defendant was responsible for Agent Y's fault, and was instead of the opinion that any delay by the defendant's agent was not "attributable to [the defendant]". In the Majority's words "…the fact that the customs payments were paid on 12 July 2017 ***was not the fault of [the defendant]***" [emphasis added]. Such a conclusion would, in effect, translate to an application of the plain meaning of Art 3.9. In other words, this conclusion would be congruous with the Majority's consistent reasoning that Art 3.9 should be interpreted according to its plain words (see [47], [56] above).

88 Thus, in relation to the claimant's first two arguments, I do not agree that the Majority's reasoning leads one to the virtually inescapable conclusion that the Majority had completely failed to understand, consider or apply its mind to the claimant's arguments.

89 In relation to the claimant's third argument on the indulgence granted by the claimant to the defendant out of goodwill, this argument was also summarised and addressed by the Majority:[80]

> 181. On the first issue regarding [the claimant's] goodwill in allowing the dredging to commence on 12 July 2017. [The claimant] accepts that it 'agreed to allow the [Cutter] to commence dredging on or around 12 July 2017'. The Parties met and agreed that [the claimant] would be 'willing to allow the [Cutter] to start as soon as possible' and in reliance on this agreement, [the defendant] commenced preparations to dredge including scheduling the Interim Survey prior to the start-up of the works with the [Cutter] on 11 July 2017'. … In these circumstances, the Parties' earlier agreement to start on 14 July 2017 cannot be relied upon.
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> …
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> 205. Finally, the Majority acknowledges [the claimant's] submissions on its indulgence. However, the Majority is not persuaded by this submission given that [the claimant] had

[80] DBD Tab 5 at pp 178–179 and 187

> subsequently agreed that the [Cutter] would commence dredging earlier, and [the defendant] relied upon this position in mobilising the barges.

90 On the basis of these passages, I cannot accept the claimant's argument that the Majority failed to consider or understand its arguments on the indulgence point. Even if the Majority was mistaken in its statement at paragraph 205 that the defendant had relied upon the indulgence in mobilising the barges, that isolated error does not mean that there has been a failure of process tainting the entirety of the reasoning of the Majority on this issue. It is also quite apparent that the point regarding indulgence was not a key part of the Majority's reasoning, but one it addressed for completeness. The Majority had already found that there was an agreement reached by the parties to allow the Cutter to commence dredging on or around 12 July 2017 and that in those circumstances, the previous agreement to start on 14 July 2017 could not be relied upon by the claimant. In essence, the key conclusion reached by the Majority (at para 205 of the Award) was that the parties had agreed to a variation of the contractual obligations. Consequently, I also fail to see how the claimant could have been prejudiced in any way. The Majority did not base its conclusion on any alleged reliance by the defendant on the claimant's indulgence in mobilising the barges. Their critical conclusion was that parties agreed to a different mode of performance to that originally envisaged in the Contract. Again, the merits of that conclusion are not justiciable before this court.

91 When viewed in its totality, the Majority did, in the portions of the Award set out above, give a detailed summary of the relevant material events, evidence and arguments raised. None of this was misunderstood by the Majority. Thus, I am unable to draw any inference that the Majority had completely failed to address its mind to and decide on the claimant's arguments and the issues raised – certainly not on the facts as I have detailed above. While

the Majority did not make a finding as to the specific reason for the 6–12 July 2017 delay, the critical part of its reasoning remained that the delay was not due to any reason which was attributable to the defendant, *ie*, the only possible exception in Art 3.9 which was in play on this issue. In my judgment, the Majority did not fail to address this key issue before it, nor did it fail to consider the claimant's arguments on it. This case sits in stark contrast to the conduct of the arbitral tribunal in *BZW and another v BZV* ("*BZW*") [2022] 1 SLR 1080 which is clearly distinguishable for its quite exceptional facts – for one, in *BZW*, the tribunal had, in its reasoning, completely failed to even mention most of the defences raised by the arbitration respondent.

92 I make one last point to close off the discussion on the Majority's reference to the "flow on effect" – in my view, the claimant cannot contend that the Majority's reasoning on the basis of the "flow on effect" is something that came out of left field, and which caught it completely by surprise. It has been repeatedly emphasised that an arbitral tribunal is not required to refer every point in its decision to the parties for submissions, so long as that decision does not represent a dramatic departure from what has been presented to it: *TMM Division* at [59]. The tribunal is free to infer unargued premises which flow reasonably from the parties' arguments: *TMM Division* at [65]; *BZW* at [60]. Here, the Majority had set out its understanding of the importation process and the instances of delay argued by the parties, *ie*, the initial delay caused by the claimant's failure to obtain the National Security Clearance, the delays by the defendants' agents (see [81]–[85] above) and the relevant dates on which various events occurred. In my judgment, it was open to the Majority to reasonably conclude on the evidence and arguments presented that there was a "flow on effect" from the initial delay caused by the claimant's error with respect to the National Security Clearance. Reading the flow of paras 201 to 205

of the Award (and para 202 specifically where the "flow on effect" is mentioned) does not give the impression that the Majority conducted itself "irrationally or capriciously" such that "a reasonable litigant in [the claimant's] shoes could not have foreseen the possibility of reasoning of the type revealed in the award" (*BZW* at [60(b)]). Thus, for this reason also, I find the claimant's objections here to be without merit.

93 However, even if I agreed with the claimant that the Majority did breach the rules of natural justice by reasoning on the basis of the "flow on effect" of the initial delay, I am far from satisfied that the claimant has suffered any prejudice as a result. Even if the Tribunal had intimated this point or possible chain of reasoning to the parties and invited submissions, it is unclear what further arguments the claimant could have made that could reasonably make any difference to the Majority's ultimate decision on the Import Delay Claim. I reiterate that the Majority's decision was simply that, on its interpretation of Art 3.9, none of the delays raised by the parties was attributable to the defendant. In my judgment, that conclusion by the Majority would not have altered, whether or not there was any "flow on effect" arising from the initial delay by the claimant in obtaining the National Security Clearance.

Conclusion on the Import Delay Claim Issue

94 For the reasons detailed in this section, I am satisfied that none of the objections raised by the claimant in respect of the Import Delay Claim Issue justifies a setting aside of the Majority's decision.

Issue 3: The Typhoon Claim Issue

95 Finally, the claimant seeks to set aside the Majority's decision to award compensation in respect of the Typhoon Claim, *ie*, the defendant's claim for

stoppage for the period [redacted – xx 2017 to yy 2017] when the Cutter and Hopper had to evacuate the work site to avoid a typhoon.[81] The claimant raises several grounds in its submissions on this issue.

The Majority's decision on the inapplicability of Art 22

96 First, the claimant challenges the Majority's finding that Art 22, the *force majeure* provision of the Contract, did not cover the typhoon. Art 22 states:[82]

> **Article 22. Force Majeure**
>
> Notwithstanding anything to the contrary in this Agreement, if due to war, strikes, industrial action short of strike, lockouts, accidents, fire, blockage, import or export embargo, *natural catastrophes or other obstacles over which the parties hereto have no control*, the Parties fail to meet any requirement under this Agreement, the Parties shall not be deemed to have incurred any liability between themselves subject to the obligation of the Employer [*ie*, the claimant] to make any outstanding payments due to the Contractor [*ie*, the defendant].
>
> [emphasis added]

97 The claimant raises two contentions in respect of the Majority's finding:[83]

(a) The Majority did not properly consider or address its argument that the typhoon, being an event which the parties had no control over, clearly fell within the wording "natural catastrophes or other obstacles over which the parties hereto have no control" within Art 22.

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81 SSJ's affidavit at para 29.

82 DBD Tab 4 at pp 91–92.

83 SSJ's affidavit at paras 72–74.

(b) The Majority, in contradiction of its own decision not to take into account pre-contractual negotiations, found that the parties had considered the risk allocation for typhoons by virtue of the defendant's typhoon response plan. In doing so, the Majority failed to consider the claimant's argument that the response plan was only provided to it on 22 July 2017 (*ie*, after the Contract had been entered into) and therefore could not have formed part of the parties' considerations on risk allocation at the point of entering into the Contract.

Analysis and decision

98 I find that there was no breach of natural justice in respect of the contentions raised. In my view, the Majority did not fail to consider or understand the claimant's arguments, nor did it contradict itself in its reasoning.

99 As a starting point, the Majority was alive to the key contention of the parties on this claim, which was whether Art 22 applied to a typhoon.[84] This turned entirely on the interpretation of Art 22. On that issue, the Majority's interpretation was that Art 22 was reserved for events which rendered performance of the parties' obligations impossible, and not events which only made performance more difficult or resulted in stoppages – the latter events would be covered by Art 3.9. The Majority construed Art 22 in the context of the contract as a whole – a submission which *the claimant itself* had advanced.[85] That context included the fact that typhoons were a frequent occurrence in the

84 DBD Tab 5 at p 237 (Final Award para 370).

85 DBD Tab 5 at pp 225–226 (Final Award paras 334(a), 337(b)).

region where Ruritania was located.[86] Construing the words "natural catastrophe" specifically in Art 22, the Majority concluded that:[87]

> 374. … An objective assessment of the words 'natural catastrophe' in their context supports the reading that this must be something more than an adverse weather event such as a typhoon, which was contemplated and the risks of which could be mitigated by a plan. …

100 Thus, the Majority's reasoning, after taking into account the parties' respective arguments, was that "natural catastrophe" under Art 22 did not encompass typhoons. To that extent, the Majority *did not* fail to consider or understand the claimant's argument – it simply *disagreed* with it. Again, whether this conclusion was right or wrong on the merits is not a matter for this court to decide. That disposes of the claimant's first contention.

101 As for the claimant's second contention (see [97(b)] above), I find that this takes the claimant nowhere. Reading the Award carefully, I do not understand the Majority to be saying that it was relying on the typhoon response plan as evidence of pre-contractual negotiations. Rather, it was discussed by the Majority in the context of its reasoning that "natural catastrophe" did not include events in respect of which risk *could* be allocated.[88] The response plan, which the claimant did not comment on and which the Majority found to be reasonable,[89] was brought up by the Majority to show that the risk associated with typhoons was capable of being allocated and indeed was allocated in this case, and therefore typhoons did not constitute a "natural catastrophe" under

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86 DBD Tab 5 at p 238 (Final Award para 373).

87 DBD Tab 5 at p 238 (Final Award para 374).

88 DBD, Tab 5 at p 239 (Final Award para 374).

89 DBD, Tab 5 at p 236 (Final Award para 365).

Art 22. Taken in this context, I do not find the Majority's comments objectionable.

102 However, even if I accept the claimant's case that there was a contradiction by the Majority which resulted in a breach of natural justice, I do not find the claimant to be prejudiced by any such breach. This is because the Majority also reasoned that in any case, *regardless* of the definition of "natural catastrophe", it agreed with the defendant's submissions that Art 22 did not apply on the facts because there was no allegation of either party failing to "meet any requirement under [the Contract]", as expressly stipulated in Art 22 itself.[90] Therefore, even if the Majority had agreed with the definition of "natural catastrophe" contended for by the claimant, this could not, in my view, have reasonably made any difference to the Majority's ultimate finding that Art 22 was in any event inapplicable on the facts before it.

Alleged failure to deal with the [redacted xx to yy 2017] delay

103 The claimant refers to the Dissenting Opinion which stated that the defendant had not explained why the Cutter did not resume work for one day after returning to the worksite on [redacted – xx 2017]. Relying on that, the claimant contends that the Majority failed to address this gap in the defendant's evidence and did not address the consequent issue of whether the stoppage from [redacted - xx to yy 2017] was attributable to the defendant.[91]

104 In my view, this objection is a thinly disguised attempt to impugn the merits of the Majority's decision. I also accept the defendant's argument that the claimant had never raised this as an issue or argument for the Tribunal's

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90 DBD, Tab 5 at pp 221 and 239 (Final Award paras 319–321 and 376).

91 CWS at para 68.

consideration. In its written submissions for this application, the claimant pointed to its Statement of Defence and Counterclaim where it had expressly *reserved* its right to state its position on the defendant's stoppage claims. I find this to be of no assistance to the claimant's case. It never made good on that right by raising the issue in the Arbitration, and yet it now seeks to criticise the Majority for failing to address the issue. It is clear to me that, as with its arguments in relation to the Interpretation Issue, this is another attempt by the claimant to belatedly (and opportunistically) piggyback on the Dissenting Opinion to advance its case in this application.

Conclusion on the Typhoon Claim Issue

105 To summarise this section, the claimant's contentions regarding the Majority's decision on the Typhoon Claim are essentially attacks on the merits of the Majority's decision. I accordingly also reject this ground of objection.

Conclusion

106 For the reasons above, none of the grounds raised by the claimant in this application has any merit. The end result is that the claimant's application is dismissed in its entirety.

107 I shall hear the parties separately on costs.

S Mohan
Judge of the High Court

Ong Boon Hwee William, Lim Jun Rui Ivan, Chong Xue Er Cheryl and Dion Loy Chen Hin (Li Zhengxian) (Allen & Gledhill LLP) for the claimant;
Professor Tan Cheng Han SC (instructed), Balachandran s/o Ponnampalam, Kok Jia An Alwyn and Iffera Ng Lu Hui (Robert Wang & Woo LLP) for the defendant.