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

[2021] SGHC 114

Originating Summons No 241 of 2020

Between

(1) CEF
(2) CEG

… *Plaintiffs*

And

CEH

… *Defendant*

GROUNDS OF DECISION

[Arbitration] — [Award] — [Recourse against award] — [Setting aside]
[Arbitration] — [Agreement] — [Scope]
[Arbitration] — [Arbitral tribunal] — [Jurisdiction]

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CEF and another
v
CEH

[2021] SGHC 114

General Division of the High Court — Originating Summons No 241 of 2020
Vinodh Coomaraswamy J
11, 12 August 2020

19 May 2021

Vinodh Coomaraswamy J:

1 By this application, the plaintiffs apply to set aside an arbitral award on several grounds: (a) that the tribunal made the award in breach of natural justice; (b) that the plaintiffs were unable to present their case on number of essential issues; (c) that the award deals with matters beyond the scope of the submission to arbitration; and (d) that the arbitral procedure was not in accordance with the parties' agreement or the UNCITRAL Model Law on International Arbitration ("the Model Law").

2 I have dismissed the plaintiffs' application with costs. In my view, the ultimate source of the plaintiffs' many complaints lies in the tactical decisions which the plaintiffs themselves made in choosing to run an all or nothing case on certain aspects of the defendant's counterclaim, and not in anything which the tribunal did or failed to do.

3 The plaintiffs have appealed against my decision. I therefore now set out the grounds for my decision.

4 Pursuant to an order made under ss 22 and 23 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the Act"),[1] I have taken three steps to preserve the parties' anonymity in these grounds of decision. First, I have anonymised the names of the parties. Second, I shall refer to the country in which the second plaintiff and the defendant are incorporated as Ruritania. Ruritania is also the place of performance under the parties' contracts. Third, I have converted all sums of money which are denominated in the local currency of Ruritania into Euro (€) at the rate prevailing on the date of these grounds of decision and have rounded them off to the nearest 10%.

Background

The parties

5 The first plaintiff is a multinational company which designs, builds and sells manufacturing plants for the steel industry.[2] The second plaintiff is a subsidiary of the first plaintiff incorporated in Ruritania.[3]

6 The defendant is a company incorporated in and carrying on business in Ruritania as a manufacturer of hot rolled steel coils.[4] Its sole shareholder is a

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1 HC/ORC 3122/2020 dated 22 June 2020.

2 Affidavit filed on behalf of the Plaintiffs by the 1st Plaintiff's Executive Vice President and Group General Counsel dated 25 February 2020 ("PA-1") at p 465.

3 PA-1 at para 10.

4 PA-1 at p 466.

major steelmaker incorporated in and listed in Ruritania.[5] I shall refer to the defendant's sole shareholder as "the Parent".

The Contract

7 The Parent entered into a contract ("the Contract") with the first plaintiff in June 2011. Under the Contract, the first plaintiff was to provide engineering equipment and services to design and build a steel making plant ("the Plant") in Ruritania at a price of €92.7m.[6] The first plaintiff's scope of supply under the Contract comprised: (a) supplying the engineering for the Plant; (b) supplying equipment and materials for the Plant; (c) supervising the erection of the Plant; (d) supervising the commissioning of the Plant; and (e) training the Plant's staff.[7]

8 The Plant was to be erected on a site in Ruritania which was and is owned by the Parent ("the Site"). The Parent intended the Plant to use the excess molten steel generated at the Parent's existing steelmaking plant on the Site to produce hot rolled coils.[8] The Contract contemplated that the first plaintiff would supply the equipment for the Plant and also the services necessary to incorporate and integrate the equipment into a functioning Plant on the Site. The parties intended the Plant, once commissioned and fully operational, to be capable of producing 600,000 tonnes of hot rolled coils per year.[9]

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5 PA-1 at para 11.

6 PA-1 at para 22.

7 PA-1 at p 64.

8 PA-1 at p 467.

9 PA-1 at para 19; p 6390.

9 The Contract was not a turnkey contract. It therefore contemplated that the defendant would erect a bespoke steel building ("the Steel Building") on the Site in which the Plant would be housed.

10 By an assignment and novation in September 2011, the defendant replaced the Parent as the first plaintiff's counterparty under the Contract.[10] As a result, the Parent was not a party to the arbitration and is not a party to this application. It is an important point, however, that the Parent continued to own the Site.

The Service Agreement

11 In May 2014, the plaintiffs and the defendant entered into a Service Agreement.[11] By this agreement, the parties assigned to the second plaintiff the first plaintiff's obligation to provide supervision and training to the defendant under the Contract. The contract price for the Service Agreement was €2.5m. The parties accordingly reduced the price of the Contract by €2.5m.[12]

12 Nothing in the arbitration or in this application turns on any distinction between the first plaintiff and the second plaintiff. I shall therefore refer to them collectively as "the plaintiffs".

13 In March 2014, the plaintiffs supplied the defendant some additional equipment worth €49,000 and some additional services worth about €31,000. This equipment and these services were additional in the sense that it is common

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10 Plaintiff's Written Submissions dated 4 August 2020 ("PWS") at para 7; PA-1 at paras 7, 18; p 129.

11 PA-1 at p 134.

12 PA-1 at para 23.

ground that they were outside the plaintiffs' scope of supply under the Contract.[13] The defendant duly paid the plaintiffs for the additional equipment and services. It appears that the additional equipment was used for or incorporated into the Plant. All future references to "the Plant" should be read as including this additional equipment.

14 In two tranches in July 2015[14] and November 2015[15] the plaintiffs extended two loans to the defendant totalling €15m ("the Loans").

The parties' disputes

15 It is common ground that the erection of the Plant was much delayed. It is also common ground that the Plant never achieved its production target of 600,000 tonnes of hot rolled steel coils per year. Each party blamed the other for the delays and the shortfall in production capacity. This led to a number of disputes between the parties.

16 The parties' disputes came to a head in February 2016. That was when the plaintiffs claimed that the Plant was complete and entitled under the Contract to receive its final acceptance certificate. The defendant rejected the plaintiffs' claim.[16] Each party took the position that the other was in repudiatory breach of contract.

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13 PA-1 at pp 601–602, 1255.

14 PA-1 at pp 513–514.

15 PA-1 at pp 514–515.

16 PA-1 at p 534.

17 As a result of the parties' disputes, the Plant was shut down and has been "moth-balled" since 2016.[17]

The arbitration

18 Article 26.1 of the Contract provides that it is governed by Singapore law.[18] Article 26.2 of the Contract provides that any disputes arising from or in connection with the Contract are to be arbitrated in Singapore under the Rules of Arbitration of the International Chamber of Commerce ("the ICC Rules").[19] Article 6 of the Service Agreement incorporates Art 26 of the Contract.[20]

19 In August 2016, the plaintiffs commenced an arbitration against the defendant under both the Contract and the Service Agreement. A few weeks later, the defendant commenced an arbitration against the plaintiffs, also under both contracts.

20 In October 2016, with the consent of the parties, the two arbitrations were consolidated.[21] In the consolidated arbitration, the plaintiffs were the claimants and the defendant was the respondent.

The Terms of Reference

21 In January 2017, in accordance with Art 23 of the ICC Rules, the parties and the tribunal signed the terms of reference ("Terms of Reference") for the

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17 PA-1 at p 3260.

18 PA-1 at p 101.

19 PA-1 at p 101.

20 PA-1 at p 139.

21 PA-1 at para 45.

arbitration.[22] The Terms of Reference sets out the procedural background and summarises the parties' cases.

22 The Terms of Reference summarise the plaintiffs' claim as follows. The plaintiffs have duly performed all of their obligations under the Contract[23] and under the Service Agreement[24] despite the defendant's breaches of the Contract from the very outset.[25] As a result, the defendant's refusal to consent to the issuance of the Plant's final acceptance certificate is a breach of contract.[26] The Terms of Reference then record the following as the plaintiffs' principal claims for relief against the defendant:[27]

> (a) a declaration that the plaintiffs had performed all of their obligations under the Contract and the Service Agreement;
>
> (b) a declaration that the plaintiffs are each entitled to full payment under both contracts;
>
> (c) a declaration that the defendant's attempt to terminate both contracts is wrongful and amounts to a repudiatory breach of each contract;
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> (d) a declaration that the defendant had breached both contracts; and accordingly, an order that the defendant pay damages to the plaintiffs; and

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22 PA-1 at p 160.

23 PA-1 at p 168.

24 PA-1 at p 169.

25 PA-1 at pp 168–170.

26 PA-1 at p 169.

27 PA-1 at p 171.

(e) an order that the defendant repay the Loans to the plaintiffs with contractual interest.

23 The Terms of Reference summarise the defendant's defence and counterclaim as follows: (a) the plaintiffs induced the defendant to enter into the Contract by making material misrepresentations;[28] (b) alternatively, the plaintiffs are in breach of both contracts;[29] and therefore (c) the defendant was not in breach of either contract.[30] The Terms of Reference then record the following as the defendant's principal counterclaims for relief against the plaintiffs:[31]

(a) rescission of the Contract and the Service Agreement;

(b) repayment of all sums which the defendant or the Parent had paid to the plaintiffs under both contracts;

(c) damages for misrepresentation under section 2(1) of the Misrepresentation Act (Cap. 390, 1994 Rev Ed); and

(d) in the alternative to (a) to (c) above, damages for the plaintiffs' breaches of the Contract and the Service Agreement.

24 The joint evidentiary hearing in the consolidated arbitration took place in October and November 2018.[32]

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28 PA-1 at pp 172–173, 178.

29 PA-1 at pp 175–178.

30 PA-1 at p 178.

31 PA-1 at p 179.

32 PA-1 at p 3082.

The award

25 The tribunal issued its award in November 2019.[33] The tribunal upheld the defendant's misrepresentation claim in its entirety and rescinded both the Contract and the Service Agreement.[34] In so far as is material, the tribunal found and held as follows:

(a) The plaintiffs induced the defendant to enter into the Contract by making representations which were material and false.[35]

(b) The defendant is therefore entitled to rescission of both the Contract and Service Agreement.[36]

(c) The defendant is not barred from seeking rescission, nor is it estopped from doing so.[37]

(d) Rescission of a contract involves: (i) avoiding the parties' contract *ab initio*; and (ii) restoring the parties to the position they were in before they entered into the contract.[38]

(e) Rescission of a contract therefore entails: (i) cancelling all future obligations which the parties may owe each other under the rescinded contract; and (ii) restoring to each party any benefits which it may

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33 PA-1 at p 201.

34 PA-1 at pp 372–373.

35 PA-1 at pp 275–302.

36 PA-1 at p 304.

37 PA-1 at pp 304–313.

38 PA-1 at p 313.

already have transferred to its counterparty under the rescinded contract.[39]

(f) As a result of rescission of the Contract and the Service Agreement, the defendant is entitled to restitution from the plaintiffs of all sums which the defendant had paid to the plaintiffs under those contracts, *ie,* the €92.7m Contract price.

(g) From that, the plaintiffs are entitled to deduct €15m, being the principal amount of the Loans, *ie,* disregarding contractual interest.[40]

(h) As for the defendant's obligation to make counter-restitution to the plaintiffs:

(i) There was "no doubt" that some deterioration of the Plant had occurred over the years;[41]

(ii) Although the tribunal had no evidence before it in relation to the current value of the Plant, it was the plaintiffs – and not the defendant – who bore the burden of proving the diminution in value of the Plant;[42]

(iii) It was also "beyond dispute" that the defendant had sold about 150,000 tonnes of hot rolled coils produced at the Plant at a total sale price of about €54.5m.[43]

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39 PA-1 at p 313.

40 PA-1 at p 314.

41 PA-1 at p 315.

42 PA-1 at pp 314–315.

43 PA-1 at p 315.

(i) In all the circumstances, the tribunal considered it just to allow the plaintiffs to deduct €54.5m from their obligation to make restitution of the Contract price. The relevant circumstances were: (i) the defendant's use of the Plant;[44] (ii) the plausible diminution in value of the Plant;[45] and (iii) the defendant's reliance loss caused by the plaintiffs' misrepresentations.[46]

(j) The defendant was also entitled to damages under s 2(1) of the Misrepresentation Act as compensation for the defendant's reliance loss, *ie*, the loss which the defendant had suffered as a result of relying on the plaintiffs' misrepresentations.[47]

(k) The tribunal was satisfied that the defendant had indeed suffered reliance loss under each of the five heads claimed.[48] However, the tribunal noted that the defendant's evidence of the quantum of each head of loss was deficient,[49] scarce[50] and incomplete.[51] Therefore, out of the defendant's total claim of €142.4m for reliance loss under all of the five heads, the tribunal allowed the defendant to recover only a flat 25% of each head, for a total of €35.6m.

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44 PA-1 at p 315–316.

45 PA-1 at pp 314–315.

46 PA-1 at pp 315–316.

47 PA-1 at pp 317–333.

48 PA-1 at pp 326–330.

49 PA-1 at pp 216–333.

50 PA-1 at p 329.

51 PA-1 at pp 326, 327, 330.

(l) In arriving at its decision to award the defendant a flat 25% across the board on its claim for reliance loss, the tribunal relied on three legal principles:

(i) where it is clear that a claimant has suffered some substantial damage, the fact that assessing the quantum of that damage is difficult because of its nature is no bar to an award of damages;[52]

(ii) the law does not require a claimant to prove the quantum of its damage with exact certainty;[53] and

(iii) a court or tribunal should adopt a flexible approach to what may constitute adequate proof of damage.[54]

As authority for these principles, the tribunal relied on *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623 at [28] and *Yip Holdings Pte Ltd v Asia Link Marine Industries Pte Ltd* [2012] 1 SLR 131 at [15].[55]

26 In the dispositive part of the award, the tribunal gave effect to its findings and holdings by making three formal orders. The parties have called them for convenience the "Repayment Order", the "Transfer Order" and the "Damages Order":

(a) The Repayment Order ordered the defendant to repay to the plaintiffs the Contract price of €92.7m less €15m and €54.5m. The €15m

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52 PA-1 at p 333.

53 PA-1 at p 333.

54 PA-1 at pp 325–326.

55 PA-1 at pp 325–326.

accounted for the Loans. The €54.5m accounted for both the defendant's use of the Plant and the diminution in value of the Plant.[56]

(b) The Transfer Order ordered the defendant to transfer title to the Plant to the plaintiffs in return for payment under the Repayment Order.[57]

(c) The Damages Order ordered the plaintiffs to pay the defendant €35.6m as damages under the Misrepresentation Act.[58]

27 The dispositive part of the award concluded with the tribunal dismissing all of the parties' other claims and requests for relief.[59]

This application

28 The plaintiffs now apply to set each of the tribunal's three orders on a number of specific grounds under the Act and the Model Law. The plaintiffs also attack the award on the general ground that its contents are inadequate to inform the parties of the several bases for the tribunal's decision.

29 The bulk of the plaintiffs' submission are directed at setting aside the Transfer Order. I therefore begin my analysis with that order.

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56 PA-1 at p 373.

57 PA-1 at p 374.

58 PA-1 at p 374.

59 PA-1 at p 374.

The Transfer Order

The plaintiffs' case

30 The plaintiffs have two complaints about the Transfer Order: (a) the term "title to the Plant" is impermissibly uncertain;[60] (b) a transfer of title to the Plant by the defendant to the plaintiffs is not legally or factually possible.[61]

31 The plaintiffs' case on these complaints is as follows. The Plant, as a matter of Ruritanian law, has become a fixture of the land on which it sits, *ie*, the Site, either directly or via the medium of the Steel Building. As a matter of Ruritanian law, therefore, the Plant no longer has any title which is separate from the Parent's title to the land which constitutes the Site. There is therefore no "title to the Plant" which the defendant can transfer to the plaintiffs in order to comply with the Transfer Order.[62] Thus, the Transfer Order is "uncertain and/or unworkable and/or contrary to law and/or factually impossible and/or meaningless"[63] and "unenforceable".[64]

32 The plaintiffs submit further that it is not possible to construe the Transfer Order as requiring the plaintiffs, at their own expense, physically to disassemble the Plant and thereafter retake possession of the components which result from the disassembly.[65] On this aspect of their case, the plaintiffs make two points. First, there is nothing in the Transfer Order which makes any

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60 PWS at paras 36, 41, 59–61.

61 PWS at paras 78, 95.

62 PWS at para 59(a).

63 PWS at para 90.

64 PWS at para 59.

65 PWS at para 59(b).

provision for any of this. Second, and in any event, disassembling the Plant will render it practically worthless.[66]

33 As a result, the plaintiffs submit that the Transfer Order should be set aside on three grounds under the Model Law:

(a) First, because the tribunal made the Transfer Order in breach of the parties' arbitration agreement, contrary to Art 34(2)(*a*)(iv) of the Model Law.[67]

(b) Second, because the Transfer Order is a decision on a matter beyond the scope of the submission to arbitration contrary to Art 34(2)(*a*)(iii) of the Model Law.[68]

(c) Third, because the tribunal either made the Transfer Order in breach of natural justice, contrary to s 24(*b*) of the Act, or the plaintiffs were unable to present their case on the Transfer Order contrary to Art 34(2)(*a*)(ii) of the Model Law.[69]

I take each of these three grounds in turn.

First ground: breach of arbitration agreement or Model Law

34 The plaintiffs' submission under Art 34(2)(*a*)(iv) is that the parties' arbitration agreement or the Model Law requires an award to be enforceable or,

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66 PWS at paras 76, 95.

67 PWS at para 41.

68 PWS at para 42.

69 PWS at paras 43, 120.

at the very least, not to be "uncertain and/or unworkable and/or contrary to law and/or factually impossible and/or meaningless".

35 I do not accept that submission. Further, and in any event, I consider the Transfer Order to be certain and workable and therefore enforceable.

Two preliminary points

36 Before I turn to an analysis of the substance of the plaintiffs' argument on Art 34(2)(*a*)(iv), I make two preliminary points about this provision.

(1) Scope of Art 34(2)(a)(iv) of the Model Law

37 First, I agree with the defendant that a challenge under Art 34(2)(*a*)(iv) cannot possibly succeed unless the *arbitral procedure* which the tribunal adopted is not in accordance with the arbitration agreement or the Model Law.[70] That is what the express words of Art 34(2)(a)(iv) say: "An arbitral award may be set aside by the court … only if … the *arbitral procedure* was not in accordance with the agreement of the parties …or… was not in accordance with this Law…" (emphasis added). If authority is needed for this proposition beyond the plain words of Art 34(2)(*a*)(iv) itself, that authority can be found in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] 4 SLR 672 at [39]:[71]

> This ground of challenge contemplates situations where there are irregularities in the procedural rules agreed between the parties. These procedural rules will include, for example, rules on the timelines for submission of answers in response to the request for arbitration, the information required to be provided in the submissions, notification to the parties of the names of the members of the arbitral tribunal, etc.

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70 Defendant's Written Submissions dated 4 August 2020 ("DWS") at paras 19–23.

71 Defendant's Bundle of Authorities ("DBA") at Tab 21.

38 An applicant challenging an award under Art 34(2)(*a*)(iv) must therefore establish that: (a) the parties agreed on a particular arbitral *procedure* or that the Model Law prescribes a particular arbitral *procedure*; (b) the tribunal failed to adhere to that agreed or prescribed *procedure*; and (c) the failure to do so was causally related to the tribunal's decision: *AMZ v AXX* [2016] 1 SLR 549 at [102].

39 Article 34(2)(*a*)(iv) cannot possibly apply to the *substance* of an award, *ie* to the *outcome* of the arbitral procedure which the tribunal adopted. Extending Art 34(2)(*a*)(iv) to the outcome of the arbitral procedure amounts to an open invitation to the court to look into the merits of the tribunal's analysis underlying its decision and orders. This case is a perfect example. The plaintiffs' complaints about the Transfer Order under Art 34(2)(*a*)(iv) (see [30] above) are in truth complaints about the substance of the Transfer Order, not about the arbitral procedure which the tribunal adopted in arriving at the order. Leaving aside for the moment the plaintiffs' alternative complaint that the tribunal breached natural justice in making the Transfer Order, dealing with the complaints at [30] above would require me to examine the merits of the tribunal's analysis underlying the Transfer Order. That is impermissible under the Model Law's setting aside regime.

(2) Waiver

40 Second, I agree with the defendant that an applicant cannot succeed in a challenge under Art 34(2)(*a*)(iv) if it failed to raise the ground for that challenge in the arbitration itself so that the tribunal could deal with it: *AMZ v AXX* [2016] 1 SLR 549 at [102];[72] Robert Merkin and Johanna Hjalmarsson, *Singapore*

[72] DBA at Tab 7.

Arbitration Legislation Annotated (Informa, 1st Ed, 2009) at p 117;[73] UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration at para 128.[74]

41 For the reasons set out at [102]–[132] below, an order for the defendant to make counter-restitution to the plaintiffs *in specie* by transferring title to the Plant back to the plaintiffs was a live issue throughout the arbitration. Not only that, but it was obvious to the plaintiffs that this was so. This is because counter-restitution *in specie* is a natural legal consequence of rescission as a remedy and also because of the all or nothing case which the plaintiffs chose to advance on rescission.

42 If the plaintiffs believed that an order for the defendant to transfer of title to the Plant to the plaintiffs was somehow contrary to the agreed or prescribed arbitral procedure, they should have raised this point to the tribunal in the course of the arbitration. If they had done so, the tribunal would have had the chance to consider the point, to determine if it was justified and, if so, to decide how to deal with it. But the plaintiffs did nothing. They cannot now rely on Art 34(2)(*a*)(iv) to challenge the Transfer Order.

(3) Conclusion on preliminary points

43 My decision on these two preliminary points suffices to dispose of the plaintiffs' challenge to the Transfer Order under Art 34(2)(*a*)(iv) of the Model Law *in limine*. In any event, even if I am wrong on these preliminary points, it is my view that this challenge fails on the merits.

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73 DBA at Tab 41.

74 DBA at Tab 44.

Enforceability

44 The plaintiffs' first argument is that the Transfer Order should be set aside under Art 34(2)(*a*)(iv) because it is unenforceable. I do not accept that the arbitral procedure agreed by the parties in the Contract or prescribed by the Model Law requires the product of that arbitral procedure to be enforceable. And in any event, I consider the Transfer Order to be enforceable.

(1) The Contract

45 The plaintiffs submit that there is an implied term in law in every arbitration agreement that any award which results from it must be in a form which is enforceable. As authority for this proposition, the plaintiffs rely on the decision of Diplock J (as he then was) in *Margulies Brothers Ltd v Dafnis Thomaides & Co (UK) Ltd* [1958] 1 WLR 398 ("*Margulies*") at 402.[75]

46 *Margulies* does not establish that it is an implied term of an arbitration agreement that any award arising out of an arbitration under that agreement must be enforceable. In *Margulies*, a tribunal delivered an award which required the respondent to pay the claimant a sum of money without fixing one of the unknowns in the agreed formula by which that sum was to be calculated. Diplock J (as he then was) held that he had the power to remit the award to the tribunal to quantify that unknown because its failure to do so made the award bad on its face. In the alternative, he held that he also had the power to remit the award because the tribunal was guilty of misconduct in that it had breached the implied term in the arbitration agreement that its award should be in a form which was capable of being enforced as a judgment.

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[75] PWS at para 52.

47 *Margulies* does not assist the plaintiffs. I say that for four reasons.

48 First, the only *ratio* that can be extracted from *Margulies* is that it is an implied term of an arbitration agreement governed by English law that an award *for the payment of money* shall be in a form which is capable of being enforced in the same manner as a judgment. The Transfer Order is not an award for the payment of money. It is an award for the transfer of title in property. It is outside the scope of any *ratio* to be extracted from *Margulies*.

49 Second, Diplock J found that the award in *Margulies* was unenforceable because it was unintelligible. Quite rightly, that is not the plaintiffs' case on the Transfer Order. The Transfer Order is perfectly intelligible: it states with complete clarity what the defendant must transfer to the plaintiffs. The plaintiffs suggest that it is not clear what "the Plant" means. That is fanciful. In the context of making counter-restitution *in specie* as a consequence of rescission, "the Plant" simply means anything physical which the plaintiffs supplied to the defendant under the Contract in exchange for the Contract price. The plaintiffs' real case is merely that it is factually impossible to comply with the Transfer Order because there is no longer any separate title to the Plant. I deal with that submission below. In any event, the fact remains that Diplock J did not go so far as to say that there is an implied term in every arbitration agreement governed by English law that an award shall not be factually impossible to carry out.

50 Third, the actual result in *Margulies* was not that the award was set aside on the ground that it was unintelligible and therefore unenforceable. Diplock J merely remitted the award to the tribunal so that the tribunal could quantify the unknown, thereby rendering it intelligible and enforceable. In the present case, neither party seeks remission of the award as an alternative to setting it aside.

51 Finally, to the extent that Diplock J expressed the view that he could have set aside the award (at 402), that was only in considering the gateways to remission, which was the only relief sought and granted in *Margulies*. In any event, *Margulies* was decided at a completely different time and under a completely different regime for setting aside awards than that which is found in the Model Law and the Act. Diplock J was speaking of setting aside in *Margulies* in the context of the old common law concept of arbitrator misconduct. That concept has no relevance to the regime for setting aside an award under the Model Law, founded as it is on the modern doctrine of minimal curial intervention. *Margulies* is therefore no authority that an award which is unenforceable can today be set aside under Art 34(2)(*a*)(iv) of the Model Law on that ground alone.

(2) The ICC Rules

52 The plaintiffs also rely on the ICC Rules, presumably on the basis that the ICC Rules form part of the parties' arbitration agreement within the meaning of Art 34(2)(*a*)(iv) of the Model Law.

53 The plaintiffs submit that Article 41 of the ICC Rules obliges a tribunal constituted under those rules to render an award which is enforceable. That Article provides as follows:

> "In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law."
>
> (emphasis added).

54 Article 41 does not assist the plaintiffs for two reasons. First, as the defendant points out,[76] it does not impose an absolute obligation on a tribunal to deliver an award which is "enforceable at law". All it requires the tribunal to do is to "make every effort to make sure" that its award is enforceable at law. Thus, Art 41 imposes a duty on the tribunal to perform rather than to achieve a defined result: see Nigel Blackaby, Constantine Partasides, *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) at para 9.14 ("*Redfern*").[77]

55 Second, I accept the defendant's submission that Art 41 requires a tribunal only to ensure that the procedural formalities for the award to be enforceable are met. A tribunal fulfils this duty as long as it: (a) ensures that it has the jurisdiction to decide all of the issues before it; (b) complies with the procedural rules governing the arbitration; and (c) signs and dates the award and arranges for it to be delivered to the parties in the manner prescribed by the applicable arbitration law or rules: see *Redfern* at 9.15.[78] The requirements at (a) and (b) give rise to independent grounds for challenging an award which the plaintiffs advance separately. And the plaintiffs do not suggest that the tribunal failed to comply with the purely formal requirements at (c). Art 41 of the ICC Rules therefore adds nothing to the plaintiffs' challenge on Art 34(2)(*a*)(iv).

(3) The Model Law

56 There is also nothing in the Model Law which requires an award to be enforceable. Article 31 of the Model Law imposes only five requirements on an award: see Sundaresh Menon, *Arbitration in Singapore, A Practical Guide*

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76 DWS at para 100.

77 DBA at Tab 36.

78 DWS at para 99; DBA Tab 36.

(Sweet & Maxwell, 2nd Ed, 2018) at para 13.059.[79] None of those requirements has anything to do with enforceability.

(4) Conclusion

57 No doubt it is desirable, for obvious reasons, that any award which a tribunal renders is enforceable. But I cannot accept that a tribunal has a contractual or statutory duty to do so, let alone that a breach of this alleged duty renders an award liable to be set aside under Art 34(2)(*a*)(iv) of the Model Law.

Workability

58 The plaintiffs' next argument is that the Transfer Order ought to be set aside under Art 34(2)(*a*)(iv) because it is "uncertain and/or unworkable and/or contrary to law and/or factually impossible and/or meaningless".[80] I use the word "unworkable" as shorthand for all of these epithets. The plaintiffs submit that the Transfer Order is unworkable on two alternative grounds:

(a) First, the Transfer Order is unworkable because the Plant is now a fixture of the Site under Ruritanian law and the Transfer Order requires the defendant to transfer title to "the Plant" to the plaintiffs *without* a transfer of title to the Site.

(b) Second, the Transfer Order cannot be construed as requiring the plaintiffs, at its own expense, physically to disassemble the Plant and retake possession of components[81] simply because that is not what the Transfer Order says.

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79 DBA at Tab 40.

80 PWS at para 90.

81 PWS at para 59(b).

59 The plaintiffs then submit that an award that is unworkable is liable to be set aside under Art 34(2)(*a*)(iv) on that ground alone. For this submission, the plaintiffs rely on Singapore Law on Arbitral Awards at [3.75]:

> The parties must be left in no doubt what the decision on the issues is, who is to pay or do what, and who is the payee. Amounts awarded must be clearly quantified or quantifiable by a clear formula (not subject to further determination or to be agreed). If a party is to do something, there must be clear language on what it is supposed to do, leaving no doubt as to the scope of its obligation and the time within which it is to be performed.
>
> (Emphasis added)

60 I do not accept that the arbitral procedure agreed by the parties or prescribed by the Act requires an award that is the product of the arbitral procedure to be workable. Again, it is certainly desirable that an award should fulfil all of the criteria set out in the passage cited at [59] above. But it does not follow that an award which does not fulfil these criteria is liable to be set aside under Art 34(2)(*a*)(iv).

61 In any event, I assume in the plaintiffs' favour, without deciding, that this submission is correct, and consider whether the award is indeed unworkable.

(1) The award is not unworkable

62 On the issue of whether the award is unworkable, both sides have adduced much evidence of the Ruritanian law of fixtures. In my view, that evidence is ultimately irrelevant to the plaintiffs' challenge under Art 34(2)(*a*)(iv).

63 In analysing whether the Transfer Order is unworkable, I assume in the plaintiffs' favour that all of their expert's evidence on Ruritanian law is correct.

Thus, I assume that the Plant has been incorporated and integrated into the Site or the Steel Building such that the Plant is now a fixture under Ruritanian law. That leads to the further assumptions under Ruritanian law that: (a) title to the Plant is now vested in the Parent together with title to the land which constitutes the Site; and therefore (b) there is no longer any separate title to the Plant which the defendant can transfer to the plaintiffs under the Transfer Order.

64 Even if all that is true, it does not establish that the Transfer Order is unworkable. The Parent makes no claim to the Plant. Indeed, the Parent does not want the Plant to remain on the Site.[82] The defendant has indicated that both it and the Parent will give the plaintiffs access to the Site to disassemble the Plant and remove the resulting components once the plaintiffs comply with the Repayment Order.[83]

65 The only relevant point of Ruritanian law, therefore, is whether the Parent – as the current owner of the Site and therefore of the Plant – can consent to the plaintiffs disassembling the Plant, thereby severing the Plant from the land so as to restore the resulting components to their original status as chattels. The defendant's expert witness on Ruritanian law has opined that this is indeed possible.[84] The plaintiffs' expert on Ruritanian law does not opine to the contrary. All of this accords with common sense. I accept the evidence of the defendant's expert on Ruritanian law that this is indeed possible.

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82 DWS at para 143(a).

83 Affidavit filed on behalf of Defendant by Group Managing Director of Defendant's holding company dated 6 May 2020 ("DA-1") at paras 8,11, 61–62.

84 DWS at para 143(b); Defendant's 1st Expert Report dated 6 April 2020 at paras 12–14.

66 Once the Plant is disassembled, the resulting components will be chattels. The components will then acquire a title separate from the Parent's title to the Site. No doubt that title will vest initially in the Parent. But, as I have mentioned, the Parent makes no claim to the Plant. It is prepared to transfer title to the components resulting from the Plant's disassembly to the plaintiffs and to allow the plaintiffs to take possession of those components.

67 The plaintiffs' claim that the Plant is not *now* a chattel and does not *now* have a separate title which the defendant can transfer to the plaintiffs does not, in itself, demonstrate that the Transfer Order is unworkable, let alone that it should be set aside. The fact that the Parent holds title to the Plant now under Ruritanian law is irrelevant given that it is prepared to allow the Transfer Order to be carried out.

(2) Effect of disassembling the Plant

68 The next point that the plaintiffs take is that the Transfer Order is unworkable because disassembling the Plant will render the Plant and its components practically worthless:[85]

> Attempting to separate these machinery/equipment from the building and/or the land will make the Plant or whatever remains of it following separation practically worthless. The separation of the equipment / machinery from the [Steel Building] and/or the [Site] would among other things require the demolition of the civil works, the dismantling of the steel structures and the destruction of most of the auxiliary systems supplied by the Plaintiffs (including, most notably, the interconnecting piping outside the Plant's technological buildings) as well as the cables connecting the Plant to the instrumentation building.[86]

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85 PWS at para 76.

86 Affidavit filed on behalf of Plaintiffs by the 1st Plaintiff's Executive Vice President and Group General Counsel dated 5 June 2020 ("PA-2") at paras 53–55.

69 I reject this claim as an afterthought and a contrivance. The fact is that, both before and after the award, the plaintiffs contemplated that the Plant could be disassembled and that the plaintiffs could retake possession of the resulting components without ever suggesting: (a) that it was unworkable to do so; or (b) that doing so would render the Plant "practically worthless".

(A) THE PLAINTIFFS' POSITION BEFORE THE AWARD

70 Before the award, the plaintiffs pleaded in their reply and defence to counterclaim that the defendant should have rejected the Plant and handed it back to the plaintiffs under the Contract or offered to surrender it to the plaintiffs when the Plant was shut down in 2016.[87] The plaintiffs did not suggest that it was unworkable for the defendant to do this or that doing this would render the Plant practically worthless.[88] Indeed, one of the defendant's express remedies under the Contract is to reject the Plant, *ie*, to restore title to and possession of the Plant to the plaintiffs.[89]

(B) THE PLAINTIFFS' POSITION AFTER THE AWARD

71 After the award, the defendant issued a letter of demand to the plaintiffs seeking payment under the Repayment and the Damages Order. In the letter, the defendant offered the plaintiffs access to the Site so that they could disassemble the Plant and remove the resulting components at their own cost and expense.[90] The plaintiffs' response[91] objected only to the defendant's assertion that all this

87 PA-1 at pp 917–918.

88 DA-1 at paras 48–49.

89 PA-1 at p 79.

90 PA-1 at p 6193.

91 PA-1 at p 6198.

should be done at the plaintiffs' expense. The plaintiffs' only response was that it should be the defendant who bore these costs. The plaintiffs did not suggest in response: (a) that it was unworkable for the plaintiffs to disassemble the Plant and retake possession of its components; or (b) that doing so would render the Plant "practically worthless".

72 In the same letter, the plaintiffs sought access to the Site and the Plant to ascertain: (a) the status of the Plant, (b) its integrity and ability to operate; (c) the nature and extent of the activities needed to disassemble the Plant and remove its components from the Site; and (d) the measures that had to be implemented to protect the plaintiffs' rights, including intellectual property rights, in the Plant and the related technology.[92]

73 Consistently with this approach, in a later letter in the same chain of correspondence, the plaintiffs told the defendant how long their team of engineers and technicians would need to prepare for a full inspection of the Plant and how long they would need to conduct that inspection.[93]

74 I accept the defendant's submission that, in the correspondence up to this point, the plaintiffs maintained the consistent position that they were entitled under the Transfer Order to inspect the Plant to make the necessary arrangements to disassemble it and to remove the resulting components.[94] The position which the plaintiffs took in this correspondence is wholly inconsistent with their claim now that disassembling the Plant and retaking possession of its

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92 PA-1 at pp 6200–6201.

93 PA-1 at p 6208.

94 DWS at paras 103, 110–120.

components is outside the scope of the Transfer Order, unworkable or will render the Plant practically worthless.

75 The plaintiffs' position changed only when they decided to launch an attempt to set aside the award. It is only in the affidavits filed for this application that the plaintiffs have taken the position that disassembling the Plant is outside the scope of the Transfer Order, unworkable and will render the Plant practically worthless.

76 But even after the plaintiffs filed this application, they continued to seek arrangements to inspect the Plant with a view to disassembling it and removing the resulting components from the Site. The defendant continued to deny that the plaintiffs had any right to inspect the Plant in order to assess its ability to operate.[95] The plaintiffs took the express position in response that:[96] (a) rescission implies restoring the parties to the position they were in before they entered into the rescinded contract; and (b) the tribunal's rescission of the Contract therefore presupposes that the Plant is capable of being operated. It was on that basis that the plaintiffs claimed a right to have access to the Site both to ascertain the ability of the Plant to operate and, more importantly, to make arrangements to disassemble the Plant and remove the resulting components from the Site. When the defendant challenged the plaintiffs' position, the plaintiffs reiterated that[97] they were entitled to have access to the Site because restoring the plaintiffs to the *status quo ante* presupposes that the Plant is capable of being operated.

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95 DA-1 at p 257.

96 DA-1 at p 259.

97 DA-1 at p 264.

77 The plaintiffs sent this last letter to the defendant four months after the award and almost a month after filing this application. It was only in this letter that the plaintiffs asserted for this first time that the Transfer Order was unenforceable or unworkable. Even then, the plaintiffs maintained their original position in the alternative: that "the Award is clear that [the defendant] 'must' and 'shall transfer the title to the Plant' to [the plaintiffs]."[98]

78 This correspondence continued. The plaintiffs have never withdrawn the position they took at the beginning of the chain. As a result, it remains the plaintiffs' position – at least on the correspondence between the parties – that the defendant must return the Plant to the plaintiffs to restore it to the *status quo ante* and that the plaintiffs are entitled to have access to the Site in order to inspect the Plant as a preparatory step to disassembling the Plant and removing the resulting components from the Site.

79 This correspondence leads me to draw two inferences. First, it leads me to reject, on the facts, the plaintiffs' claim that disassembling the Plant and removing the resulting components from the Site is unworkable or will render the Plant or the components practically worthless. Second, it leads me to infer, as the defendant invites me to, that the plaintiffs' claim that the Transfer Order is unenforceable and unworkable is an afterthought and a contrivance, adopted simply to manufacture a ground for setting aside the award.[99]

80 Further, in so far as the plaintiffs suggest that the scope of the Transfer Order is unclear and, in particular, that it does not specify who should pay to disassemble the Plant, that is a matter which the plaintiffs ought to have raised

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98 DA-1 at p 265.

99 DA-1 at paras 8–11, 38–40.

directly with the tribunal under Art 33(1)(*b*) or possibly Art 33(3) of the Model Law. The plaintiffs cannot keep the issue in reserve, so to speak, and raise it after the thirty-day period stipulated in Art 33 has expired as a ground for setting the award aside under Art 34(2)(*a*)(iv) of the Model Law.

Conclusion on Art 34(2)(a)(iv)

81 For all these reasons, I do not accept the plaintiffs' submission that the Transfer Order should be set aside on any ground under Art 34(2)(*a*)(iv) of the Model Law.

82 In any event, in so far as the plaintiffs rely on unenforceability to challenge the Transfer Order, the grounds on which an award will be refused enforcement under Art 36 of the Model Law mirror the grounds on which an award will be set aside under Art 34 of the Model Law. Thus, the plaintiffs' argument that the tribunal had a duty to render an enforceable award diverts the analysis from the real question. The real question is not whether the award should be set aside under Art 34(2)(*a*)(iv) because it is unenforceable but whether the plaintiffs have positively established one of the grounds prescribed in Art 36 to have the award set aside.

83 That leads me neatly to the plaintiffs' next challenge to the Transfer award, brought under Art 34(2)(*a*)(iii) of the Model Law.

Second ground: beyond the scope of the submission to arbitration

The plaintiffs' case

84 Article 34(2)(*a*)(iii) of the Model Law provides that an award may be set aside if it "deals with a dispute not contemplated by or not falling within the

terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration".

85 The plaintiffs' case on Art 34(2)(*a*)(iii) is as follows. Looking at the Terms of Reference, the list of issues, the pleadings, the memorials and the post hearing submissions in the arbitration, a transfer of title to the Plant never formed part of the parties' submission to arbitration. The only relief which the defendant sought upon rescission was monetary compensation, not restitution and counter-restitution *in specie*.[100] When the tribunal ordered the defendant to make counter-restitution of the Plant to the plaintiffs *in specie*, therefore, the tribunal decided a matter beyond the scope of the submission to arbitration.[101] Thus, the Transfer Order ought to be set aside under Art 34(2)(*a*)(iii) of the Model Law.

86 I do not accept the plaintiffs' submission.

Article 23 of the ICC Rules

87 The plaintiffs first rely on Art 23 of the ICC Rules and the Terms of Reference as delimiting the scope of the parties' submission to arbitration.[102] Article 23(1) requires the parties and the tribunal to draw up and sign Terms of Reference. Article 23(4) prohibits any party from making any claim in the course of the arbitration which falls outside the limits of the Terms of Reference without the tribunal's authorisation. In deciding whether to grant authorisation,

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100 PWS at para 106.

101 PWS at para 107.

102 PWS at para 99.

the tribunal must "consider the nature of the new claims, the stage of the arbitration and other relevant circumstances."[103]

88 It is true that the tribunal did not include counter-restitution of the Plant *in specie* upon rescission as one of the issues in the Terms of Reference (see [22] and [23] above). It is also true that the tribunal did not exercise its power under Art 23(4) of the ICC Rules in the course of the arbitration to authorise either party to seek an order for counter-restitution of the Plant *in specie*.

89 None of that, however, means that the Transfer Order was outside the scope of the submission to arbitration. I do not accept that Art 23 renders any relief which is not expressly stated in the Terms of Reference in an ICC arbitration, for that reason alone, outside the scope of the parties' submission to arbitration. That is because Art 23(1) does not require the Terms of Reference to state in detail every single head of claim which a party advances in an arbitration or every single head of relief which a party seeks in the arbitration. Article 23(1)(*c*) requires only that the Terms of Reference include "a *summary* of the parties' respective claims and of the relief sought by each party".[104] As the defendant points out, this is because the specific terms and the nature of the relief sought may not be presented uniformly in all jurisdictions:[105] see Herman Verbist, Erik Schaefer *et al*, *ICC Arbitration in Practice* (Kluwer Law International, 2nd Ed 2015) at p 128.[106] Just because a particular head of relief does not appear in the Terms of Reference does not mean it is outside the scope of the submission to arbitration within the meaning of Art 34(2)(*a*)(iii).

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103 PBA at Tab 43.

104 PBA at Tab 43.

105 DWS at para 26.

106 DBA at Tab 38.

90 It is only the parties' arbitration agreement and the notice of arbitration which initiates a specific reference to arbitration which delimits the scope of the parties' submission within the meaning of Art 34(2)(*a*)(iii) of the Model Law. It is therefore only if the Transfer Order is outside the scope of the parties' arbitration agreement and outside the scope of each of their notices of arbitration in the two consolidated arbitrations that the Transfer Order will be outside the scope of their submission to arbitration. The plaintiffs, quite rightly, make no such allegation.

Paragraph 78 of the Terms of Reference

91 In any event, even if Art 23 of the ICC Rules and the Terms of Reference do limit the scope of the submission to arbitration within the meaning of Art 34(2)(*a*)(iii) of the Model Law, paragraph 78 of the Terms of Reference contains language wide enough to bring counter-restitution of the Plant *in specie* within the scope of the submission to arbitration. Paragraph 78 provides as follows:[107]

> Subject to Article 23(4) of the ICC Rules, the issues to be determined by the Arbitral Tribunal shall be those factual or legal issues resulting from the Parties' submissions, including forthcoming submissions, which are relevant to the adjudication of the relief respectively sought by the Parties, in particular of the claims and defenses raised and including any further questions of fact or law which the Arbitral Tribunal, in its discretion, may deem necessary or appropriate to decide upon, after hearing the Parties, for the purpose of resolving the present dispute.

92 An issue which surfaces in the course of an arbitration and which is known to all the parties is within the scope of the submission to arbitration even if it is not part of any list of issues or pleading: see Timothy Cooke, *International*

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107 PA-1 at p 179.

Arbitration in Singapore, Legislation and Materials (Sweet & Maxwell, 2018) at 1.359.[108] The only, fairly obvious, caveat I would add to this proposition is that the issue must nevertheless be within the scope of the parties' arbitration agreement and of the notice of arbitration initiating the reference.

93 Thus, in *AKN v ALC* [2015] 3 SLR 488,[109] the Court of Appeal held that a claim is within the scope of a submission to arbitration if a party could have, in principle, advanced that claim by way of an amendment to its pleadings in the arbitration: at [74]. If so, the real issue is not whether the claim is within the scope of the submission to arbitration but whether the tribunal has complied with natural justice under s 24(*b*) of the Act in allowing the claim to be advanced and whether the opposing party is able to present its case on the claim under Art 34(2)(*a*)(ii) of the Model Law.

94 Restitution and counter-restitution of benefits is the natural legal consequence of rescission: see for example *Strait Colonies Pte Ltd v SMRT Alpha Pte Ltd* [2018] 2 SLR 441 at [33];[110] *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997 at [56].[111] Counter-restitution of the Plant *in specie* was therefore the natural legal consequence of the defendant's counterclaim for rescission. There is no doubt that both the plaintiffs and the defendant could, in principle, have been granted leave to amend their pleadings to advance a claim or a counterclaim for counter-restitution of the Plant *in specie*. The Transfer Order therefore falls within the scope of paragraph 78 of the Terms of Reference. Counter-restitution of the Plant *in specie* was one of

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108 DBA at Tab 43.

109 DBA at Tab 6.

110 DBA at Tab 30.

111 DBA at Tab 24.

the "factual or legal issues" arising out of the defendant's claim for rescission within the meaning of paragraph 78.

95 The scope of paragraph 78 of the Terms of Reference is illustrated by the way in which the plaintiffs themselves resisted the defendant's claim for rescission. In the Terms of Reference, the plaintiffs' only response on rescission was a general denial of the defendant's entitlement to rescission.[112] Thus, the plaintiffs are not recorded, in the Terms of Reference, as alleging that rescission was barred or that the defendant was estopped from seeking rescission. The plaintiffs nevertheless went on to rely on these two legal grounds for resisting rescission.[113] Quite rightly, nobody suggested that the plaintiffs had to secure the tribunal's authorisation under Art 23(4) to do so simply because these two grounds were not expressly recorded in the Terms of Reference. These grounds for resisting rescission came within the meaning of the words "…factual or legal issues resulting from the Parties' submissions…" or "…further questions of fact or law which the Arbitral Tribunal, in its discretion, may deem necessary or appropriate to decide upon, after hearing the Parties, for the purpose of resolving the present dispute" in paragraph 78 of the Terms of Reference.

Waiver

96 In any event, for the reasons set out at [102]–[132] below, the plaintiffs were aware throughout the arbitration that counter-restitution of the Plant *in specie* was a live issue in the arbitration. If the plaintiffs' position was that counter-restitution was somehow outside the scope of the submission to arbitration within the meaning of Art 34(2)(*a*)(iii) of the Model law, they should

112 PA-1, p 170.

113 PA-1, pp 878–880.

have raised the complaint promptly to the tribunal. If they had done so, the tribunal would have had the chance to consider the complaint, to determine if it was justified and, if so, to decide how to deal with it. The plaintiffs did nothing. They cannot now rely on Art 34(2)(*a*)(iii) to challenge the Transfer Order.

Third ground: breach of natural justice

The law

97 The final ground on which the plaintiffs seek to have the Transfer Order set aside is that they were denied natural justice within the meaning of s 24(*b*) of the Act or were unable to present their case on the Transfer Order within the meaning of Art 34(2)(*a*)(ii) of the Model Law. The only rule of natural justice is in play under s 24(*b*) is the fair hearing rule.

98 Article 34(2)(*a*)(ii) of the Model Law, in so far as it relates to a party's ability to present its case is co-extensive in scope and result with s 24(*b*) of the Act: *ADG v ADI* [2014] 3 SLR 481 ("*ADG*") at [118].[114] It is therefore generally convenient to analyse a challenge under Art 34(2)(*a*)(ii) of the Model Law together with a challenge under s 24(*b*) of the Act: see *Government of the Republic of the Philippines v Philippine International Air Terminals Co, Inc* [2007] 1 SLR(R) 278 at [18].[115]

99 The propositions of law relevant to a challenge on grounds of a breach of the fair hearing rule, whether under s 24(b) of the Act or under Art 34(2)(*a*)(ii) of the Model Law can be summarised as follows:

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114 DBA at Tab 4.

115 PBA Tab at 15.

(a) If an applicant was given an opportunity to present its case on a particular issue but did not avail itself of that opportunity, the award will not be set aside: *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 at [94].[116]

(b) The court will look at the pleadings and the proceedings in the arbitration holistically rather than technically in order to determine whether it ought to have been clear to the applicant that the point was in issue: *Soh Beng Tee v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*").[117]

(c) There must be a causal nexus between the breach of natural justice and the aspect of the award which the applicant seeks to set aside. If a tribunal reached its decision on a basis which is untainted by the breach of natural justice, then the necessary causal nexus will be absent: *ADG* at [127], [140]–[141].[118]

(d) The applicant must show that the breach of natural justice denied the tribunal the benefit of evidence or arguments that had a real, as opposed to a fanciful, chance of making a difference to its decision. An applicant will suffer prejudice so long as the evidence or arguments, if presented, *could* have made a difference to the tribunal's decision: *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [54].[119]

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116 DBA Tab at 34.

117 DBA Tab at 29.

118 DBA Tab at 4.

119 DBA at Tab 16.

The plaintiffs' case

100 The plaintiffs' submission that the tribunal breached the fair hearing rule in making the Transfer Order[120] proceeds as follows. The plaintiffs were unable to present their case on the issue of whether the tribunal could and should order counter-restitution of the Plant *in specie* as a consequence of rescission because counter-restitution was never a live issue in the arbitration.[121] The defendant never prayed for counter-restitution *in specie* as a consequence of rescission. The only order which the defendant sought as a consequence of rescission was an order for the plaintiffs to pay the defendant a sum of money. If the defendant had prayed for counter-restitution *in specie*, the plaintiffs would have presented evidence and submissions to establish that any such order would be unworkable or unenforceable. The plaintiffs have suffered prejudice because this evidence and these submissions could have made a difference to the tribunal's decision to make the Transfer Order.

101 I do not accept any step in the plaintiffs' submission. Although it is true that the defendant did not pray for counter-restitution *in specie*, that issue was live throughout the arbitration. Despite that, the plaintiffs chose to run an all or nothing defence on rescission, meeting only the defendant's claim for rescission without advancing an alternative case on the consequences of rescission as a fallback position.

Counter-restitution was always a live issue

102 The plaintiffs accept, as they must, that whether the tribunal ought to rescind the Contract and the Service Agreement was a live issue in the

120 PA-1 at para 88.

121 PA-2 at para 58.

arbitration.[122] The defendant expressly sought rescission in its request for arbitration[123] and in its answer to the plaintiffs' request for arbitration.[124] The tribunal expressly set out rescission in the Terms of Reference as one of the heads of relief which the defendant claimed.[125] The defendant expressly pleaded a claim for rescission in its statement of defence and counterclaim.

103 The natural legal consequence of rescission is that the parties to the contract make restitution and counter-restitution to each other of the benefits which they exchanged under the contract: see [94] above. This restitution is done, as far as possible, *in specie*.

104 Merely seeking rescission of a contract as relief makes restitution and counter-restitution of benefits *in specie* a live issue as the natural legal consequences of rescission. Counter-restitution of the Plant *in specie* was therefore a live issue in the arbitration from the very outset, as soon as the defendant included a claim for rescission in its notice of arbitration in August 2016.[126]

105 Nothing that the defendant did in the arbitration thereafter had the effect of withdrawing counter-restitution *in specie* as a live issue.

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122 PA-1 at para 87.

123 PA-1 at p 422.

124 PA-1 at p 456.

125 PA-1 at p 179.

126 PA-1, pp 422.

(1) The Terms of Reference

106 The absence of any reference to counter-restitution *in specie* in the Terms of Reference did not withdraw it as a live issue. As the defendant points out, the Terms of Reference is simply a summary of the parties' cases on the merits and on the relief sought.[127] The tribunal set out the defendant's claim for rescission under the heading "*Summary* of the Relief sought by the [defendant]" (emphasis added). Further, Art 23(1), as I have already mentioned (see [89] above), provides that the Terms of Reference is merely a *summary* of the claims that each party advances and the relief that each party seeks. Finally, the Tribunal expressly provided at paragraph 24 of the Terms of Reference that it was merely a summary:[128]

> The following summaries are intended to satisfy the requirements of Article 23(1)(c) of the ICC Rules, without prejudice to the scope of any allegations, arguments or contentions advanced in the submissions already served by the Parties or still to be served by the Parties during these arbitration proceedings under the control of the Arbitral Tribunal. In particular, subject to Article 19 and 23(4) of the ICC Rules, the Arbitral Tribunal shall remain entitled to take into consideration any further allegations, arguments and contentions to be advanced by the Parties. Moreover, merely by signing these Terms of Reference, neither Party shall be taken to agree or concede any part of the other Party's claims or counterclaims (as summarized below or otherwise).

107 On the contrary, for the reasons I have already given (see [94] above), the scope of paragraph 78 of the Terms of Reference is wide enough to encompass the issue of counter-restitution *in specie*, being one of the natural legal consequences of rescission.

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127 DWS at para 25.

128 PA-1, p 167.

(2) The defence and counterclaim

108 The defendant pleaded counter-restitution *in specie* as the natural legal consequence of rescission in paragraphs 379,[129] 384,[130] 388[131] and 393[132] of its defence and counterclaim.[133] The defendant pleaded in these paragraphs that title to equipment which the plaintiffs supplied to the defendant under the Contract should and would revest in the plaintiffs upon rescission:[134]

> 379 By reason of the [plaintiffs'] misrepresentations, the Contract should be set aside and title to the tundish temperature measurement system should revert to [the first plaintiff]
>
> …
>
> 384 Further, by reason of the [plaintiffs'] misrepresentations, the Contract should be set aside and title to the replacement equipment should revert to [the first plaintiff]
>
> …
>
> 388 … in any event, by reason of the [plaintiffs'] misrepresentations, the Contract should be set aside and title to the [commissioning] spare parts [within the Scope of Supply], which have not been used, should revert to [the first plaintiff], and [the defendant] is not obliged to pay for the costs for [these] spare parts.
>
> …
>
> 393 In any event, by reason of the Claimants' misrepresentations, the Contract should be set aside and title to the wear parts, which have not been used, should revert to the [first plaintiff], and the defendant is not obliged to pay for the costs for the wear parts. In the alternative, in the event that

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129 PA-1, p 761.

130 PA-1, p 762.

131 PA-1, p 763.

132 PA-1, p 764.

133 PA-1, pp 761–765.

134 DA-1 at para 43.

> the tribunal orders damages, the damages awarded must also include the cost of the said repairs.

109 The plaintiffs submit that the defendant pleaded these four paragraphs to advance its defence to the plaintiffs' claim and not to advance a counterclaim as to the consequences of rescission. I reject the submission for two reasons.

110 First, the defendant's defence and counterclaim was not divided, as is customary, into a section headed "Defence" and another section headed "Counterclaim". Instead, it was a single pleading interweaving the defendant's defence with its counterclaim in a comprehensive document comprising seven topical sections running to 424 paragraphs over 151 pages. These four paragraphs appear in a section headed "VI. Remedies". This section was subdivided into two subsections, the first setting out the defendant's pleaded case on the remedies which it counterclaimed against the plaintiffs and the second setting out its pleaded case on the remedies which the plaintiffs claimed against it. It is true that these four paragraphs appear in the latter subsection rather than the former. But it is meaningless to raise rescission and its consequences by way of defence. Rescission and its consequences can arise only by way of claim. To that extent, these four paragraphs must be read not as a defence to the plaintiffs' claim but as part of the defendant's counterclaim.

111 Second, regardless of the subsection of the defence and counterclaim in which the defendant pleaded these paragraphs, they sufficed positively to put the plaintiffs on reasonable notice that counter-restitution *in specie* upon rescission – as one of the natural legal consequences of rescission – was a live issue in the arbitration.

(3) The defendant's prayer for relief

112 The plaintiffs place weight on the fact that the defendant failed to plead a specific and express prayer for counter-restitution *in specie* at the conclusion of its defence and counterclaim. In so far as it is relevant, the counterclaim concludes with the following prayer for relief:

> 424. In light of the matters set out above, [the defendant] respectfully submits that the Tribunal grant [the defendant] its sought reliefs, namely:
>
> (a) Rescission of the Contract and the Service Agreement;
>
> (b) Repayment of all sums paid by [the Parent] and/or [the defendant] to [the first plaintiff] and/or [the second plaintiff] under the Contract and the Service Agreement;
>
> …

113 I do not accept the plaintiffs' submission that the defendant's omission amounts to the defendant withdrawing counter-restitution *in specie* as a live issue and limiting its counterclaim to what the plaintiffs call "pecuniary rescission". What the plaintiffs mean by pecuniary rescission is an order for the payment of a sum of money calculated to achieve the same net economic effect as an order for the restitution and counter-restitution *in specie* of benefits exchanged under the rescinded contract. I say that for two reasons.

114 First, the defendant's prayer for relief must be read in the context of the four preceding paragraphs which I have cited at [108] above. For the reasons I have given, the import of those four paragraphs was to make counter-restitution *in specie* a live issue in the arbitration. The omission of a specific prayer for counter-restitution of the Plant *in specie* did not negate the import of those four paragraphs or withdraw counter-restitution *in specie* as a live issue in the arbitration. Whether or not the defendant sought a specific order for counter-

restitution in specie, it remained a natural legal consequence of rescission and therefore a live issue.

115 Second, I do not accept that paragraph 424(b) of the defendant's defence and counterclaim (see [112] above) amounts to a prayer for pecuniary rescission. What the defendant prayed for in fact was for *full* restitution of the Contract price from the plaintiffs *without* any deduction to account for counter-restitution to the plaintiffs. The implicit premise of the prayer is that the original value of the Plant was nil. That was the defendant's best case on the consequences of rescission. The defendant was perfectly entitled to advance its best case in this way. Restitution and counter-restitution are, in principle at least, benefits to the receiving party and a burden to the restoring party. The defendant therefore had a tactical forensic duty to plead the benefits it sought from the plaintiffs but no such duty to volunteer a benefit to the plaintiffs. The defendant was perfectly entitled to advance a case which sought restitution in full from the plaintiffs without volunteering counter-restitution of any kind to them. The defendant's approach cast a tactical forensic burden on the plaintiffs to take a position on counter-restitution as a natural consequence of rescission. The plaintiffs could either have claimed counter-restitution as a benefit or rejected counter-restitution as a burden, on the facts of this case. The plaintiffs did neither.

116 Instead, the plaintiffs chose not to meet the defendant's case on the consequences of rescission. Instead, they chose to resist rescission on the sole basis that that remedy was entirely unavailable to the defendant, either because rescission was barred or because the defendant was estopped from seeking it. That left the plaintiffs exposed in the event that the tribunal found that rescission was not barred and that the defendant was not estopped from seeking it. Having created this exposure by adopting an all or nothing defence to rescission, the

plaintiffs can hardly complain about the way in which the tribunal handled the natural legal consequences of rescission in the absence of any alternative case advanced by the plaintiffs on that live issue.

(4) Opening submissions in the arbitration

117 The defendant positively raised counter-restitution *in specie* as a consequence of rescission in paragraph 201 of its opening submissions in the arbitration:[135]

> 201. If the Tribunal agrees that by reason of the [plaintiffs'] misrepresentations, the Contract should be rescinded, then title to the Plant, including the additional equipment installed, transfers to [the first plaintiff]. …

The plaintiffs did not suggest at any time in the arbitration that they were taken by surprise by the defendant advancing in this paragraph an issue which was not live. Nor did the plaintiffs meet this aspect of the defendant's case on the merits.

118 The plaintiffs submit that this paragraph appears in a section of the defendant's opening submissions rejecting the plaintiffs' claims and not in the preceding section dealing with the defendant's counterclaims against the plaintiff.

119 Once again, for the reasons set out at [109]–[111] above, I reject this distinction as artificial.

(5) Oral closing submissions

120 Both parties' counsel took positions in their oral closing submissions which accepted that a natural legal consequence of rescission was that the

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135 PA-1 at p 1334.

defendant would have to make, and the plaintiffs would have to accept, counter-restitution *in specie*.

121 One of the arguments which plaintiffs' counsel advanced in her oral closing submissions was that rescission was barred because the Plant had been abandoned since 2016 and therefore restoring the plaintiffs to the *status quo ante* was no longer possible:[136]

> In the present condition you would restore -- imagine that your awards (*sic*) said "yes, they are entitled to rescind for misrepresentation". What about the plant? How can the parties now go back to their former situation considering that in this case the plant was erected by respondent, operated by respondent for years? Respondent even had the time to benefit. It sold. It sold for a long time the products of the plant. It was commissioned by it and then it would be what, physically restituted (*sic*) to the [first plaintiff] or what? If [the first plaintiff] should pay 400 millions it would have something in exchange. The plant? What plant? That have (*sic*) been abandoned by purchaser, today respondent, because it has lost complete interest on that. So restoration, the restoration principle… would absolutely remain inapplicable.

122 Thus, plaintiffs' counsel accepted that: (a) that the goal of rescission is to put the parties in the position they were in before they entered into the rescinded contract through restitution and counter-restitution;[137] and (b) rescission ordinarily requires both restitution and counter-restitution, not just in principle or in money's worth, but *in specie*.

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136 PA-1 at p 5117.

137 PA-1 at p 5142.

123 Defendant's counsel also made it clear that the tribunal's decision to rescind the Contract would oblige the defendant to return the Plant to the plaintiffs and would oblige the plaintiffs to accept it back:[138]

> I will now deal with the … point about restoration to its former position and he asks: how can that happen? That's like saying that even if this tribunal finds that there was a fundamental breach of the contract that they would have to repay the price, that the tribunal cannot then direct that they take the process back.
>
> Remember it is not just -- it is not the plant. It is the process, the design and the layout, that is at issue here. To suggest that regardless of whether they were right or wrong we are stuck with the process and have to pay for it is, with respect, remarkable. If they gave us a dud, why do we keep it? Contract provides, the law of contract, and this is basic law, provides that if there is misrepresentation it is rescinded, you take it back.
>
> The only reason it is sitting there since 2016 is that they refuse to take it back. So in the event you find that I am right on the fundamental flaws in the plant, then I would have been entitled in 2016 to ask them to take it back. If it has deteriorated since, it is not my fault. It is because they refused to take it back.
>
> Indeed, there is nothing here that prevents restitution from taking place because there is no evidence that they can't come dismantle and take it back. Whether they have any value for it is by the by and the point that they make which is "Oh, you have used the plant to sell some coils", there are two answers to it.
>
> The first is that the coils were all but useless. The second is we have already given credit for the amounts we received for those coils in our damages claims. So they are not double hit. They would just take back what they gave us.

124 It is true that counsel did not make these submissions in the specific context of whether the tribunal should order counter-restitution *in specie*. But the fact that counsel made these submissions at all shows that both parties appreciated that, if the tribunal rescinded the Contract, a transfer of title to the

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138 PA-1 at pp 5133-5135.

Plant *in specie* was not just a possible consequence of rescission but the natural legal consequence of rescission.

(6) The List of Issues

125 A few days after the evidentiary hearing concluded, the tribunal drew up and circulated to the parties a list of what it considered to be the main issues it had to determine in the arbitration ("the List of Issues").[139] The List of Issues sets out 18 discrete issues. Of those, only Issue 2 pertained to the defendant's claim for rescission. Issue 2 reads as follows: "Is the [defendant], as a result of the alleged misrepresentations, entitled to rescind the Contract or is the [defendant] estopped from claiming a rescission of the Contract?"[140]

126 The plaintiffs point out that the List of Issues makes no mention of counter-restitution *in specie* being an issue in the arbitration. But the failure to refer to counter-restitution *in specie* in the List of Issues did not withdraw that issue as a live issue in the arbitration.

127 A list of issues is merely a tool which sets out and identifies the "key factual and legal" issues in an arbitration for the forensic and analytical convenience of the tribunal and the parties Stephen Bond, Marily Paralika *et al*, *Concise International Arbitration* (Wolters Kluwer, 2nd Ed, 2015) at p 404.[141]. It is not intended to set out every possible issue in the arbitration or to prevail over the scope of the parties' arbitration agreement, the notice of arbitration, the Terms of Reference or the pleadings. Indeed, a large part of the utility of a list

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139 PA-1 at p 6216.

140 PA-1 at p 6216.

141 DBA at Tab 39.

of issues is lost if it strives to be an exhaustive list of every single issue in an arbitration, posed at every descending level of generality.

128 The omission of any reference to counter-restitution *in specie* in the List of Issues did withdraw it as a live issue in the arbitration.

(7) Post-hearing submissions

129 In their post-hearing submissions, the plaintiffs showed that they understood perfectly well that the issue of counter-restitution *in specie* was a live issue. The plaintiffs made the point that, if the tribunal rescinded the Contract, the plaintiffs' obligation to make restitution of the Contract price to the defendant must be reduced to account for the diminution in value of the Plant since it was shut down in 2016:[142]

> 67. In the event that the Tribunal finds that the defects complained of are of such a fundamental nature as to warrant a rescission of the Contract, then any sum awarded in favour of [the defendant] in respect of the return of the Contract price must take into account the following;
>
> (i) the loan of EUR 15 million together with interest accrued;
>
> (ii) the *diminution* in value of the Plant by reason of the same lying idle for three years after the termination; and
>
> (iii) the sum of about RM270 million received by the defendant in selling 149,530.297 tonnes of coils up to July 2016.
>
> (Emphasis added)

130 The plaintiffs' position in paragraph 67(ii) would have been quite different if they believed that the defendant's counterclaim was confined to pecuniary rescission and that counter-restitution *in specie* was not a live issue.

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142 PA-1 at pp 1560–1561.

If they believed that, paragraph 67 would have been premised on the defendant (or the Parent) retaining title to the Plant. The plaintiffs would then have argued in paragraph 67(ii) that the defendant must give the plaintiffs credit against restitution of the Contract price for the *full original* value of the Plant, not merely for the *diminution* in its value. By submitting that the plaintiffs' restitution of the Contract price should be reduced only by the *diminution* in value of the Plant, and not by the *full* original value of the Plant, the plaintiffs showed that they anticipated reacquiring title to the Plant upon counter-restitution *in specie*. That plus monetary compensation for the diminution in value of the Plant would make counter-restitution complete and restore them to the *status quo ante*.

131 I draw two inferences from this paragraph. First, counter-restitution of the Plant *in specie* remained a live issue at the close of submissions in the arbitration. Second, and most importantly, the plaintiffs *knew* that it was a live issue. That is why they argued that their obligation to make restitution of the Contract price should be reduced only by the difference between the full original value of the Plant and the current value of the Plant.

132 For these reasons, I reject the plaintiffs' submission that this paragraph cannot be construed as their acknowledgment that counter-restitution *in specie* was a live issue in the arbitration. Counter-restitution *in specie* is the clear premise of paragraph 67(ii).

The award

133 In the award, the tribunal expressly acknowledged that the plaintiffs had not prayed for counter-restitution of the Plant *in specie*. But the tribunal held

that both sides had accepted that counter-restitution *in specie* was a natural legal consequence of rescission:[143]

> 392. As the Contract becomes void *ab initio*, the Tribunal finds that the rescission of the Contract must entail restitution. Accordingly, the [defendant] is entitled to receive back the sums paid to the [plaintiffs] for the Plant. In return, the [defendant] will transfer the title to the Plant, including the additional equipment installed, to [the first plaintiff]. While the [plaintiffs] did not request the transfer of title to the Plant in their request for relief, such transfer of the title is the natural (i.e. legal) consequence of the rescission of the Contract, as specifically acknowledged by the [defendant] and not challenged by the [plaintiffs].

134 The tribunal attached two footnotes to the last sentence of this paragraph. First, in the footnote to the phrase "specifically acknowledged by the [defendant]", the tribunal made express reference to the paragraphs of the defendant's defence and counterclaim which I have set out above at [108]. Second, in the footnote to the phrase "and not challenged by [the plaintiffs], the tribunal noted that the plaintiffs too anticipated a transfer of title by the submission in paragraph 67 of their post-hearing submission which I have cited at [129] above. That footnote reads as follows:

> The [plaintiffs] did not ask explicitly to receive the title to the Plant because they objected to the [defendant's] misrepresentation claim. However, the [plaintiffs] explicitly argued that rescission must take into account the state of the Plant. In the Tribunal's opinion, this must mean that the [plaintiffs] acknowledged that rescission may entail a transfer of title (see for example, [the plaintiffs'] Response to [the defendant's] post-hearing brief, para. 67).

135 There was no breach of the fair hearing rule in the manner in which the tribunal arrived at its decision to make the Transfer Order.

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143 PA-1 at p 313.

Conclusion on s 24(b) and Art 34(2)(a)(ii)

136 For the foregoing reasons, I find that counter-restitution of the Plant *in specie* was a live issue in the arbitration from the moment the defendant sought rescission in its notice of arbitration all the way until the tribunal rendered its award. The plaintiffs were well able to present their case on counter-restitution *in specie* as one of the natural legal consequences of rescission. They chose not to do so. I therefore reject the plaintiffs' attempt to set aside the Transfer Order under s 24(*b*) of the Act and under Art 34(2)(*a*)(ii) of the Model Law.

Conclusion on the Transfer Order

137 I have found that all three of the plaintiffs' challenges to the Transfer Order fail. The ultimate source of the plaintiffs' complaints about the Transfer Order is their tactical decision to run an all or nothing defence on rescission which did not meet the defendant's case on the natural legal consequences of rescission. The plaintiffs' complaints do not arise from anything which the tribunal did or failed to do. There has been no breach of the provisions of the Act or the Model Law on which the plaintiffs rely.

138 My findings make it unnecessary to consider the issue of prejudice, in so far as it is relevant. It suffices to say that, in my view, the plaintiffs were the authors of their own alleged misfortune. The Transfer Order therefore stands.

139 I now turn to consider the plaintiffs' case on the Repayment Order.

The Repayment Order

The plaintiffs' case

140 The plaintiffs complain that tribunal had no basis for deciding that the defendant should be allowed to deduct €54.5m under the Repayment Order in order to account for the diminution in value of the Plant and for the defendant's use of the Plant. The plaintiffs therefore seek to set aside the Repayment Order under s 24(*b*) of the Act or Art 34(2)(*a*)(ii) of the Model Law on two grounds:[144]

(a) The tribunal breached natural justice in making the Repayment Order in that the plaintiffs were unable to present their case on the current value of the Plant or the diminution in value of the Plant;[145] and

(b) The tribunal made the Repayment Order without any evidence of the current value of the Plant or the diminution in value of the Plant.[146]

141 The first ground is the familiar ground alleging a breach of the fair hearing rule. The second ground is novel: the plaintiffs argue that Singapore law ought to recognise that it is a breach of natural justice for a tribunal to make a decision on no evidence at all. The rule of natural justice which is said to be engaged on the second ground is the no evidence rule. The plaintiffs thus urge me to accept the no evidence rule as a third free-standing rule of natural justice in Singapore law, in addition to the rule against bias and the fair hearing rule.

142 I begin my analysis with the fair hearing rule before turning to the no evidence rule.

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144 PWS at para 44; PWS at para 126.

145 PA-1 at paras 89–93; PWS at para 126(a).

146 PWS at para 126(b).

Fair hearing rule

143 I find that the tribunal did not breach the fair hearing rule in making the Repayment Order. The diminution in the value of the Plant was a live issue in the arbitration from the very outset. The plaintiffs made it a live issue when they pleaded that rescission was barred because, amongst other things, the Plant's condition had deteriorated since it was moth-balled in 2016. The defendant's express plea in response was that rescission was not barred on these grounds because rescission could be accompanied by a monetary award of sufficient value to restore the plaintiffs to the *status quo ante*:[147]

> 299. The fact that the Plant has been used is not a bar to rescission. The Tribunal can assess a suitable sum to compensate [the first plaintiff] for any use of the property by [the defendant]. Any deterioration in the property as a result of such use alone will not bar rescission where monetary compensation can be made. The Tribunal has a power to award such monetary compensation.

144 From this point forward, two issues were live in the arbitration: (a) *whether* the plant had diminished in value since 2016; and (b) if so, the *quantum* of the diminution in the value of the Plant.

145 The tribunal held that the plaintiffs bore the burden of proving the quantum of the diminution in value of the Plant, relying on *Salt v Stratstone Specialist Ltd* [2015] EWCA Civ 745 at [30].[148] For what it is worth, I consider the tribunal to have been correct. But that is immaterial. The point is that the plaintiffs cannot on this application go behind the tribunal's holding that the plaintiffs bore the burden of proof on this issue. That would amount to arguing that the tribunal had made an error of law. A tribunal's error of law – no matter

147 PA-1 at p 738.

148 PA-1 at p 314–315.

how obvious, egregious or prejudicial – is no ground for setting aside an award under the Act or the Model Law: *Prometheus Marine Pte Ltd v King, Ann Rita and another appeal* [2018] 1 SLR 1 at [57].[149]

146 The only way the tribunal's holding on the burden of proof could give rise to a ground for setting aside the award would be if the plaintiffs could make out a ground under s 24(*b*) of the Act or Art 34(2) of the Model Law in relation to the manner in which the tribunal had arrived at its ruling on the burden of proof. For example, the plaintiffs could argue that they were unable to present their case on the issue of who was to bear the burden of proving the diminution in the value of the Plant. But the plaintiffs, quite rightly, do not even suggest that there are any grounds under the Act or the Model Law for challenging the tribunal's decision on the incidence of the burden of proof.

147 What the plaintiffs do submit is that the tribunal's holding on the burden of proof is tainted by its findings on the Transfer Order. This, the plaintiffs say, is because the defendant sought only pecuniary rescission in the arbitration. Therefore, the plaintiffs say, the defendant bore the burden of proving every element in the formula necessary to calculate the monetary award which would achieve the same net economic effect as restitution and counter-restitution *in specie*.[150] This includes the diminution in value of the Plant.

148 For the reasons I have already given (see [115] above), I do not accept that the defendant prayed for pecuniary rescission. In my view, the defendant pleaded its best case on rescission, which was full restitution of the Contract price by the plaintiffs with no counter-restitution by the defendant of any kind.

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149 DBA at Tab 18.

150 PA-2 at para 72.

149 The tribunal's holding meant that the plaintiffs bore the burden of proving both: (a) that the value of the Plant had in fact diminished since 2016; and (b) the quantum by which the value had diminished. If the plaintiffs failed to discharge this burden, the tribunal would have been perfectly entitled to accept the defendant's best case on the consequences of rescission and order the plaintiffs to make restitution without receiving any counter-restitution.

150 The plaintiffs were perfectly able to present their case on both aspects of the diminution in value of the Plant: principle and quantum. They chose not to do so because they chose to present an all or nothing case on rescission which did not address the consequences of rescission. There is no basis for setting aside the Repayment Order for breach of the fair hearing rule.

The no evidence rule

151 The no evidence rule posits that an award which contains material findings of fact made with no evidential basis at all is liable to be set aside for breach of natural justice. In *AUF v AUG and other matters* [2016] 1 SLR 859[151] (at [76]) Belinda Ang J cited the following statement of the rule in Michael Mustill, Steward Boyd, *Mustill & Boyd: Commercial Arbitration* (Butterworths, 2nd Ed, 1989) at p 561:[152]

> "It is conceivable that where the state of the evidence is such as to show, not merely that no reasonable arbitrator would reach a particular conclusion of fact upon the basis of it, but also that there is no evidence at all to sustain the finding, the award can be attacked – either on the ground that the arbitrator has acted unjudicially, or on the ground that by deciding that contrary to the obvious facts he has taken the parties by surprise, and hence been guilty of misconduct."

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151 PBA at Tab 8.

152 PBA at Tab 41.

152 I reject the plaintiffs' submission that the no evidence rule should be accepted as a part of Singapore law. Given our adoption of the Model Law and our strong policy imperative of minimal curial intervention, accepting the no evidence rule would add nothing to the existing grounds for setting aside an award save for an impermissible invitation to the court to reconsider the merits a tribunal's findings of fact as though a setting-aside application were an appeal. That is neither permissible nor desirable.

153 In any event – even if the no evidence rule were to be accepted as a free-standing rule of natural justice in Singapore law – I accept the defendant's submission that it can have no application to a situation in which a tribunal has no evidence before it on a material issue of fact simply because the party who bears the burden of proof on that issue has failed to adduce any such evidence. For the reasons which follow, that is precisely what the plaintiffs did on the issue of the quantum of the diminution in value of the Plant.

154 I have held that the diminution in value of the Plant was a live issue in the arbitration. I have already noted that the plaintiffs do not – and have no basis to – challenge the tribunal's decision that the burden of proving the diminution in value of the Plant lay on the plaintiffs. The plaintiffs failed to adduce any evidence on this issue, despite bearing the burden of proof on it. The tribunal acknowledged in its award that it did "not have any evidence before it in relation to the current value of the Plant".[153] As the tribunal pointed out, only the plaintiffs are to blame for this state of affairs.[154]

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153 PA-1 at pp 314–315.

154 PA-1 at pp 314–315.

155 The plaintiffs attempt to deflect the blame for this state of affairs to both the defendant and the tribunal. Thus, the plaintiffs complain that they "did not have access to the Plant and could not obtain any evidence on diminution of value without orders from the tribunal to facilitate such access and gathering of evidence". They argue that: "It is for these reasons that [the plaintiffs] did not address the issue of diminution in value of the Plant, save to submit that the diminution in value should be counted against [the defendant] '*by reason of the same lying idle for three years after the termination*'" (emphasis in original).[155] They submit that the tribunal could have "summoned the Parties to tender additional evidence on the current value of the Plant and/or the quantum of the diminution in value of the Plant, or appointed its own expert to assess and provide evidence on the current value of the Plant and/or the quantum of the diminution in value of the Plant".[156]

156 I reject all of these submissions. The burden was on the plaintiffs to prove the diminution in value of the plant. The burden was therefore also on the plaintiffs to deploy the appropriate procedural machinery at the appropriate procedural stage of the arbitration to secure the necessary evidence to discharge their burden of proof. The plaintiffs do not suggest that they were under any inhibition or disability whatsoever in seeking discovery or in serving interrogatories to secure the necessary evidence. Further, the plaintiffs could have sought the defendant's consent to inspect the Plant. If the defendant refused to consent, they could have applied to the tribunal for an order to compel the defendant to permit such inspection. Yet the plaintiffs took none of these steps.

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155 PA-1 at para 90; pp 1560–1561.

156 PA-1 at para 92; PWS at para 139.

157 There was no burden on the defendant to facilitate the plaintiffs' evidence gathering process. Nor was it for the defendant to present evidence on the quantum of the diminution in value of the Plant as part of its own case. Whether the Plant had diminished in value and if so by how much was irrelevant to the defendant's case. The defendant's pleaded position was that it was not obliged to give the plaintiffs any credit for the value of the plant at all, whether for its full original value or its current diminished value.

158 There was no burden on the tribunal to facilitate the plaintiffs' evidence gathering. Certainly, there was no duty on the tribunal of its own motion to prompt the plaintiffs to use the procedural machinery available to them or to order the defendant to allow the plaintiffs an opportunity to inspect the Plant. The tribunal also had no duty to appoint an expert to assess the current value of the Plant.

159 Just as the plaintiffs wholly failed to discharge their burden of proof, they also wholly failed to state a case on the diminution in the value of the Plant. The plaintiffs had at least five clear opportunities to state such a case. They did not take any of them.

(a) The first opportunity was in the plaintiffs' reply and defence to counterclaim. In the counterclaim, the defendant had pleaded its claim for rescission. The plaintiffs' plea in response was that rescission was barred because, amongst other reasons, the plaintiffs could not be restored to the *status quo ante* by awarding them monetary compensation for the *services* rendered to the defendant.[157] However, the plaintiffs did not deny the defendant's plea that the tribunal could award

[157] PA-1 at p 878.

the plaintiffs monetary compensation for the diminution in value of the Plant to restore the plaintiffs to the *status quo ante*. The plaintiffs also did not plead any alternative case as to the quantum of the diminution in value of the Plant.

(b) The second opportunity was in the response to the defendant's opening submissions in the arbitration. In those submissions, the defendant reiterated its position that rescission was not barred because it was well within "the Tribunal's power to assess a suitable sum to compensate [the plaintiffs] for … the resulting deterioration, or for services rendered by [the plaintiffs] to [the defendant]".[158] As the defendant points out, the plaintiffs had the opportunity to advance an alternative case on the quantum of the diminution in value of the Plant at any point thereafter. Instead, the plaintiffs chose to pursue the all or nothing defence that rescission was wholly unavailable to the defendant.

(c) The third opportunity was in the post hearing submissions. The plaintiffs made the point that the defendant had failed to produce any evidence of the current state of the Plant[159] and submitted that rescission was barred because returning the Plant in "a state of utter disrepair" would be inequitable and would fail to restore the plaintiffs to the *status quo ante*.[160] However, the plaintiffs did not address the defendant's point that the burden lay on the plaintiffs to produce the necessary evidence.

(d) The fourth opportunity was in the plaintiffs' response to the defendant's post-hearing submissions. The plaintiffs submitted that, if

158 PA-1 at p 1331.

159 PA-1 at p 1366.

160 PA-1 at p 1367.

rescission were granted, the plaintiffs' obligation to make restitution of the Contract price should be adjusted to reflect the diminution in value of the Plant.[161] Yet again, the plaintiffs made no submission on the quantum of the diminution in value of the Plant.

160 The plaintiffs' failure to discharge their burden of proof left the tribunal no alternative – once it had found that the defendant was entitled to rescission – but to make a just estimate of the diminution in the value of the Plant.[162] The tribunal thus made the Repayment Order, allowing the plaintiffs to deduct €54.5m from the Contract price for both the diminution in the value of the Plant and the defendant's benefit from the use of the Plant.[163] The plaintiffs cannot complain that the tribunal made the Repayment order on no evidence when the plaintiffs had the burden of adducing that evidence.

161 There is therefore no basis to set aside the Repayment Order on the no evidence rule, even if that rule were to be accepted in Singapore law as a free-standing third rule of natural justice.

Conclusion on the Repayment Order

162 The tribunal did not breach natural justice in making the Repayment Order, regardless of whether one sees the doctrine of natural justice as comprising two rules or three. The plaintiffs had every opportunity to present their case on the quantum of the diminution in value of the Plant. Instead of doing that, the plaintiffs chose to run an all or nothing case on rescission. When the tribunal rejected that case, the plaintiffs found themselves unprepared to

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161 PA-1 at pp 1560–1561.

162 PA-1 at pp 314–316.

163 PA-1 at pp 315–316.

discharge their burden of proof. The plaintiffs cannot now argue that they were unable to present their case on the diminution in value of the Plant or that their own failure left the tribunal with no evidence on the diminution in value of the Plant.

163 Given my finding that the tribunal did not breach of natural justice in making the Repayment Order, it is not necessary to consider the issue of prejudice.

The Damages Order

The plaintiffs' case

164 Part of the defendant's case against the plaintiffs was a claim for €142.4m in damages under five heads as reliance loss under s 2(1) of the Misrepresentation Act. The tribunal awarded the defendant a flat 25% across the board, on each of the five heads of loss.[164] The Damages Order thus requires the plaintiffs to pay the defendant €35.6m as reliance damages.

165 The plaintiffs now seek to set aside the Damages Order under either: (a) s 24(*b*) of the Act on the ground that the tribunal breached the rules of natural justice in quantifying the defendant's reliance loss at €35.6m; or (b) Art 34(2)(*a*)(ii) of the Model Law on the grounds that the plaintiffs were unable to present their case on the quantum of the defendant's reliance loss.[165] Once again, the plaintiffs rely under s 24(*b*) on both the fair hearing rule and the no evidence rule.

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164 PA-1 at pp 741–743, 773.

165 PA-1 at paras 94–96; PWS at para 46.

The fair hearing rule

166 The defendant pleaded the facts underlying each of its five heads of reliance loss in its defence and counterclaim. It supplied evidence of the facts underlying each head of loss in the witness statement of the Parent's chief financial officer ("the CFO").[166] The CFO's witness statement annexed: (a) the defendant's audited accounts for the year ended 30 June 2016; (b) its unaudited accounts for the year ended 30 June 2017; and (c) a number of spreadsheets supporting the defendant's heads of claim prepared by the CFO from figures drawn from these accounts.[167] In the body of his witness statement, the CFO explained how he had derived the quantum of each head of loss from the audited accounts. The CFO gave evidence in the evidential hearing and was cross-examined.

167 It remained the defendant's position throughout the arbitration that the evidence it had adduced was sufficient to discharge its burden of proof on the quantum of its reliance loss. It took this position in its rejoinder,[168] in its oral closing submissions[169] in its post-hearing brief,[170] in its reply to the plaintiffs' post-hearing submissions[171] and in its supplementary submissions.[172] On that basis, the defendant asked the tribunal to award its claim for damages in full, at €142.4m.[173]

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166 PA-1 at p 2330.

167 PA-1 at p 2337.

168 PA-1 at pp 1037–1038.

169 PA-1 at pp 5264–5265.

170 PA-1 at pp 1517–1518.

171 PA-1 at pp 1694–1696.

172 PA-1 at p 1712.

173 PA-1 at p 1529.

168 The only defence which the plaintiffs advanced to the defendant's claim for reliance loss was that the claim should be rejected in its entirety because defendant had failed to discharge its burden of proving that its reliance loss amounted to €142.4m. The plaintiffs took this position in their reply and deference to counterclaim,[174] in their rejoinder,[175] in their opening statement,[176] in their opening oral submissions[177] in their oral closing submissions,[178] in their post-hearing submissions[179] and in their response to the defendant's post-hearing submissions.[180]

169 The plaintiffs maintained this position in the cross-examination of the CFO. The plaintiffs sought to establish only three issues through the CFO's cross-examination. All three issues were directed to showing that the defendant had failed to meet its burden of proof on reliance loss. The three issues were: (a) that the auditors relied on the defendant to ensure the audited accounts were correct;[181] (b) that the defendant had not produced any source documents to support the figures in the audited accounts;[182] and (c) that the defendant had failed to produce any bank statements to show that the interest costs which the defendant was claiming had actually been incurred and were referable to the Plant.[183] The plaintiffs chose not to ask the CFO any questions designed to test

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174 PA-1 at pp 880, 910–911, 913.

175 PA-1 at pp 1194–1195.

176 PA-1 at pp 1274, 1277.

177 PA-1 at pp 3173–3174.

178 PA-1 at pp 5263–5264.

179 PA-1 at pp 1423–1424.

180 PA-1 at pp 1615–1617, 1624.

181 PA-1 at p 4342.

182 PA-1 at pp 4342–4343.

183 PA-1 at pp 4343–4344.

the substance of his evidence or to meet and undermine the merits of the defendant's case on the quantum of reliance loss.

170 The plaintiffs maintained this position in the witness statement of their expert witness on damages, a forensic accountant. The plaintiffs instructed him to confine his report and opinion only to the defendant's claim against the plaintiffs for damages for breach of contract and not to express any opinion on the defendant's claim for reliance loss.[184]

171 The plaintiffs maintained this position in their document requests. The first procedural order in the arbitration set out a protocol for document requests.[185] Even though they sought documents relevant to other issues from the defendant, the plaintiffs never took advantage of this protocol to require the defendant to produce the source documents on the quantum of their claim for reliance loss.[186]

172 It was always a possibility that the tribunal would reject the plaintiffs' case and accept that the defendant had proved that it had suffered *some* reliance loss which was substantial, *ie*, not nil. In that event, the tribunal would have to assess the quantum of that loss. Despite this, the plaintiffs chose not to meet the merits of the defendant's case on the quantum of its reliance loss. Once again, the plaintiffs pursued an all or nothing strategy.

173 The plaintiffs submit the tribunal could have required the defendant to produce the source documents evidencing each head of its claim for reliance

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184 PA-1 at p 4580.

185 PA-1 at pp 194–195.

186 DA-1 at pp 288–300.

loss.[187] The plaintiffs submit also that the tribunal could have, of its own motion, appointed an expert to secure and analyse evidence of the defendant's reliance loss.[188] The tribunal could, of course, have done many things. What it could have done is not to the point. The fact remains that it was the plaintiffs' responsibility, and the plaintiffs' alone, to decide how it wished to meet the defendant's claim for reliance loss amounting to €142.4m. The plaintiffs had every opportunity in the arbitration to require the defendant to produce any source documents which they wanted and which were relevant to the quantum of reliance loss. The plaintiffs did not do so.

174 It is no doubt true the defendant bore the burden of proof on the quantum of its reliance loss. In that sense, the defendant took a significant forensic risk by not voluntarily producing the source documents necessary to substantiate its claim for €142.4m in reliance loss. It also took a significant forensic risk by putting forward the CFO's rather elliptical evidence as the only evidence to support this claim. The risk was that the tribunal would hold that the CFO's evidence was insufficient to discharge the defendant's burden of proof and therefore dismiss the defendant's claim for damages entirely.

175 Equally, however, the plaintiffs took a forensic risk by resting their defence on quantum on – and only on – arguing that the defendant had failed to discharge its burden of proof. The risk was that the tribunal would accept that the CFO's evidence was sufficient to discharge the defendant's burden of proving that it had suffered reliance loss of €142.4m and therefore allow the claim in full. In that sense, given that the tribunal accepted the CFO's evidence to find that the defendant had suffered reliance loss, it is the defendant who

187 PWS at para 182.

188 PA-1 at para 95.

should be expected to complain about the tribunal's decision not to award it the €142.4m in full, given that the plaintiffs had no alternative case on quantum.

No evidence rule

176 The plaintiffs' attempt to rely on the no evidence rule to set aside the Damages Order cannot succeed for three reasons.

177 First, for reasons I have already given, I do not accept that the no evidence rule should be accepted in Singapore as a free-standing rule of natural justice.

178 Second, and quite apart from that, the tribunal had before it the CFO's evidence on quantum. It is true that the tribunal had no evidence before it to justify awarding a flat 25% of each of the five heads of loss across the board. One might well ask: why not 30% or 90%? The answer to that question is simple. Given that the tribunal had the CFO's evidence before it on quantum, the tribunal would have complied with the no evidence rule if it had awarded the defendant 100% of its claim. Given that, the plaintiffs can hardly complain if the tribunal gave them a 75% discount.

179 Finally, as the defendant points out, a tribunal is perfectly entitled to take a middle path between the parties' opposing all or nothing positions. Further, a tribunal has no duty to consult the parties on its thinking process before finalising its award so long as the final outcome does not involve a dramatic departure from what has been presented to it: *Soh Beng Tee* at [65(e)].

180 Even if the no evidence rule is a free-standing rule of natural justice, this tribunal did have evidence before it to justify the Damage Order.

Prejudice

181 Given my finding that no grounds under s 24(*b*) of the Act or under Art 34(2)(*a*)(ii) of the Model Law have been made out to set aside the Damages Order, I need not consider the issue of prejudice.

Conclusion on the Damages Order

182 The tribunal did not breach natural justice in making the Damages Order. The plaintiffs chose to present an all or nothing defence on reliance loss. The tribunal, having rejected the plaintiffs' all or nothing defence, was forced to make a just estimate of the defendant's reliance loss on the evidence available. There is no basis for setting aside the Damages Order for breach of natural justice.

Inadequate reasons

183 The plaintiffs' final ground for seeking to set aside the award is that its contents, taken as a whole, do not inform the parties of the several bases on which the tribunal reached its decision on material or essential issues.[189] The plaintiffs complain that the inadequacies of the award mean that the plaintiffs cannot ascertain the true extent of the grounds on which the Award should be set aside. The plaintiffs therefore seek to set aside the entire award under s 24(*b*) of the Act and Art 34(2)(*a*)(ii) and Art 34(2)(*a*)(iv) of the Model Law.[190]

184 The plaintiffs claim that the award leaves the following unclear:[191]

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189 PA-1 at para 97.

190 PWS at para 46.

191 PA-1 at para 97.

(a) the proportion of the €54.5m which the tribunal awarded for diminution in value of the Plant, or the basis upon which it decided that the diminution in value of the Plant was an unspecified or indeterminate proportion of €54.5m;

(b) the basis upon which the tribunal awarded a flat 25% of each of the five heads of the defendant's claim for reliance loss; and

(c) whether the Transfer Order includes a transfer of title to the Site.

185 I do not accept any aspect of the plaintiffs' arguments on this ground.

186 Whether an award is adequately reasoned is a matter of degree to be determined in the circumstances of each case. The test is whether the contents of the award taken as a whole suffice to inform the parties of the bases on which the tribunal reached its decision on the essential issues: *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM Division Maritima SA*") at [104].[192] Inadequacy of reasons is not a ground, in itself, for setting aside an award, even if the duty to give adequate reasons is characterised as an aspect of the rules of natural justice: *TMM Division Maritima SA* at [98].[193] Even if an award gives no reasons at all, that is not in itself a ground for setting it aside: *AUF v AUG* [2016] 1 SLR 859 at [79].[194]

187 As far as the plaintiffs' point about the Transfer Order is concerned (see [184(c)] above), I have already held that the Transfer Order is workable and enforceable. The suggestion that any reasonable person could ever construe the

192 DBA at Tab 33.

193 DBA at Tab 33.

194 DBA at Tab 9.

Transfer Order as requiring the defendant to procure the Parent to transfer title to the Site to the plaintiffs is fanciful, to say the least.

188 As for the other points which the plaintiffs raise, I find that the award does give sufficient reasons to inform the parties of the several bases on which the tribunal reached its decision on all of the essential issues. Certainly, the award suffices for me to discern the tribunal's chain of reasoning on all of the material issues before it and to dispose of the plaintiffs' exhaustive grounds of challenge. The plaintiff's suggestion that there are or may be other grounds of challenge lurking within the award, concealed by the tribunal's lack of reasons, is also fanciful, to say the least.

189 It is true that the tribunal took a broad-brush approach to assessing the diminution in value of the Plant, the benefit which the defendant had obtained by use of the Plant and the defendant's reliance loss. But that is not a result of any breach of the Act or the Model Law, for the reasons I have given. It is the result of the natural and inevitable imprecision in assessing any award of damages. In this case, that imprecision was compounded by the all or nothing positions adopted by both parties, the failure of the parties' cases to meet on the merits in relation to quantum and the resulting inadequacies in the evidence which both parties placed before the tribunal.

190 The difference between the parties is that the defendant accepts the downside risk of its forensic choices as they have eventuated in the award. The defendant could well challenge the tribunal's decision to order the defendant to make counter-restitution of the Plant to the plaintiffs even though the plaintiffs never sought it, to quantify the diminution in the value of the Plant even though the plaintiffs failed to discharge their burden of proof on it and to reduce the defendant's claim for reliance loss by an arbitrary 75% even though the

plaintiffs advanced no case on the appropriate reduction. The defendants, however, accept the award as it is.

191 The plaintiffs instead attempt to rely on the downside risks of their own forensic choices as grounds for setting aside the award. That attempt must fail and has failed.

Conclusion

192 For all of the foregoing reasons, I have dismissed the plaintiffs' application with costs.

Vinodh Coomaraswamy J
Judge of the High Court

Alvin Yeo, SC, Chou Sean Yu, Oh Sheng Loong and Daryl Wong (WongPartnership LLP) for the plaintiffs;
Davinder Singh, SC, David Fong and Hanspreet Singh Sachdev (Davinder Singh Chambers LLC) for the defendant.