

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

[2023] SGHC 237

Originating Application No 754 of 2022

Between

CZO

... Claimant

And

CZP

... Respondent

GROUND OF DECISION

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

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CZO

v

CZP

[2023] SGHC 237

General Division of the High Court — Originating Application No 754 of 2022

Vinodh Coomaraswamy J

28 March 2023

28 August 2023

Vinodh Coomaraswamy J:

Introduction

1 The claimant applies to set aside a final arbitration award issued in favour of the respondent on 28 June 2022.¹ The claimant relies on two statutory provisions to submit that the tribunal breached the rules of natural justice in arriving at its award. First, the claimant submits that the tribunal breached the rules of natural justice and thereby prejudiced the claimant's rights in the arbitration within the meaning of s 24(b) of the International Arbitration Act 1994 ("the IAA"). In the alternative, the claimant submits that it was unable to present its case in the arbitration within the meaning of Art 34(2)(a)(ii) of the UNCITRAL Model Law on International Commercial Arbitration as adopted

¹ 1st affidavit of HJC filed on 10 November 2022 ("1 HJC") at p 58.

by the United Nations Commission on International Trade Law on 21 June 1985 (“the Model Law”) and as enacted in Singapore law by s 3 of the IAA. As an alternative to the remedy of setting aside, the claimant asks me to remit the award to the tribunal under Art 34(4) of the Model Law, in order to give the tribunal an opportunity to eliminate the grounds for setting aside.

2 I have dismissed the claimant’s application with costs. The claimant has appealed against my decision. I now set out the grounds for my decision.

Facts

The parties

3 The claimant in this application is CZO. It provides original design and manufacturing services for electronic equipment.² The claimant was the respondent in the arbitration.

4 The respondent in this application is CZP. It was the claimant in the arbitration. The respondent develops electronic devices that use touch, vision and voice technologies and delivers them to its customers in the hospitality industry, including restaurants.³ The respondent does not develop these devices entirely by itself. Instead, it relies on original design and manufacturers like the claimant to provide development and manufacturing support.⁴

² Claimant’s written submissions, para 2; 1 HJC at p 737, para 3.

³ Claimant’s written submissions, para 3; Award at para 42; 1 HJC at p 737, para 1.

⁴ 1 HJC p 737 at para 2.

The parties' contract

5 One of the devices that the respondent develops and delivers to restaurants is a digital tablet that allows diners to order food and beverage and pay for it, all at their tables (“the Device”).⁵ The Device also allows diners to play digital games at their tables. These games offer diners the opportunity to make in-app purchases. The respondent earns a share of the revenue generated by these in-app purchases.⁶

6 In October 2015, the respondent entered into a Master Supply Agreement (“MSA”) with the claimant.⁷ Under the MSA, the respondent engaged the claimant to design, develop and manufacture the Device for the respondent.⁸

7 The MSA contains five terms that are material for present purposes.

8 The first is Art 3(a). This term obliges the claimant to develop and manufacture the Device in accordance with a set of specifications exhibited to the MSA.⁹ One of those specifications is the degree to which the Device’s enclosure is required to protect its interior from the ingress of water and possibly other liquids. This ingress specification is of critical importance, both in the arbitration and on this application. I set it out and expand upon its meaning at [38]–[46] below. It suffices for present purposes simply to note that the threshold issue in the arbitration was, broadly speaking, whether the ingress

⁵ Award at para 43.

⁶ Claimant’s written submissions, para 4; Award at para 43.

⁷ 1 HJC at p 130.

⁸ CCB Tab 27, pp 433–446.

⁹ 1 HJC at p 131.

specification on its proper construction required the Device to withstand the ingress of drops of *water* that were *vertically falling* on the Device or to go beyond that and withstand the ingress of *any liquid*, including but not limited to water, which was *sprayed* on to the Device.

9 The second material term of the MSA is Art 3(d).¹⁰ This term obliges the claimant to repair at its expense all Devices which fail during the Warranty Period as a result of material or workmanship defects.

10 The third material term of the MSA is Art 9.¹¹ This term is the claimant’s representation and warranty to the respondent that the Device will, amongst other things, operate and perform substantially in accordance with the specifications – including quite obviously the ingress specification – for a period of one year from the date of delivery (“the Warranty Period”).

11 The fourth material term of the MSA is Art 17(f).¹² This term obliges the claimant to repair or replace all affected Devices if an “Epidemic Condition” arises, whether within or outside the Warranty Period. Under Art 17 of the MSA, an “Epidemic Condition” arises when the same or a similar defect affects 5% or more of the Devices manufactured in a separate and distinguishable manufacturing run within two years after delivery.

12 The final material term of the MSA is Art 19(m).¹³ This term obliges the parties to submit any dispute under the MSA to the Singapore International

¹⁰ 1 HJC at p 131.

¹¹ 1 HJC at p 134.

¹² 1 HJC at pp 138–139.

¹³ 1 HJC at p 140.

Arbitration Centre for arbitration in Singapore. This term also provides that the MSA is governed by and is to be interpreted in accordance with the laws of the State of California.

The dispute between the parties

13 The claimant started manufacturing Devices under the MSA and delivering them to the respondent in March 2017.¹⁴ The respondent, in turn, delivered the Devices to its customers in the restaurant business. The claimant manufactured and delivered over 180,000 Devices to the respondent between July 2017 and September 2021.¹⁵

14 Upon the outbreak of the Covid-19 pandemic in March 2020, the respondent asked the claimant to recommend a disinfecting method for the Device.¹⁶ The claimant recommended that the respondent's customer should not spray any liquid directly on to the Device but should instead wipe the Device with a cloth containing alcohol.¹⁷

15 In June 2020, the respondent put the claimant on notice that an Epidemic Condition had arisen under Art 17(f) of the MSA. The malfunction in question rendered the Device completely inoperable.¹⁸ As a result, the respondent returned a substantial number of malfunctioning Devices to the claimant for diagnosis and repair or replacement pursuant to the claimant's obligations under

¹⁴ CCB Tab 35, pp 480–482; CCB Tab 11, p 270: RWS1 at para 9.

¹⁵ 1 HJC p 815 at para 17.

¹⁶ CCB Tab 13, p 281: Witness Statement of RW3 (“RWS3”) at para 3.

¹⁷ CCB Tab 37, pp 497–501; CCB Tab 13, p 281–282: RWS3 at paras 4–5.

¹⁸ 1 HJC at p 741–742, para 20.

the MSA.¹⁹ The claimant denied that it was under any obligation to repair or replace the malfunctioning Devices, as alleged or at all.²⁰

16 In late 2020, the claimant implemented a number of hardening measures on Devices to prevent the ingress of liquid.²¹ It did so without accepting or admitting that it was in breach of the MSA. However, even the hardened Devices continued to malfunction, albeit at a significantly lower rate.²²

The arbitration

17 In March 2021, the respondent issued a notice of arbitration against the claimant under Art 19(m) of the MSA.²³ The respondent's case was that the claimant had breached Art 3(a) of the MSA by failing to deliver Devices that met the ingress specification and had breached Arts 9 and 17(f) of the MSA by failing to repair or replace the malfunctioning Devices.

18 The claimant submitted its response to the notice of arbitration denying any liability, in April 2021.

19 The parties then exchanged a round of pleadings in September²⁴ and December 2021²⁵ accompanied by witness statements. They exchanged a

¹⁹ CCB Tab 38, p 504; 1 HJC p 742 at para 20.

²⁰ 1 HJC p 744 at para 27.

²¹ CCB Tab 13, p 283; RWS3 at para 11; CCB Tab 45, pp 552–553.

²² Award at para 70.

²³ 1 HJC at p 219.

²⁴ 1 HJC at p 735.

²⁵ 1 HJC at p 807.

further round of pleadings, again accompanied by witness statements, in February²⁶ and March 2022.²⁷

20 The respondent's pleaded case in the arbitration was as follows.²⁸ As a result of the negotiations for the MSA, the claimant knew that the Device must be designed to withstand the rigours of a restaurant environment, including exposure to food and beverages and frequent cleaning.²⁹ That is why the claimant accepted and agreed to an ingress specification in the MSA which, on its proper construction, required the Device to allow *any* liquid to enter and leave the Device without causing a malfunction.³⁰ The claimant's own analysis showed that the root cause of the malfunction in over 80% of the malfunctioning Devices was liquid ingress.³¹ By failing to manufacture Devices in accordance with the ingress specification, the claimant was in breach of Art 3(a) of the MSA. By refusing to repair or replace the malfunctioning Devices at its own cost, the claimant was in breach of its obligations under Arts 9 and 3(d) of the MSA or under Art 17(f) of the MSA arising from the Epidemic Condition. The respondent's loss arising from the claimant's breaches of the MSA totalled US\$16.46m under three heads: (a) US\$12.95m for the past and future cost of repairing Devices; (b) US\$1.70m for the cost of keeping a stock of Devices on standby for its customers; and (c) US\$1.81m for lost gaming revenue.³²

²⁶ 1 HJC at p 889.

²⁷ 1 HJC at p 926.

²⁸ 1 HJC at p 735.

²⁹ 1 HJC at p 738, para 6.

³⁰ 1 HJC at p 740, para 12.

³¹ 1 HJC at p 743, para 25.

³² 1 HJC at p 756, para 73.

21 The claimant's pleaded case in the arbitration was as follows.³³ The ingress specification required the Device to withstand *only* vertically falling drops and *only* of water. The Device met the ingress specification. The claimant had thereby fulfilled its obligation under Art 3(a) of the MSA.³⁴ The ingress specification did not require the Device to withstand the ingress of any liquid other than water or to withstand the ingress of any liquid (including water) by spraying.³⁵ The root cause of the malfunction in over three-quarters of the affected Devices was the ingress of a cleaning fluid or disinfecting solution that had been sprayed on to the Devices³⁶ and not vertically falling drops of water. The malfunction was not the result of any breach of the MSA on the claimant's part but was the result of the respondent's customers' failure to follow the claimant's recommended disinfecting method (see [14] above).³⁷ The respondent's claims for damages therefore has no basis in law.

22 The evidentiary hearing was held in April 2022.³⁸ Both parties then filed post-hearing briefs, also in April 2022.³⁹

The award

23 The tribunal delivered its award on 28 June 2022. In its award, the tribunal found substantially in favour of the respondent on both liability and quantum. The tribunal made six key findings of fact and holdings of law.

³³ 1 HJC at p 807.

³⁴ 1 HJC at p 809, paras 3–5.

³⁵ 1 HJC at p 809, para 2.

³⁶ 1 HJC at p 817, paras 22 and 24.

³⁷ 1 HJC at p 814, paras 15–16; p 822, para 44.

³⁸ Award at para 38.

³⁹ Award at para 39.

24 First, construing the MSA in accordance with the principles of California law, the ingress specification required Devices to allow liquids of a kind and quantity that one might reasonably expect Devices to be exposed to in a restaurant environment to enter and leave Devices without causing a malfunction.⁴⁰

25 Second, the Devices malfunctioned because of the ingress of cleaning fluid when the respondent's customers cleaned the Devices by spraying cleaning fluid at the Devices.⁴¹

26 Third, it was part of the respondent's customers' normal restaurant operations to clean Devices after every use. This was their practice both before and after the onset of the Covid-19 pandemic. In particular, the frequency at which they cleaned Devices did not increase by reason of the pandemic or during the pandemic.⁴²

27 Fourth, the claimant had breached Art 3(a) of the MSA by failing to develop and manufacture Devices in accordance with the ingress specification construed in accordance with California law.⁴³ The ingress specification obliged the claimant to deliver Devices to the respondent that would not malfunction if exposed to cleaning liquids in the ordinary course of restaurant operations.⁴⁴

⁴⁰ Award at para 127.

⁴¹ Award at paras 130–132 and 134–135.

⁴² Award at paras 129 and 137.

⁴³ Award at para 140.

⁴⁴ Award at para 137.

28 Fifth, by failing or refusing to repair malfunctioning Devices, the claimant was in breach of its obligation under Arts 3(d) and 9 of the MSA.⁴⁵ Further, the contractual prerequisites for declaring an Epidemic Condition within the meaning of Art 17(f) of the MSA were met. The claimant was also in breach of its obligation under Art 17(f) of the MSA by failing or refusing to repair or replace malfunctioning Devices.⁴⁶

29 Sixth, the claimant's breach of the MSA had caused the respondent to suffer actual loss of US\$10.68m⁴⁷ up to March 2022 under three heads: (a) US\$9.10m for the cost of repairs to the Devices; (b) US\$0.883m for the cost of maintaining a standby stock of Devices; and (c) US\$0.698m for lost gaming revenue (see [5] above). The tribunal awarded the respondent no damages for future loss on the ground that it was impermissibly speculative.⁴⁸ The tribunal also ordered the claimant to pay the respondent's legal costs and the respondent's costs of the reference to arbitration.⁴⁹

The claimant's case

30 The claimant now seeks to have the award set aside or remitted insofar as it relates to the three major holdings by the tribunal: (a) on liability, that the claimant breached the MSA; (b) on quantum, that the claimant is liable to pay US\$10.68m in damages to the respondent; and (c) on costs, that the claimant is liable to pay to the respondent its legal costs of the arbitration and its costs of the reference to arbitration.

⁴⁵ Award at paras 141–144.

⁴⁶ Award at paras 153–155.

⁴⁷ Award at para 195; Correction of Final Award at para 7.

⁴⁸ Award at paras 164–165.

⁴⁹ Award at paras 190–192.

31 On liability, the claimant submits that the tribunal breached the fair hearing rule in holding the claimant liable to the respondent either because the tribunal completely failed to apply its mind to an essential issue on liability that the claimant raised in the arbitration or by completely failing to consider the claimant's evidence and submissions on that issue. The essential issue in question is the manner of ingress covered by the ingress specification on its proper construction. On quantum, the claimant submits that the tribunal breached the fair hearing rule in arriving at its holding by completely failing to consider critical evidence and submissions that the claimant presented to the tribunal on quantum.

Applicable legal principles

32 I begin the analysis with the law. Neither party suggests that there is any difference in the approach to a challenge under s 24(b) of the IAA as compared to a challenge under Art 34(2)(a)(ii) of the Model Law. Further, the principles of law that govern both types of challenge are not in dispute. I can therefore state the governing principles briefly.

33 The parties to an arbitration do not have the right to a "correct" decision from the tribunal. They have a right only to a decision that is within the ambit of their consent to arbitration, and to a fair process leading up to the decision (*AKN v ALC* [2015] 3 SLR 488 ("*AKN*") at [38]). Therefore, on an application to set aside an award, the court cannot and will not inquire into the merits of the parties' dispute or even into any error of law or fact that the tribunal is alleged

to have committed (*BLC v BLB* [2014] 4 SLR 79⁵⁰ (“*BLC*”) at [53]; *BZW and another v BZV* [2022] 1 SLR 1080⁵¹ (“*BZW*”) at [56]).

34 A claimant who applies to set aside an award on the basis that the tribunal did not follow a fair process must establish four points. First, it must identify which rule of natural justice the tribunal has breached. Second, it must establish how the tribunal breached the rule. Third, it must show in what way the breach is connected to the making of the award. Finally, it must show how the breach caused actual or real prejudice to its rights (*Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 (“*Soh Beng Tee*”) at [29], [86] and [91];⁵² *BTN and another v BTP and another* [2021] 1 SLR 276 (“*BTN*”) at [43]).⁵³ A breach of natural justice will have caused actual or real prejudice to a party’s rights if it *could* reasonably have made a difference to the outcome of the arbitration if the tribunal had complied with the rules of natural justice. It is not necessary to show that it *would* have made a difference: *BZW* at [63].⁵⁴

35 Where a claimant’s case on the fair hearing rule is that the tribunal failed to apply its mind to an essential issue in the arbitration, the claimant must persuade the court to draw an inference to that effect. It must show that this inference is a “clear and virtually inescapable” one: *AKN* at [46].⁵⁵ One of the

⁵⁰ DBA, Tab 9.

⁵¹ DBA, Tab 12.

⁵² CBOA Tab 8.

⁵³ DBA, Tab 11.

⁵⁴ CBOA Tab 6.

⁵⁵ CBOA Tab 3.

factors from which this inference can be drawn is that the tribunal's decision is inexplicable: *BZW* at [60(a)].⁵⁶

36 Where a claimant's case on the fair hearing rule is that the tribunal failed to consider its arguments or evidence, only a "failure to even consider that argument" will amount to a breach of the rule (*BRS v BRQ* [2021] 1 SLR 390 ("*BRS*") at [98]).⁵⁷ The fair hearing rule does not oblige a tribunal to deal with and dispose of every argument that the aggrieved party raised in the arbitration (*Soh Beng Tee* at [65(d)]; *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 ("*SEF*") at [60]).⁵⁸ Therefore, while it may be possible to draw the inference that a tribunal failed to consider one or both parties' arguments on a specific issue from the tribunal's failure to analyse that issue in its award, any such failure will not in itself suffice to warrant the inference (*Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 at [31], [39], [44]–[45];⁵⁹ *ASG v ASH* [2016] 5 SLR 54 at [90]–[91]).⁶⁰

37 I turn now to the claimant's challenges and begin by setting out the terms to the ingress specification.

⁵⁶ CBOA Tab 6.

⁵⁷ DBA, Tab 9.

⁵⁸ DBA, Tab 14.

⁵⁹ CBOA Tab 7.

⁶⁰ CBOA Tab 4.

The ingress specification

The terms of the ingress specification

38 The parties executed the MSA in October 2015. As contemplated by the MSA, the parties then negotiated the terms of the ingress specification. In February 2016, they reached agreement on the ingress specification.

39 The ingress specification reads as follows:⁶¹

3. ID/Mechanical Design

...

- Housing:
 - Plastic housing with black rubber paint
 - IP X2 rating (*allow liquid to enter device and leave without causing functional defect to the device*).

...

[emphasis added]

40 As can be seen, the ingress specification comprises two elements: the words “IP X2 rating” and the parenthetical phrase following those words which I have italicised above. The critical threshold issue in the arbitration was the contractual content of the parenthetical phrase. More specifically the critical issue was whether the plain and ordinary meaning of the parenthetical phrase was to be constrained, on its proper construction, by the words “IP X2 rating” or by a test of reasonableness (see [24] above).

41 There is no dispute about the contractual content of the words “IP X2 rating”. It is therefore apposite at this time to describe that content.

⁶¹ 1 HJC at para 18 and page 1868.

IP X2 rating

42 “IP” is an abbreviation for the phrase “ingress protection”. This abbreviation refers to an international standard for the level of protection provided by the enclosure of an electrical device against the ingress of two types of material: solid foreign objects (principally dust) and water.⁶²

43 The technical specifications for each level of ingress protection against these two types of material are set out in a document known as the “IP Code”.⁶³ An IP rating consists of two digits. The first digit specifies the level of ingress protection against solid foreign objects. The second digit specifies the level of ingress protection against water. Each level of protection against the ingress of solid foreign objects is assigned a single digit between 0 and 6. Each level of protection against the ingress of water is assigned a single digit between 0 and 9. The higher the digit, the greater the ingress protection against that type of material specified by the IP Code.

44 Returning to the words “IP X2” in the ingress specification in this case, the letter “X” in the first position in the IP rating “X2” means that the Device’s enclosure need not meet any specification for withstanding the ingress of solid foreign objects.⁶⁴ The number “2” in the second position means that the Device’s enclosure must withstand the ingress of water to the level 2 specification in the IP Code. Level 2 protection is defined in the IP Code as follows: “Vertically falling drops shall have no harmful effects when the enclosure is tilted at any angle up to 15° on either side of the vertical”.⁶⁵

⁶² 1 HJC, p 2166 at p 2174.

⁶³ 1 HJC at p 2166.

⁶⁴ 1 HJC, p 2166 at p 2177.

⁶⁵ 1 HJC, p 2166 at p 2183.

45 It is significant that the IP Code does not deal with the ingress of any liquid other than water. It is also significant that an IP rating of 2 covers only drops that come into contact with the device by falling vertically on to the Device within 15° on either side of the vertical and not drops that come into contact with the Device in any other manner, *eg* by being sprayed on to the Device.

46 For ease of exposition, I shall from now on use the phrase “Vertically Falling Drops” as shorthand for the manner of ingress specified in the IP Code for level 2 ingress protection, *ie* ingress by “vertically falling drops ... when the [Device] is tilted at any angle up to 15° on either side of the vertical”. It is important to note that I intend this phrase to describe only the *manner of ingress* and to say nothing about the *kind* of liquid that is falling on to the Device. In other words, I intend this phrase to encompass the ingress of *any liquid* by when the [Device] is tilted at any angle up to 15° on either side of the vertical.

The arbitration

The parties’ cases in the arbitration

47 In the arbitration, both parties accepted that the plain and ordinary meaning of the parenthetical phrase was so wide as to lead to commercially absurd results. The respondent accepted this despite advancing as its primary submission the argument that the parenthetical phrase should be given its plain and ordinary meaning. The parties were therefore agreed, in substance if not in form, that the contractual content of the parenthetical phrase had to be constrained.⁶⁶ Where they disagreed was what that constraint was, on the proper construction of the ingress specification.

⁶⁶ Award at para 121.

48 With that background in mind, the critical threshold issue in the arbitration can now be stated with even more specificity. That issue was whether the parenthetical phrase is constrained by the words “IP X2 rating” both as to the kind of liquid and as to the manner of ingress. The issue can therefore be broken down into two questions. Does the parenthetical phrase encompass ingress *only by* water? If not, does it encompass ingress of liquid *only by* Vertically Falling Drops?

49 The claimant’s case in the arbitration on this critical issue was that, on the proper construction of the ingress specification, the constraint was found in the words “IP X2 rating”. The parenthetical phrase properly construed therefore required *only* that, *if* any ingress of *water* results from *Vertically Falling Drops*, the Device’s enclosure will allow the water to enter and leave the device without causing the Device to malfunction.⁶⁷

50 The respondent’s case on this critical issue was as follows. The constraint on the parenthetical phrase could not be the words “IP X2 rating”. Adopting those words as the constraint would deprive the parenthetical phrase of any contractual meaning. On the proper construction of the ingress specification, the constraint was found in a test of reasonableness. The Device’s enclosure must allow liquids of a kind and volume that one might reasonably expect to be present in a restaurant environment to enter and leave the Device without causing it to malfunction.⁶⁸

⁶⁷ Award at paras 114 and 116.

⁶⁸ Award at para 121.

The tribunal's analysis

51 The tribunal began its analysis by noting that there were difficulties with each party's case on how the parenthetical phrase was to be properly construed. The difficulty with the claimant's construction was that it gave no meaning to the parties' choice of the more general word "liquid" in the parenthetical phrase as opposed to "water" which was incorporated into the words "IP X2 rating". This was contrary to the authorities on contractual construction under California law. Those authorities made clear that the two elements of the ingress specification had to be read together and that neither element could be ignored.⁶⁹ On the other hand, the respondent's construction required narrowing the plain and ordinary meaning of the parenthetical phrase by reading words into it that the parties did not use (*ie* a test of reasonableness) in order to avoid commercial absurdity.⁷⁰

52 The tribunal nevertheless preferred and accepted the respondent's construction.⁷¹ Its reasoning was as follows. Both parties must be taken to have known that the Device would be exposed to liquids other than water in the course of restaurant operations. In those circumstances, their use of the word "liquid" in the parenthetical phrase must have been intentional and must be construed as carrying some meaning, commercially and contractually.⁷² In any event, if there were any uncertainty about the meaning of the parenthetical phrase, it ought to be construed against the claimant as the claimant was the

⁶⁹ Award at para 113.

⁷⁰ Award at para 122.

⁷¹ Award at para 127.

⁷² Award at para 125.

author of the ingress specification. This was in accordance with California's version of the *contra proferentem* rule.⁷³

53 It is worthwhile setting out verbatim the tribunal's reasoning in this critical passage of the award:

122. Neither of the interpretations proposed by the parties is without difficulty. [The claimant's] interpretation requires one to ignore the fact that the parties used the word "liquid" rather than the word "water". [The respondent's] interpretation, on the other hand, requires one to interpret the phrase in parentheses more narrowly than suggested by its plain and ordinary meaning, to avoid commercial absurdity.

123. My task is to interpret the contract in a manner that gives effect to the intentions of the parties. It is permissible to take into account not just the language of the contract, but also its purpose and the context in which it was made. See: *PV little Italy LLC. v Metrowork Condominium Assn.*, 210 Cal.App.4th 132 (2012). If the intentions of the parties still are not clear, it is permissible to consider additional extrinsic evidence with a view to resolving the ambiguity. This does not mean, however, that the actual subjective intentions, understandings or beliefs of either party should govern the interpretation. Instead, I am to consider objectively the circumstances surrounding the contract, including its business purpose and facts known to both parties when the contract was made, with a view to arriving at an interpretation that is reasonable in the circumstances, and that is not contrary to any express manifestation in the contract. See: *ASP Properties Group, L.P. v Fard, Inc.* 133 Cal. App. 4th 1257.

124. When the MSA and [the ingress specification] were agreed, both parties must be taken to have known that the IPX2 standard addressed only water ingress. [The claimant] has not, however, provided any explanation as to why it proposed the use of the word "liquid" rather than the word "water" in the [ingress specification]. When the MSA was made and the [ingress specification] agreed, the evidence shows that both parties knew that the business purpose of the agreement was the supply of table-top devices to be used for ordering, payments and gaming by restaurant customers. Reasonable persons in the position of [the respondent] and [the claimant] would have anticipated that the ... Devices might be exposed to

⁷³

Award at para 126.

liquids other than water – including ordinary cleaning fluids and, potentially, spilled beverages of various kinds. While the types of liquids to which the device might deliberately or accidentally be exposed in a restaurant environment were not limited to water, it would not have been within the reasonable contemplation of any person in the position of the contracting parties that the ... Devices would be, for example, immersed in buckets of sea water, gasoline or detergent.

125. After careful consideration, I find that the interpretation proposed by [the respondent] is to be preferred to that proposed by [the claimant]. Viewing the matter objectively, in circumstances where both parties must be taken to have known that the IPC Code and the IPX2 standard referred only to water ingress and where both parties knew that the devices would be exposed to liquids other than water in the course of restaurant operations it would be wrong to conclude that the parties did not intentionally and meaningfully choose to use the word “liquid” rather than the word “water”.

126. If there were any residual uncertainty as to the correctness of this view (and in my view there is none) that uncertainty would have to be resolved against [the claimant] as the author of the language that gives rise to the uncertainty. See: *ASP Properties Group, b. P. v. Fard, Inc.*, 133 Cal.App.4th 1257, 1269 (2005); *Neal v. Store Farm Ins. Co.*, 188 Cal.App.2d 690, 695 (1961).

127. For the reasons I have stated, I find that, properly interpreted in accordance with the principles of California law, the [ingress specification] specifies that the ... Device must meet the IPX2 standard and testing requirements in respect of water ingress and must also allow liquids of a *kind and quantity* that one might reasonably expect it to be exposed in a restaurant environment to enter the device and leave without causing a functional defect.

(emphasis added)

The parties’ cases on this application

54 It is significant that the tribunal’s holding in paragraph 127 of the award deals only with the “kind and quantity” of liquid and not with the manner of ingress, *ie* whether by Vertically Falling Drops or by spray. Indeed, it is common ground that the tribunal does not make any express holding, in this passage or anywhere else in the award, that the parenthetical phrase properly

construed encompasses a *manner of ingress* beyond Vertically Falling Drops and encompassing ingress by spray.

55 The claimant’s primary case on this aspect of the award is that the tribunal breached the fair hearing rule in arriving at its holding on liability in two ways. First, the tribunal “completely failed” to apply its mind to the claimant’s argument that the parenthetical phrase properly construed required the Device to withstand the ingress of liquid only by Vertically Falling Drops. Second, the tribunal “completely failed” to apply its mind to the claimant’s argument that the parties’ pre-contractual negotiations and post-contractual conduct showed that they “could not have intended” the parenthetical phrase to require the Device to withstand the ingress of liquid otherwise than by Vertically Falling Drops.

56 I do not accept that either of these submissions is a clear and inescapable inference to be drawn from the tribunal’s failure to hold expressly anywhere in the award that the parenthetical phrase properly construed encompasses a manner of ingress going beyond Vertically Falling Drops and encompassing ingress by spray.

57 I deal with the claimant’s two submissions in turn.

The proper construction of the ingress specification

58 The claimant’s first submission is that the tribunal “completely failed” to apply its mind to the argument that the parenthetical phrase properly construed required the Device to withstand the ingress of liquid only by Vertically Falling Drops. In response, the respondent submits that the tribunal’s test of reasonableness, which covers expressly the kind and quantity of liquid, also covers impliedly the manner of ingress. In other words, the respondent

submits that, in addition to its express holding at paragraph 127 of the award, the tribunal impliedly held that the parenthetical phrase properly construed requires the Device to allow liquids that enter the Device *by a manner of ingress* that one might reasonably expect it to be exposed to in a restaurant environment to leave the Device without causing it to malfunction.⁷⁴

59 For the reasons which follow, I accept the respondent's submission.

60 It is true that, in setting out its holding as to the proper construction of the parenthetical phrase in paragraph 127 of the award, the tribunal fails to make an express finding as to the manner of ingress encompassed by the parenthetical phrase. Given the case that each party advanced in the arbitration on this issue, there are only four possible explanations for that failure. The first possible explanation is that, as the claimant submits, the tribunal completely failed to address its mind to the claimant's case on the manner of ingress. The second possible explanation is that the tribunal impliedly held that there was no constraint on the manner of ingress. The third possible explanation is that the tribunal impliedly held that the words "IP X2 rating" constrained the manner of ingress. The fourth and final possible explanation is that the tribunal impliedly held that the test of reasonableness constrained the manner of ingress.

61 I consider the fourth possibility not just to be the most likely explanation, but to be the correct explanation by a process of elimination, and therefore by necessary implication.

62 The first possible explanation is that the tribunal completely failed to address its mind to the claimant's case on the manner of ingress. I do not accept

⁷⁴ CCB Tab 6, pp 153 - 154: 1st SS at para 23(c).

this explanation. The award, read in context, shows that the tribunal did address its mind to the claimant's argument that the parenthetical phrase properly construed required the Device to withstand the ingress of liquid only by Vertically Falling Drops. The tribunal did this in its discussion of commercial absurdity in paragraph 121 of the award.

63 In that paragraph, the tribunal accepts the claimant's argument that giving the parenthetical phrase its plain and ordinary meaning would lead to commercial absurdity. In giving its reasons, the tribunal expressly posits examples of commercial absurdity arising from the kind of liquid (gasoline, sea water or liquid detergent) and the quantity of liquid (immersion for an extended time). But the tribunal also posits an example of commercial absurdity arising from the manner of ingress. The example given is ingress by a concentrated high-pressure spray:

121 ...[A]s [the claimant] points out the plain and literal meaning of the phrase in parentheses is that there is no limit on the nature of the liquid or the volume of liquid to which the [D]evice is exposed, Literally, the device would have to allow any liquid of any kind, no matter how obviously harmful and corrosive, to enter and leave without causing harm. *If the literal meaning of the parenthesized words applies, then even if the [D]evice were immersed in a bucket of gasoline or sea water or liquid detergent for an extended time or were **subjected to a concentrated high pressure spray** of any kind, the [D]evice would have to remain operable.* [The claimant] submits, and I agree, that such an interpretation does not make commercial sense, and cannot have been what the parties intended. The rules of interpretation under California law make clear that such absurd interpretations are to be avoided. For this reason, despite its primary argument that the plain meaning of the words used is determinative, [the respondent] contends that the parenthetical phrase should be interpreted more narrowly than the plain meaning suggests, to mean that the ... Device must allow the kinds and volumes of liquids that one might reasonably expect to be present in a restaurant environment to enter the device and leave without causing a functional defect.

[emphasis added in italics and bold italics]

64 It is, to my mind, no coincidence that the tribunal selected “a concentrated high-pressure spray” as its example of a manner of ingress that would be commercially absurd to construe the parenthetical phrase as encompassing. The claimant’s evidence and submission in the arbitration was that the Devices malfunctioned because of the use of a spray. By selecting this example, the tribunal was clearly, albeit impliedly, contrasting a type of spray leading to commercial absurdity with an ordinary cleaning spray that one might reasonably expect the Device to be exposed to in a restaurant environment.

65 The second possible explanation is that the tribunal impliedly held that there was no constraint on the manner of ingress. I do not accept this explanation. It is contradicted by the tribunal’s express holding that giving the parenthetical phrase its plain and ordinary meaning with no constraint led to commercially absurd results, and the express examples that the tribunal posited to demonstrate the commercial absurdity. Further, both parties were agreed (albeit in substance and not in form) that the plain and ordinary meaning of the parenthetical phrase had to be constrained. I do not consider it likely in the least that the tribunal made an implied finding to this effect when neither party was advancing that case in substance before it.

66 The third possible explanation is that the tribunal impliedly held that the words “IP X2 rating” constrained the manner of ingress. I do not accept this explanation. The tribunal rejected the claimant’s argument to this effect in paragraph 125 of the award (see [53] above). By doing so, the tribunal rejected any constraint on the plain and ordinary meaning of the parenthetical phrase originating from the words “IP X2 rating”. This entailed rejecting *both* water as a constraint on the kind of liquid *and* Vertically Falling Drops as a constraint on the manner of ingress. On the tribunal’s chain of reasoning, rejecting the words

“IP X2 rating” as an available constraint on the proper construction of the parenthetical phrase *necessarily* entailed rejecting Vertically Falling Drops as a possible constraint on the manner of ingress.

67 The fourth and final possible explanation is that the tribunal impliedly held that the test of reasonableness constrained the manner of ingress. I accept this explanation. The claimant submits that a doing so is tantamount to putting words into the tribunal’s mouth. I reject the claimant’s submission. Indeed, I consider this possibility not just to be the most likely explanation, but by the process of elimination to be a necessary implication from the tribunal’s chain of reasoning. This explanation is consistent with the tribunal’s chain of reasoning in rejecting a high-pressure spray as commercially absurd in paragraph 121 of the award (see [63] above). It is also consistent with the tribunal’s chain of reasoning in rejecting the words “IP X2” (and therefore “Vertically Falling Drops”) as a constraint on the parenthetical phrase.

68 Further, it appears to me that, on the evidence presented in the arbitration, the concept of the quantity of liquid subsumed the manner of ingress. It was only the “kind and quantity” of liquid that entered the Device that was the root cause of the malfunction. There are only three differences between Vertically Falling drops of a liquid and a spray of drops of a liquid: (a) a spray is capable of generating drops that make contact with the Device at an angle larger than 15° on either side of the vertical; (b) a spray is capable of generating drops that are much finer than those generated only under the force of gravity; and (c) a spray is capable of propelling drops of the liquid towards the Device with a force greater than the force of gravity. But the Devices did not malfunction because of any of these three factors *in themselves*. For example, it was not suggested in the arbitration that the physical force with

which the spray propelled drops of cleaning solution on to a Device caused physical damage to the enclosure and thereby was the root cause of any malfunction. These three factors were relevant to the root cause of the malfunction only in so far as they served to increase the quantity of liquid that entered the Device, accumulated there and had to leave the Device without causing it to malfunction, as compared to Vertically Falling Drops. That is why, in my view, the tribunal refers only to the “kind and quantity” in paragraph 127 of the award. On the evidence before him, it was only the kind and quantity that went to the root cause of the malfunction, not the manner of ingress.

69 The claimant points to the tribunal’s finding at paragraph 118 of the award that the parenthetical phrase “address[es] a subject that is not addressed by the IP X2 standard”.⁷⁵ The claimant submits that this is further evidence that the tribunal completely failed to address its mind to the claimant’s case as to the manner of ingress. I do not accept this submission. What the tribunal actually found is that the parenthetical phrase “address[es] a subject that is not addressed by the IP X2 standard, namely: the risk that any liquid, in addition to water, may enter the device”. The tribunal made this finding in the course of analysing and rejecting the claimant’s submission that the words “IP X2 rating” constrained the plain and ordinary meaning of the parenthetical phrase on its proper construction. The distinction that the tribunal draws here is between protection against the ingress of water (indisputably covered by the words “IP X2 rating”) and protection against the ingress of other liquids (on the tribunal’s construction, covered only by the parenthetical phrase). The tribunal is not here stating that the parenthetical phrase does not encompass the manner of ingress.

⁷⁵ CCB Tab 1, pp 44 – 45; Award at para 118.

70 The claimant submits that it was an essential issue in the arbitration whether the parenthetical phrase required the Device to withstand the ingress of liquids that one might reasonably expect it to be exposed in a restaurant environment “howsoever caused” and that the tribunal failed to apply its mind to this issue. I do not accept this submission. In paragraph 121 of the award, the tribunal clearly rejected any construction of the parenthetical phrase which would leave the manner of ingress unconstrained. As I have already held, the tribunal’s holding in paragraph 127 of the award impliedly held that the manner of ingress was subject to the same test of reasonableness as the kind and quantity of liquid was subject to (see [67] above).

71 The claimant submits that the tribunal’s award would be manifestly incoherent if I were to find that it impliedly subjected the manner of ingress to the same test of reasonableness as it subjected the kind and quantity of liquid. The claimant says that it is entirely inconsistent for the tribunal to find that the ingress specification required the Device to withstand ingress of water only to the IP X2 standard but at the same time required the Device to withstand ingress of all liquids (including water) beyond Vertically Falling Drops and encompassing sprays. I do not accept this submission. The tribunal addressed this point in paragraph 120 of the award. In that paragraph, the tribunal accepted that a difficulty with the respondent’s construction of the parenthetical phrase was that it would render the contractual content of the words “IP X2 rating” redundant in the ingress specification. But the tribunal also held that the phrase “IP X2 rating” nevertheless served a contractual purpose by specifying an objective test external to the MSA which the Device must pass in order to be accepted under the MSA. The tribunal appreciated that both parties’ submissions as to the proper construction of the parenthetical phrase posed difficulties. The point that the claimant makes does not demonstrate any

incoherence in the award. It demonstrates instead an incoherence in the ingress specification. The tribunal recognised this incoherence and, as was its duty, resolved it as best it could.

72 For the foregoing reasons, I do not accept that the tribunal failed to apply its mind to the claimant’s submission that the parenthetical phrase on its proper construction did not require the Device to withstand the ingress of liquid beyond Vertically Falling Drops. There was no breach of natural justice on the first ground that the claimant raises.

The parties’ intentions as to the ingress specification

73 The claimant’s alternative submission is that the tribunal completely failed to apply its mind to the evidence that the claimant adduced in the arbitration to establish that the parties could not have intended the parenthetical phrase to encompass a manner of ingress beyond Vertically Falling Drops.

74 The evidence in question comprises evidence of the parties’ negotiations leading up to their agreement on the ingress specification and evidence that the Device was subjected to and passed tests confirming that it met the IP X2 rating in 2016 and again in 2020.

Evidence of the negotiations leading up to the ingress specification

75 In the arbitration, the claimant adduced the following evidence of the parties’ negotiations leading up to their agreement on the ingress specification. First, the parties had initially agreed on an ingress specification of “IPX3 rating” alone. This ingress specification did not contain the parenthetical phrase. It also specified ingress protection at IP level 3 against water, *ie* one degree higher than IP level 2. IP level 3 requires a device to withstand “water sprayed at an angle

up to 60° on either side of the vertical”.⁷⁶ The parties later agreed to abandon “IP X3 rating” as the ingress specification and to adopt “IP X2 rating” and the parenthetical phrase as the ingress specification.⁷⁷ Second, the negotiations between the parties’ representatives showed that they intended the parenthetical phrase to require only that Vertically Falling Drops be allowed to enter and leave the Device without causing a malfunction.⁷⁸

76 It is not in dispute that the tribunal does not in its award analyse either this evidence that the claimant adduced or the submissions that the claimant advanced relying on this evidence. But I do not accept that it is a clear and inescapable inference from this failure is that the tribunal completely failed to apply its mind to this evidence and submissions. The evidence of the parties’ negotiations amounts to evidence of subjective intention. It is clear from the tribunal’s summary of California law in paragraph 123 of the award (see [53] above) that the parties’ subjective intention was of no relevance to the exercise in construction which the tribunal had to undertake. As the tribunal put it, its task was to give effect to the parties’ objective intentions, *ie* not to the “actual subjective intentions, understandings or beliefs of either party”. The claimant does not submit or even suggest that this the tribunal misunderstand or misapplied California law in this regard. Indeed, it is not open to the claimant to do so on an application of this nature (see [33] above).

⁷⁶ 1 HJC p 2166 at p 2183.

⁷⁷ CCB Tab 10, pp 248, 258–260: R1SOC at para 1, paras 33–35 and para 40; CCB Tab 17, pp 309–310: R2SOC at para 7; and CCB Tab 23, pp 393–394, 398–399: RPHB at para 3, paras 16 and 19.

⁷⁸ CCB Tab 10, pp 248, 259: R1SOC at para 3, paras 34–35; CCB Tab 17, p 309: R2SOC at para 6; and CCB Tab 23, p 399: RPHB at para 19.

77 On the tribunal’s finding as to California law, this evidence of the parties’ negotiations and these submissions were therefore simply irrelevant. It is therefore not surprising that the tribunal makes no reference to the claimant’s evidence or submissions on this issue.

78 There is no breach of natural justice on this ground.

Testing only at IP X2 rating

79 The claimant submits also that the tribunal “completely failed to consider” evidence in the arbitration that: (a) the respondent had approved the design of the Device after it passed tests in 2016 showing that it met the specifications for an IP X2 rating; and (b) the Device passed tests repeated in 2020 showing that it continued to meet the specifications for an IP X2 rating.

80 The following facts are not in dispute. A third-party service provider tested and confirmed that the Device merited an IP X2 rating in 2016.⁷⁹ Both parties participated in the testing process. The respondent did not then ask for any tests to be conducted on the Device which were more stringent.⁸⁰ The respondent received⁸¹ and accepted the test results.⁸² The respondent approved the claimant’s design for the Device. The respondent accepted and approved every batch of Devices that the claimant delivered up to the time of their dispute

⁷⁹ CCB Tab 11, p 269: RWS1 at para 6.

⁸⁰ CCB Tab 11, p 269: RWS1 at para 6; CCB Tab 31, pp 458–461; CCB Tab 32, pp 463–467.

⁸¹ CCB Tab 11, p 269: RWS1 at para 7; CCB Tab 33, pp 469–476.

⁸² CCB Tab 11, pp 269–270: RWS1 at para 8; CCB Tab 34, p 478.

in 2020.⁸³ The same third-party service provider tested the Device again in 2020. The Device again met the IP X2 specification.

81 It is also not in dispute that the tribunal does not in its award analyse either the evidence adduced of these facts or the claimant's submissions based on that evidence.

82 Once again, however, it appears that the claimant relied on these facts in the arbitration to establish the parties' subjective intentions with regard to the manner of ingress encompassed by the parenthetical phrase. For the reasons I have already given, the parties' subjective intentions are irrelevant under California law to the tribunal's exercise in construing the ingress specification (see [76] above). It is again not surprising that the tribunal makes no reference to this evidence or to these submissions.

83 Given that I have found that there has been no breach of the fair hearing rule on any of the grounds put forward by the claimant, it is not necessary for me to consider the issues of connection to the making of the award and prejudice to the claimant (see [34] above).

84 I now turn to consider the claimant's case on damages.

Damages

85 As I have mentioned (see [29] above), the tribunal awarded the respondent US\$10.68m in damages for the respondent's loss up to March

⁸³ CCB Tab 11, p 270; RWS1 at paras 9–10; CCB Tab 35, pp 480–482.

2022.⁸⁴ The tribunal also rejected the respondent's claim for damages for future loss on the ground that it was impermissibly speculative.⁸⁵

86 The claimant's complaint on this application is that the tribunal's analysis on damages refers only to the respondent's evidence and makes no mention of the claimant's evidence or submissions. As the claimant puts it, reading the award gives the impression that the claimant never challenged the respondent's evidence on damages in the arbitration, "which cannot be further from the truth".⁸⁶

87 I make three points at the outset.

88 First, expert evidence was necessary to address the issue of damages because much of the respondent's claim for damages had to be based on estimates. This is because it was not possible to track actual repair costs for each Device during the relevant period or to distinguish between Devices that malfunctioned during that period because of liquid ingress and Devices that malfunctioned for other reasons.

89 Second, the respondent adduced evidence of damages from two witnesses: a factual witness⁸⁷ and an expert witness.⁸⁸ For its part, the claimant chose to adduce evidence only from a factual witness and to adduce no expert evidence at all. The claimant was content to challenge the respondent's expert evidence only with its own evidence of fact, cross-examination and

⁸⁴ Award at para 195; Correction of Final Award at para 7.

⁸⁵ Award at paras 164–165.

⁸⁶ 1 HJC at para 80.

⁸⁷ CCB Tab 18, pages 321–325.

⁸⁸ CCB Tab 8, pages 186–231; CCB Tab 14, pages 286–290.

submissions. The result was that, even though the case on damages was necessarily based on expert evidence, the claimant did not give the tribunal any evidence from an opposing expert to critique the respondent's expert's methodology, data or assumptions and to give the tribunal an alternative basis on which to reach its conclusions on damages.

90 Third, it is clear from the award that the tribunal did apply its mind to the respondent's expert's evidence. As the respondent points out, the tribunal put questions of his own to the respondent's expert during the arbitration on the following issues:

- (a) The tribunal asked the respondent's expert whether he had compared the projection of future losses with past losses.⁸⁹
- (b) The tribunal asked the respondent's expert how many Devices had been delivered to the respondent and how he had derived that figure.⁹⁰
- (c) The tribunal pointed out that some of the figures the respondent's expert had relied on originated only from the respondent itself and were therefore open to question.⁹¹
- (d) The tribunal asked the respondent's expert to justify the figures he relied on in calculating the respondent's losses.⁹²

⁸⁹ DBD, Vol. 7, Tab 18, Exhibit SS-9, p 143 line 8 to p 144 line 1 (at p 3204–3205).

⁹⁰ DBD, Vol. 7, Tab 18, Exhibit SS-10, p 180 line 12 to p 181 line 6 (at p 3276–3277).

⁹¹ DBD, Vol. 7, Tab 18, Exhibit SS-10 at p 181 lines 15 to 24 (at p 3277); p 186 line 6 to p 188 line 3 (at p 3282–3284).

⁹² DBD, Vol. 7, Tab 18, Exhibit SS-10 at p 187 line 8 to p 189 line 9 (at p 3283–3285); p 191 lines 8 to 25 (at p 3287); p 192 line 6 to p 195 line 5 (at p 3291).

- (e) The tribunal queried whether it was reasonable to use 59.6% as a projected failure rate for the Device.⁹³

91 Having done so, the tribunal accepted some parts of the expert's evidence and rejected other parts of his evidence. Most notably, the tribunal rejected the entirety of the respondent's expert's evidence on the respondent's future loss.⁹⁴

92 I now take each of the three heads of damages in turn. They are: (a) the cost of repairs to the Devices up to March 2022; (b) the cost of maintaining a standby stock of Devices up to March 2022; and (c) lost gaming revenue up to March 2022 (see [29] above).

Actual repair costs

93 The claimant's case on actual repair costs can be distilled to four broad points:

- (a) That Art 10(c) of the MSA requires the respondent, not the claimant, to bear the cost of shipping malfunctioning Devices to the claimant for repair;⁹⁵
- (b) That between May 2021 and March 2022, the respondent returned to the claimant only 7,126 Devices that had malfunctioned because of liquid ingress as opposed to the 34,533 as claimed by the respondent;⁹⁶

⁹³ DBD, Vol. 7, Tab 18, Exhibit SS-10 at p 198 line 19 to p 200 line 15 (at p 3294–3296).

⁹⁴ Award at para 167.

⁹⁵ 1 HJC at para 77.

⁹⁶ 1 HJC at para 78.

(c) That the cost of hardening the Devices was US\$151,238 (3,346 Devices multiplied by US\$45.20 per Device) instead of US\$180,764 as claimed by the respondent;⁹⁷ and

(d) That hardened Devices encountered a significantly lower failure rate and should therefore have incurred significantly lower costs of repair.⁹⁸

94 I accept the respondent's submission that the tribunal considered and rejected the claimant's evidence and submissions on these points.

95 On the first broad point, the tribunal expressly found that an Epidemic Condition existed in respect of all of the Devices which the claimant had delivered to the respondent before the end of 2020.⁹⁹ The tribunal also held that the result of that finding was that the damages that the respondent could recover were not limited to those recoverable for malfunctions within the one-year warranty period.¹⁰⁰ The result of this finding is that the respondent was relieved of its obligation to pay shipping costs under Art 10(c) of the MSA.¹⁰¹

96 On the second broad point, the tribunal received¹⁰² and acknowledged¹⁰³ evidence from the claimant's own witness, that "[i]t should be 31,980 units with liquid causing failures". The claimant points out that its witness was speaking

⁹⁷ 1 HJC at para 79.

⁹⁸ 1 HJC at paras 81–82.

⁹⁹ Award at para 152.

¹⁰⁰ Award at para 155.

¹⁰¹ Award at para 154.

¹⁰² DBD, Vol. 7, Tab 18, Exhibit SS-11, p 326, lines 10 to 12 (at p 3455).

¹⁰³ DBD, Vol. 7, Tab 18, Exhibit SS-11, p 325, line 25 to p 329 line 17 (at p 3505).

of the much longer period between July 2017 and August 2021 and not the relevant period over which the tribunal was assessing the respondent's loss and damage. But that establishes merely that the tribunal made an error of fact. An error of fact is not a breach of natural justice.

97 On the third broad point, the claimant failed to adduce any evidence in the arbitration of the cost per unit of hardening the Devices. With no evidence before the tribunal to support this submission, there can be no breach of natural justice from the tribunal's failure to address this submission.

98 On the fourth broad point, the tribunal acknowledged in paragraph 70 of its award, as part of its summary of the facts, that hardened Devices would have a significantly lower failure rate.¹⁰⁴ Once again, it is true that the tribunal did not take this into account in assessing the cost of repair during the relevant period. But once again, this is at most an error of fact and not a breach of natural justice.

Costs of standby stock of Devices

99 The claimant's case on the standby stock costs is that the tribunal completely failed to consider the grounds on which the claimant challenged the reliability of the methodology and the data that the respondents' witnesses relied on in their evidence¹⁰⁵ and "appears to have unquestioningly adopted [their] calculation ... without any reference to [the claimant's]...evidence and submissions".¹⁰⁶

¹⁰⁴ 1 HJC at para 81.

¹⁰⁵ 1 HJC at para 88.

¹⁰⁶ 1 HJC at para 90.

100 I do not accept this submission. The tribunal found expressly at paragraph 160 of the award that the respondent’s expert’s “projections of the number of [Devices] that would be returned after April 2021 were generally conservative”.¹⁰⁷ Given that finding, and given that the claimant chose not to mount a positive challenge to the respondent’s expert’s methodology and data by calling an expert of its own, it is a far from inescapable inference that the tribunal failed to apply its mind to the claimant’s evidence and submissions on the respondent’s witnesses’ methodology and data.

101 In the alternative, the claimant submits that the tribunal failed to consider its alternative argument: that even if the tribunal found that the respondent had suffered some loss arising from the cost of maintaining a standby stock of Devices, both the multiplier and the multiplicand advanced by the respondent for assessing this loss were overstated.¹⁰⁸

102 I do not accept this submission. Once again, the case put forward by the claimant amounts at most to an error of fact. It does not lead to the inescapable inference that the tribunal completely failed to address its mind to the claimant’s alternative case.

Lost gaming revenue

103 On the quantum of its lost gaming revenue, the claimant submits that the tribunal completely failed to consider the following two submissions that it made:

¹⁰⁷ Award at para 160.

¹⁰⁸ 1 HJC at para 89.

- (a) That the respondent failed to meet its burden of proving the quantum of any such loss;¹⁰⁹ and
- (b) That the respondent's expert's calculation of this loss should have been reduced on certain grounds advanced by the claimant's witness of fact.¹¹⁰

The claimant's submission is that the "irresistible conclusion is that the Tribunal failed to consider [the claimant's] aforesaid evidence and submissions" in awarding damages to the respondent under this head.¹¹¹

104 I do not accept this submission. The tribunal expressly set out in the award its reasoning for holding that the respondent was entitled to recover this head of loss and for its holding as to the quantum of this loss. More specifically, the tribunal applied its mind to the respondent's case in the arbitration and held against the respondent on following issues: the tribunal held that a limitation of liability provision in the MSA applied to this head of loss,¹¹² that there was an element of double counting in the respondent's claim for both standby stocks and for loss of gaming revenue,¹¹³ that the gaming revenue lost during the one-year warranty period must be subject to the same type of adjustment as the adjustment that the respondent's expert had made to the figure for repair costs incurred during the one-year warranty period.¹¹⁴ As a result, the tribunal held

¹⁰⁹ 1 HJC at para 93.

¹¹⁰ 1 HJC at para 94.

¹¹¹ 1 HJC at para 95.

¹¹² Award at para 171.

¹¹³ Award at para 183.

¹¹⁴ Award at para 177.

that the respondent should recover only 22.3% of its expert's quantification of US\$697,977 for lost gaming revenue, *ie* US\$155,648.87.¹¹⁵

105 Once again, the points made by the claimant amount, at the very most, to an error of fact and not to a breach of natural justice.

Conclusion

106 For all of the foregoing reasons, I have dismissed the claimant's challenge on grounds of a breach of the fair hearing rule. The tribunal did not breach natural justice in arriving at its substantive holdings either on liability or on quantum. The result is that those two holdings stand in their entirety.

107 That result carries two consequences for the remainder of the claimant's challenge.

108 First, it is not necessary for me to analyse separately the claimant's challenge to the tribunal's award to the respondent of its legal costs of the arbitration and the costs of the reference. As the tribunal's substantive holdings in the award have withstood the claimant's challenge, so too must the tribunal's procedural holding to award those costs to the respondent.

109 Second, it is not necessary for me to analyse separately the claimant's final alternative submission that I should remit the award to the tribunal under Art 34(4) of the Model Law. The power to remit an award under that article arises only if I conclude that it is appropriate to "give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside". I

¹¹⁵ Award at para 177.

have rejected all of the claimant's grounds for setting aside. My power to remit the award under Art 34(4) is therefore not even enlivened.

110 I have therefore dismissed the claimant's application with costs. I have fixed the costs payable by the claimant to the respondent at \$20,000 excluding reasonable disbursements, such disbursements to be fixed by the court unless otherwise agreed between the parties.

Vinodh Coomaraswamy
Judge of the High Court

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Nandakumar Ponniya Servai, Jeunhsien Daniel Ho and Irvin Ho
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