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

[2022] SGHC 153

Originating Summons No 952 of 2021

Between

York International Pte Ltd

… *Plaintiff*

And

Voltas Ltd

… *Defendant*

JUDGMENT

[Arbitration — Arbitral tribunal — Jurisdiction]
[Arbitration — Award — Finality of award — Whether arbitrator is *functus officio*]

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v
Voltas Ltd

[2022] SGHC 153

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28 February, 29 March 2022

30 June 2022 Judgment reserved.

S Mohan J:

Introduction

1 *Functus officio* – the Latin phrase to denote that having completed or accomplished the intended task or function, a person or body possesses no further authority or legal competence. In the realm of arbitration proceedings, disputes occasionally arise as to whether an arbitrator is *functus officio* or still possesses a reserve of jurisdiction to determine issues which one party contends have not yet been disposed of. More specifically and the question that arises for my determination in this case is this – is an arbitrator *functus officio* once a *conditional final award* has been rendered by the arbitrator in the arbitral proceedings?

2 The present matter concerns the plaintiff's application under s 21(9) of the Arbitration Act (Cap 10, 2002 Rev Ed) (the "AA"), for the court to decide

that the sole arbitrator (the "Arbitrator") in Singapore International Arbitration Centre ("SIAC") Arbitration No 61 of 2012 (the "Arbitration") does not have jurisdiction to issue a further award in the Arbitration, following the Arbitrator's ruling as a preliminary question that he has jurisdiction to do so. At the core of the parties' dispute is whether an award issued by the Arbitrator in 2014, titled "Final Award" (the "2014 Award"), resolved all the issues in the Arbitration such that the Arbitrator became *functus officio*, and therefore no longer retained jurisdiction to issue any further award.

3 Having heard and considered the competing arguments, I find that the Arbitrator was *functus officio* upon the 2014 Award being rendered and thus, possesses no jurisdiction to issue any further award. Accordingly, I allow the plaintiff's application.

4 Before elaborating upon the reasons for my decision, I first summarise the relevant background facts of this case.

Background facts

5 The plaintiff and defendant are both companies incorporated in Singapore.[1] On 3 March 2008, the defendant was engaged by Resorts World at Sentosa Pte Ltd ("RWS") to carry out the design, supply, construction, completion and maintenance of a District Cooling Plant ("DCP") on Sentosa Island, Singapore (the "Main Contract"). The purpose of the DCP was to supply chilled water to Resorts World at Sentosa and other developments on Sentosa Island. The Main Contract was subsequently novated on 27 May 2008 by RWS to DCP (Sentosa) Pte Ltd ("DCP Sentosa"), a joint venture between RWS and

[1] Plaintiff's Bundle of Cause Papers ("PBCP") vol 1 p 187, paras 1–2.

Sentosa Development Corporation.[2] For the purposes of this judgment, I will refer to RWS and DCP Sentosa interchangeably.

6 By a purchase agreement dated 3 April 2008, the defendant purchased five water-cooled dual centrifugal chillers (the "Chillers") from the plaintiff for a lump sum price of S$5,230,000 (the "Purchase Agreement"). The Chillers formed one of the components of the DCP and are each powered by two motors. The plaintiff duly delivered the Chillers to the defendant sometime between December 2008 and November 2009. However, between March 2011 and May 2011, seven of the Chiller motors failed during operation.[3]

7 Consequently, disputes arose between the parties and the plaintiff commenced a suit against the defendant in HC/S 821/2011 on 17 November 2011. On 13 January 2012, the parties agreed to settle their disputes through arbitration and entered into an agreement for *ad hoc* arbitration ("the Arbitration Agreement").[4] Clause 1 of the Arbitration Agreement provides as follows:[5]

> All the claims or matters in [HC/S 821/2011] and/or any dispute arising under or in connection with the Purchase Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration and the final decision of a single arbitrator in accordance with and subject to the provisions of the prevailing laws on arbitration or any statutory modification thereof for the time being in force in Singapore and that any such reference shall be deemed to be submission to arbitration within the meaning of such laws. The single arbitrator shall be mutually agreed within twenty-one (21) days of any notice of arbitration, failing which he or she shall be appointed by the Chairman of the Singapore International Arbitration Centre.

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2 1st Affidavit of Buay Kee Seng Christopher dated 21 September 2021 ("BKS-1"), paras 6–7 (PBCP vol 1 p 9)

3 BKS-1, paras 8–9 (PBCP vol 1 p 10).

4 BKS-1, paras 12 and 14(a) (PBCP vol 1 pp 11–14).

5 BKS-1, Tab 3 (PBCP vol 1 pp 160–161).

8 On 21 February 2012, the plaintiff commenced the Arbitration against the defendant in Singapore.[6] The disputes referred to arbitration were, *inter alia*, the plaintiff's claim for outstanding payments owed by the defendant under the Purchase Agreement, as well as the defendant's counterclaims for damages, losses, and/or expenses arising out of the plaintiff's supply of allegedly defective Chillers. In particular, the defendant alleged that the Chiller motor failures had resulted in RWS making claims against the defendant for losses and expenses. The defendant therefore sought to recover those amounts from the plaintiff in the Arbitration by way of its counterclaims. Among its other claims, the defendant counterclaimed for the following:[7]

(a) A sum of S$1,099,162.46, which was the cost that RWS had incurred in introducing nitrogen into the thermal storage tanks and installing air-cooled chillers downstream of the chiller water system networks, which cost RWS sought from the defendant (the "Nitrogen Claim"); and

(b) A sum of S$33,277, which was the cost that RWS had incurred in removing the failed motors and installing temporary motors, which cost RWS also sought from the defendant (the "Removal Claim").

9 The arbitration hearing took place from June 2013 to April 2014.[8] On 25 August 2014, the Arbitrator issued the 2014 Award. In the 2014 Award, the Arbitrator allowed the plaintiff's claim for outstanding payments due under the Purchase Agreement, and also allowed the defendant's counterclaims in part.

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6 BKS-1, para 14(d) (PBCP vol 1 p 13).

7 BKS-1, paras 10 and 15 (PBCP vol 1 pp 10 and 15).

8 BKS-1, paras 14(h)–(i) (PBCP vol 1 pp 13–14).

The Arbitrator found that the plaintiff was liable to the defendant for the Nitrogen and Removal Claims. However, the Arbitrator observed that there was a need for "some degree of caution" as it appeared that the defendant had not paid RWS for the sums due under the Nitrogen and Removal Claims.[9] There was therefore a risk of the defendant enjoying a windfall, if it ultimately did not have to pay RWS. In the circumstances, the Arbitrator decided to make his orders *conditional* upon the defendant making payment to RWS. In respect of the Nitrogen Claim, the Arbitrator made the following order:[10]

> … I will make an order for the [plaintiff] to make payment to the [defendant] for this head of damage as itemised at page 988 of Mr Sidhwani's affidavit, up to a maximum of $1,099,162.46, upon the [defendant] making payment to RWS in respect of such items set out under this head of damage.

10 Likewise, in respect of the Removal Claim, the Arbitrator made the following order:[11]

> I … similarly make an order for the [plaintiff] to pay the [defendant] for this head of damage, up to a maximum of S$33,277.00, when the [defendant] pays RWS in respect of this head of damage.

11 Following the 2014 Award, the defendant entered into a settlement agreement with DCP Sentosa on 12 August 2015 (the "Settlement Agreement"). Under the Settlement Agreement, DCP Sentosa agreed to pay the defendant S$1,000,000 (excluding GST) in full and final settlement of all claims each party may have against each other in relation to the Main Contract. In arriving at the settlement sum of S$1,000,000, the defendant and DCP Sentosa agreed to set off the sums owed by the defendant to DCP Sentosa in respect of the

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9 PBCP vol 1 p 288, para 238(f).

10 PBCP vol 1 p 289, para 238(h).

11 PBCP vol 1 p 289, para 239.

Nitrogen and Removal Claims. As such, the defendant considers that the total amount of S$1,132,439.46 which it owed DCP Sentosa for the Nitrogen and Removal Claims (S$1,099,162.46 + S$33,277 = S$1,132,439.46), was paid by it to DCP Sentosa by way of set off when the Settlement Agreement was concluded.[12]

12 From 2015 to 2018, the defendant demanded payment of the sum of S$1,132,439.46 from the plaintiff on several occasions, by way of letters sent by its solicitors to the plaintiff. However, the plaintiff refused to make payment on the basis that the defendant had allegedly not provided sufficient evidence that it had indeed paid DCP Sentosa for the Nitrogen and Removal Claims.[13]

13 On 24 August 2020, the defendant applied to the Arbitrator for a further award, to determine (a) whether the defendant had, in substance, paid DCP Sentosa in respect of the Nitrogen and Removal Claims; (b) if so, what sums the defendant had paid in respect of these claims; and (c) accordingly, what sums are to be paid by the plaintiff to the defendant (the "Further Award"). On the same date, and without prejudice to its application for the Further Award, the defendant also issued a notice of arbitration, purporting to commence fresh arbitration proceedings against the plaintiff under the Arbitration Agreement claiming payment for the Nitrogen and Removal Claims (the "Notice of Arbitration").[14]

14 The plaintiff objected to both steps taken by the defendant. In respect of the Notice of Arbitration, the plaintiff wrote to the defendant on 16 September

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12 1st Affidavit of Jaison Mathew dated 1 November 2021 ("JM-1"), para 23 (PBCP vol 4 p 2042).

13 JM-1, paras 24–25 (PBCP vol 4 pp 2043–2047).

14 JM-1, paras 26 and 28 (PBCP vol 4 pp 2048–2049).

2020, stating that the disputes referred to in the Notice of Arbitration did not fall within the scope of the Arbitration Agreement.[15] As for the defendant's application for the Further Award, the plaintiff sent a letter to the Arbitrator and the defendant on 19 October 2020 raising a jurisdiction objection. The plaintiff contended that the Arbitrator was *functus officio* in relation to the Arbitration and did not retain any jurisdiction after the issuance of the 2014 Award.[16]

15 At the Arbitrator's invitation, the parties exchanged submissions on whether the Arbitrator retained jurisdiction to issue the Further Award.[17] On 23 August 2021, the Arbitrator issued a written decision on whether he was *functus officio* in relation to the Arbitration (the "2021 Decision"). In the 2021 Decision, the Arbitrator concluded, *inter alia*, that he *did* retain jurisdiction to issue the Further Award, and accordingly invited the parties to tender further submissions on the substantive merits of the defendant's application for the Further Award.[18]

16 Dissatisfied with the 2021 Decision, the plaintiff filed the present application under s 21(9) of the AA on 21 September 2021 seeking, among others, a decision from the court that the Arbitrator does not have jurisdiction to make any further award in respect of the Arbitration.

The parties' cases

17 The main thrust of the plaintiff's case is that the 2014 Award is final, in that it disposed of all matters that the parties had referred to the Arbitration.

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15 PBCP vol 5 pp 3363–3364.

16 BKS-1, para 21 (PBCP vol 1 pp 22–23).

17 JM-1, paras 31–34 (PBCP vol 4 pp 2050–2051).

18 PBCP vol 1 p 49, para 65.

Accordingly, the Arbitrator is *functus officio* and does not retain any jurisdiction to issue any further award.

18 In support of the plaintiff's case, counsel for the plaintiff, Mr Ng Kim Beng, makes four arguments why the 2014 Award is dispositive of all issues in the Arbitration:

(a) First, it is clear from the Arbitrator's reasoning in the 2014 Award that he did not intend to reserve his jurisdiction. In the 2014 Award, the Arbitrator expressly noted that there were two ways to prevent the defendant from obtaining a windfall in respect of the Nitrogen and Removal Claims, drawing support from the decision of the English High Court in *Biffa Waste Services Ltd and another v Maschinenfabrik Ernst Hese GMBH and another* [2008] EWHC 2210 (TCC) ("*Biffa Waste*"). These were to (a) adjourn the decision on quantum to a later date; or (b) to make an award on the condition that money is paid to a third party. The Arbitrator ultimately chose the second option, given that he ordered the plaintiff to make payment to the defendant for the Nitrogen and Removal Claims on the condition that the defendant made a corresponding payment to RWS (*per* the orders made by the Arbitrator at [9]–[10] above). The Arbitrator therefore did not choose to adjourn the decision on quantum, or reserve jurisdiction in that respect. There was also no *express* reservation of jurisdiction in the 2014 Award.[19]

(b) Second, the 2014 Award is a "self-executing award".[20] The 2014 Award should be read together with the affidavit of Mr Shyam M

19 Plaintiff's Written Submissions ("PWS") paras 51(c) and 51(d).

20 PWS para 56(b).

Sidhwani ("Mr Sidhwani"), which was filed and relied upon by the defendant in the Arbitration. Mr Sidhwani's affidavit contains a breakdown of the items that comprise the Nitrogen Claim and their corresponding cost, amounting to a total of S$1,099,162.46 (*ie,* the maximum quantum that the Arbitrator awarded to the defendant for the Nitrogen Claim in the 2014 Award). Thus, in relation to the Nitrogen Claim, the defendant only needs to provide the plaintiff with evidence of which items (as listed in Mr Sidhwani's affidavit) the defendant has paid DCP Sentosa for, in order for the plaintiff's liability to pay the defendant to crystallise. As for the Removal Claim, the defendant similarly only needs to provide the plaintiff with proof that it has paid DCP Sentosa a certain sum, following which the defendant would be entitled to demand that same sum from the plaintiff. In other words, there is no need for a further award to determine the amount payable by the plaintiff to the defendant for the Nitrogen and Removal Claims.[21]

(c) Third, the 2014 Award included a final order on costs, which the plaintiff contends is "an unmistakable feature of a full, final and conclusive award".[22]

(d) Finally, following the issuance of the 2014 Award, it is clear from correspondence exchanged between the parties that both parties treated the 2014 Award as dispositive of all issues in the Arbitration.[23]

19 Counsel for the defendant, Ms Charlene Sim Yan, seeks to resist the plaintiff's application on three grounds. First, Ms Sim argues that the plaintiff

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21 PWS paras 62 and 66.

22 PWS paras 68–69.

23 PWS para 73.

is not entitled to make an application under s 21(9) of the AA. She contends that the 2021 Decision is not a ruling "on a plea as a *preliminary question* that [the Arbitrator] has jurisdiction" [emphasis added], within the meaning of s 21(9)(*a*) of the AA. This is because the 2021 Decision pertains to a challenge to the Arbitrator's jurisdiction that was made at an advanced stage of the Arbitration (*ie*, well *after* the conclusion of the arbitration hearing in 2014), and not to a challenge made at the initial or preliminary stages of the Arbitration.[24] Accordingly, the defendant alleges that there is no basis for the plaintiff's application under s 21(9) of the AA.

20 Second, even if the plaintiff is entitled to make the present application under s 21(9) of the AA, the 2014 Award was *not* fully dispositive of all issues in the Arbitration. While the defendant does not dispute that the 2014 Award does *not* contain an express reservation of jurisdiction, the defendant argues that the 2014 Award did not determine the precise extent of the plaintiff's liability to the defendant for the Nitrogen and Removal Claims. As such, the Arbitrator is not *functus officio* in respect of this issue.[25]

21 Third and finally, the defendant argues that if the plaintiff is correct that the Arbitrator does not have jurisdiction to issue any further award, the defendant would effectively be left with no remedy in respect of the Nitrogen and Removal Claims. In this regard, the defendant highlights that it is the plaintiff's position that the defendant is not entitled to commence a fresh arbitration to claim payment for the Nitrogen and Removal Claims (as noted above at [14]). The defendant is also unable to request for an additional award under s 43(4) of the AA, given that the 30-day timeline to do so has passed.

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24 Defendant's Written Submissions ("DWS") paras 34–35.

25 DWS paras 41–42.

Further, the defendant claims that it would be unable to obtain leave to enforce the Arbitrator's orders (as stated in the 2014 Award) in respect of the Nitrogen and Removal claims, as the quantum owed by the plaintiff to the defendant is not specified.[26]

Issues to be determined

22 Based on the arguments advanced by the parties, the following issues arise for my determination:

(a) Is the plaintiff barred from making the application under s 21(9) of the AA ("Issue 1")?

(b) If it is not, does the Arbitrator have jurisdiction to issue the Further Award ("Issue 2")?

Issue 1: Is the plaintiff barred from making the application under s 21(9) of the AA?

23 Section 21(9) of the AA provides as follows:

> (9) If the arbitral tribunal rules —
>
> (*a*) on a plea as a preliminary question that it has jurisdiction; or
>
> (*b*) on a plea at any stage of the arbitral proceedings that it has no jurisdiction,
>
> any party may, within 30 days after having received notice of that ruling, apply to the Court to decide the matter.

24 Given that the 2021 Decision is a positive jurisdictional ruling (*ie*, a decision that the Arbitrator has jurisdiction to issue the Further Award), it is clear and not seriously in dispute that the plaintiff's application is grounded

[26] DWS paras 55–61.

upon s 21(9)(*a*) rather than s 21(9)(*b*) of the AA. As summarised above, the defendant argues that the plaintiff is not entitled to make the present application under s 21(9)(*a*), as the 2021 Decision does not constitute a ruling on a "preliminary question". In this regard, the defendant contends that a "preliminary question" refers to a jurisdictional ruling made at the early stages of the arbitral proceedings. Accordingly, a party is only entitled to make an application under s 21(9)(*a*) of the AA where the tribunal makes a positive jurisdictional ruling at the "initial stage" of the arbitration proceedings.[27]

25 In support of its proposed interpretation of s 21(9)(*a*) of the AA, the defendant relies on the case of *Tan Poh Leng Stanley v Tang Boon Jek Jeffrey* [2000] 3 SLR(R) 847 ("*Jeffrey Tang (HC)*").[28] In *Jeffrey Tang (HC)*, the arbitrator had issued an award dismissing the claim and counterclaim, and which stated that the award was "final save as to costs" (the "January Award"). At the request of Mr Jeffrey Tang, one of the respondents in the arbitration, the arbitrator held a hearing to hear further arguments on whether the January Award should be reversed. This was objected to by one of the claimants, Mr Stanley Tan, on the basis that the arbitrator was *functus officio* after the issuance of the January Award. Notwithstanding these objections, the arbitrator issued an additional award, reversing the January Award in part and allowing the counterclaim (the "March Award") (at [5]).

26 *Jeffrey Tang (HC)* concerned Mr Stanley Tan's application to set aside the March Award under the provisions of the International Arbitration Act (Cap 143A, 1995 Rev Ed) (at [6]). A preliminary objection to the application was raised by Mr Jeffrey Tang, namely that the application was filed out of time. In

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27 DWS para 32(a).

28 DWS para 35(a).

this regard, counsel for Mr Tang contended that the application was governed by the 30-day time limit contained in Art 16(3) of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), and not the three-month time limit contained in Art 34 of the Model Law (at [7]).

27 This contention was rejected by G P Selvam J. The learned Judge found that the setting aside application was governed by Art 34 and not Art 16(3) of the Model Law, as the March Award was not a preliminary ruling on jurisdiction (at [14]–[15]):

> 14 In this case, there was no preliminary decision by the arbitrator on the issue of jurisdiction. ***Additionally, Art 16 applies to a challenge to the jurisdiction of the tribunal at the commencement of the arbitral proceedings and not at or after the conclusion stage of the arbitral proceedings. This is indicated by the stipulation that the plea 'shall be raised not later than the submission of the statement of defence'.***
>
> 15 The time limit that applies to this case is stipulated in Art 34 of the Model Law. It is three months from the receipt of the award. This applies when the arbitrator's ruling on jurisdiction is included in the award.
>
> [emphasis added in bold italics]

28 Turning back to the present case, the defendant argues that the comment in *Jeffrey Tang (HC)* at [14] supports its argument that the phrase "preliminary question", as used in s 21(9)(*a*) of the AA, refers only to positive jurisdictional rulings made at the early or initial stages of the arbitral proceedings. I disagree with the defendant that s 21(9)(*a*) of the AA can or should be interpreted in such a manner. First, the true *ratio decidendi* of *Jeffrey Tang (HC)* on Mr Tang's preliminary objection is, in my view, to be found at [15] where the learned Judge correctly held that the application was governed by Art 34 and not Art 16(3) of the Model Law, since the ruling on jurisdiction was included in the March Award which also dealt with the substantive merits of the arguments made at the further hearing. There was thus no ruling or decision as a preliminary

question but rather an award that would only have been subject to a setting aside application under Art 34 of the Model Law. As I explain below at [38], this is in line with the decision of Judith Prakash J (as she then was) in the subsequent case of *AQZ v ARA* [2015] 2 SLR 972 ("*AQZ*"). The *obiter dictum* in *Jeffrey Tang (HC)* at [14] was accordingly immaterial to the learned Judge's decision on Mr Tang's preliminary objection. In any case and to the extent that my own conclusion on the ambit of s 21(9)(*a*) of the AA may be inconsistent with this *obiter dictum* in *Jeffrey Tang (HC)*, I respectfully decline to adopt the same as also being applicable to s 21(9)(*a*) of the AA. I also note that *Jeffrey Tang (HC)* was subsequently reversed by the Court of Appeal in *Tang Boon Jek Jeffrey v Tan Poh Leng Stanley* [2001] 2 SLR(R) 273 ("*Jeffrey Tang (CA)*") on the substantive merits of the setting aside application, although the Court of Appeal did not comment on the correctness of the *obiter dictum* in *Jeffrey Tang (HC)* at [14].

29 I have come to the conclusion that s 21(9)(*a*) of the AA is *not* limited only to positive jurisdictional rulings or decisions made at the early or initial stages of an arbitration for three reasons.

30 First, based on the plain wording of s 21(9)(*a*) alone, it is not at all apparent that a jurisdictional challenge *must* be raised at the early or initial stages of the arbitral proceedings. It is well established that the first step of statutory interpretation is to ascertain the possible interpretations of the statutory provision, having regard to the text of the provision: *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 (*"Tan Cheng Bock*") at [37]. In the present case, nowhere in s 21(9)(*a*) is there any suggestion that a jurisdictional challenge must be raised by a certain point in time, or by a certain stage in the arbitral proceedings. The defendant's proposed interpretation of s 21(9)(*a*) appears to read a time limit into the provision that is not provided for. For this

reason, I find that the defendant's interpretation of s 21(9)(*a*) is not a possible interpretation of the provision, and it therefore falls at the first step.

31 Second, even if there is any ambiguity as to what a "preliminary question" means, s 21(9)(*a*) must be read in the context of the other provisions of the AA. At the first step of statutory interpretation, regard must also be given to the context of the provision in question within the written law *as a whole*: *Tan Cheng Bock* at [37]. In this regard, I note that s 21(8) of the AA provides as follows:

> (8) The arbitral tribunal may rule on a plea *referred to in this section* ***either as a preliminary question or in an award on the merits***.
>
> [emphasis added in italics and bold italics]

32 In my view, s 21(8) makes clear that the phrase "preliminary question" does *not* refer to a decision made at the early stages of the arbitration, as the defendant contends. Section 21(8) itself must be read in the context of the other provisions in s 21 of the AA. The relevant provisions are as follows:

> **Separability of arbitration clause and competence of arbitral tribunal to rule on its own jurisdiction**
>
> **21.**—(1) The arbitral tribunal may rule on its own jurisdiction, including a plea that it has no jurisdiction and any objections to the existence or validity of the arbitration agreement, *at any stage of the arbitral proceedings*.
>
> …
>
> (4) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.
>
> …
>
> (6) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

> (7) Notwithstanding any delay in raising a plea referred to in subsection (4) or (6), the arbitral tribunal may admit such plea if it considers the delay to be justified in the circumstances.
>
> [emphasis added]

33 It is clear from the above provisions that the overarching principle behind s 21 of the AA is that a tribunal may decide on a jurisdictional challenge *at any stage of the arbitration proceedings*. This much is made explicit by the plain wording of s 21(1). The defendant contends that s 21(4) of the AA suggests that relief under s 21(9)(*a*) is only available for positive jurisdictional rulings made at the early stages of the arbitral proceedings, since s 21(4) provides that a plea that a tribunal has no jurisdiction "shall be raised not later than the submission of the statement of defence".[29] A similar observation was made in *Jeffrey Tang (HC)* at [14], in respect of Art 16(2) of the Model Law (*in pari materia* with s 21(4) of the AA) (see [27] above).

34 However, in my view, it is clear from the design of s 21 of the AA that s 21(4) (and s 21(6), for that matter) are to be read subject to s 21(7) of the AA. While ss 21(4) and 21(6) impose *general* timelines for when objections to a tribunal's jurisdiction should be raised, s 21(7) expressly provides that the tribunal nonetheless has discretion to admit a belated objection, if it considers the delay to be "justified in the circumstances". Accordingly, it is clear to me that while parties are generally obliged to raise jurisdictional challenges in a timely manner under ss 21(4) and 21(6), the overall architecture of s 21 recognises the tribunal's power and discretion to decide on a jurisdictional objection at *any* stage of the proceedings.

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[29] DWS para 35(a).

35 In my judgment, the wording of s 21(8) of the AA must therefore be considered against this backdrop. Section 21(8) provides that a tribunal may rule on a plea "*referred to in this section* either as a preliminary question or in an award on the merits" [emphasis added]. Given my observation at [33] above that a jurisdictional objection referred to in s 21 may ultimately be decided on by the tribunal at any stage of the proceedings, it would contradict the entire design of s 21 if s 21(8) were read to mean that a tribunal can only decide a jurisdictional challenge made *at the initial stages of an arbitration*, or in an award that also deals with the merits. Accordingly, reading s 21(8) in context, it is evident that the phrase "preliminary question" cannot possibly refer only to a ruling made at the early or initial stages of the arbitration. It therefore follows that the phrase "preliminary question", as used in s 21(9)(*a*) of the AA, likewise does *not* only refer to a ruling made at the initial stages of an arbitration. There is no reason why the phrase "preliminary question" should be interpreted differently across ss 21(8) and 21(9) of the AA, and Ms Sim has not suggested any.

36 Turning to the third reason for my conclusion, I find that the drafting history of ss 21(8) and 21(9) of the AA also makes clear that the phrase "preliminary question" does *not* refer to a ruling made at the initial stages of the arbitration proceedings. As I elaborate below, the phrase "preliminary question" instead refers to an *interim decision* on the tribunal's jurisdiction that is issued separately from a decision on the merits of the parties' claims.

37 The AA was enacted to align our domestic arbitration laws with our international arbitration laws and specifically, the Model Law: *Singapore Parliamentary Debates, Official Report* (5 October 2001) vol 73 at col 2213 (Ho Peng Kee, Minister of State for Law). In this regard, ss 21(8) and 21(9) of

the AA are modelled after Art 16(3) of the Model Law, which provides as follows:

> *Article 16. Competence of arbitral tribunal to rule on its jurisdiction*
>
> …
>
> (3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

38 The genesis of Art 16(3) of the Model Law was considered in detail by Prakash J (as she then was) in *AQZ*. The issue in *AQZ* was whether a party was entitled to apply to the court under Art 16(3) of the Model Law for a decision on the tribunal's jurisdiction, where the tribunal had issued an award that ruled on its jurisdiction as well as the merits of the arbitration. After considering the drafting history of Art 16(3) of the Model Law, Prakash J concluded that the proper recourse in such a situation was for the party to apply to set aside the award, rather than to seek relief under Art 16(3). In particular, the learned Judge observed as follows:

> 65 ***A review of the drafting history of the Model Law makes clear that the drafters did not intend an award that deals with the merits of the dispute (however marginally) to be subject to challenge under Art 16(3) of the Model Law.*** Article 16(3) embodies the compromise the drafters eventually reached between two competing policy considerations concerning the issue of when courts should exercise control over the arbitral tribunal's decision on its jurisdiction. On the one hand, allowing courts to rule on pleas as to the arbitral tribunal's jurisdiction early would prevent undue waste of time and money in conducting an unnecessary arbitration. However, the availability of such a challenge could also be abused by a party for purposes of delay or obstruction and therefore it may be more desirable to defer court control

until after the arbitral tribunal has issued its award (*ie*, in a proceeding to set aside an eventual award): see *Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session* (A/40/17, 3–21 June 1985) at paras 158–157.

…

68 The Commission, having considered the proposal of the Working Group, struck a compromise between the two competing policy considerations in the following manner. ***It allowed the tribunal to choose between deciding the issue of its jurisdiction in a preliminary ruling which would be subject to instant court control or in a procedural decision which may be contested only in an action for setting aside the award.*** Therefore, the tribunal was empowered to assess whether there was a greater risk of dilatory tactics or a possibility of time and costs being wasted by carrying out an unnecessary arbitration and decide whether it should make its decision on jurisdiction open to immediate court control. The learned authors of *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation, 1989), Howard M Holtzmann and Joseph E Neuhaus, describe the mode of court control that was finally adopted in the following terms (at p 486):

> First, under Article 8 a court may decide a jurisdictional objection in the course of deciding whether to refer a substantive claim before it to arbitration. During the pendency of this question before the court, the arbitral tribunal has discretion to continue the proceedings. Second, ***under Article 16, the arbitral tribunal has a choice whether to decide a jurisdictional question preliminarily or only in the final award.*** If it issues a preliminary ruling, that is subject to immediate review by a court. Otherwise, review must wait for a setting aside proceeding. The advantage of this procedure is that the arbitral tribunal can assess in each case and with regard to each jurisdictional question whether the risk of dilatory tactics is greater than the danger of wasting money and time in a useless arbitration. The dangers of delay in the arbitration while the court is reviewing a preliminary ruling are further reduced by provision of short time period for seeking court review, finality in the court's decision, and discretion in the arbitral tribunal to continue the proceedings while the court review is going on. ***These procedures … allow the tribunal to postpone decision of frivolous or dilatory objections, or ones that are difficult to separate from the merits of the case.*** …

> 69 From the above, it should be apparent that relief under Art 16(3) is not available when a party seeks to set aside a ruling which is predominantly on jurisdiction but also marginally deals with the merits because that is simply not the purpose that the drafters intended Art 16(3) to serve. In such situations, the dissatisfied party can seek to set aside the award pursuant to s 3(1) of the [International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA")] read with the relevant limbs of Art 34(2) of the Model Law. That would be the obvious and more appropriate remedy. …
>
> [emphasis in original omitted; emphasis added in bold italics]

39 The defendant also cites the above passages in support of its contention that the phrase "preliminary question" refers to a decision made at the early stages of the arbitration. In particular, the defendant relies on Prakash J's observation at [65] in *AQZ* that there is a policy interest in "allowing courts to rule on pleas as to the arbitral tribunal's jurisdiction *early* [to] prevent undue waste of time and money in conducting an unnecessary arbitration" [emphasis added]. The defendant contends that Art 16(3) of the Model Law and s 21(9)(*a*) of the AA were therefore drafted to only permit recourse to courts in respect of positive jurisdictional rulings that are made as a preliminary question at the *early* stages of the arbitration proceedings.[30]

40 In my judgment, the defendant's argument misses the point of the observations in *AQZ* reproduced above at [38]. From the quoted passages, it is clear that while the drafters of Art 16(3) of the Model Law were keen to balance the interest in preventing unnecessary arbitrations on the one hand against the possibility of dilatory tactics on the other, the solution adopted was to allow the tribunal "a choice whether to decide a jurisdictional question preliminarily or only in the final award" (*AQZ* at [68]). In other words, if the tribunal's concern is that time and costs may be wasted on an unnecessary arbitration, it can decide

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30 DWS para 32(a).

on its jurisdiction "preliminarily", in an *interim decision separate from the merits*, which would expose the tribunal's decision to "instant court control" under Art 16(3) of the Model Law (*AQZ* at [68]). On the other hand, if the tribunal's concern is that a party may use jurisdictional objections as a dilatory tactic, it can deal with questions of jurisdiction together with an award on the merits, which would only be subject to challenge at the setting aside stage.

41 Accordingly, it is clear that the phrase "preliminary question" was used by the drafters of Art 16(3) to refer to an interim decision or ruling that deals *solely* with the tribunal's jurisdiction, in contradistinction to an award that deals with *both* the tribunal's jurisdiction and the merits of the parties' claims. Crucially for present purposes, there is no suggestion in the drafting history of Art 16(3) that the phrase "preliminary question" was meant to refer only to a decision or ruling made at the *early* stages of an arbitration. There is therefore no merit in the defendant's submission. In my judgment, the term "preliminary question" in Art 16(3) of the Model Law, properly understood, refers simply to a decision or ruling made separate from and preliminary to any award on the merits, and *not* to a decision or ruling made at the preliminary (*ie*, early) *stages* of the arbitration.

42 In my view, the phrase "preliminary question", as used in ss 21(8) and 21(9) of the AA, should similarly refer to an interim decision or ruling on the tribunal's jurisdiction, which is separate to any award rendered on the substantive merits of the dispute. As I have noted at [37] above, ss 21(8) and 21(9) of the AA are modelled after Art 16(3) of the Model Law, and the defendant has not demonstrated why the phrase "preliminary question" should carry a different meaning in the AA than that in the Model Law or the IAA.

43 In addition, if the defendant's suggested interpretation is correct, it would lead to the anomalous consequence that the 2021 Decision is completely immune to any challenge. If the 2021 Decision is not, as the defendant contends, a ruling as a preliminary question because it was not made at an early stage in the Arbitration, then it would not fall within s 21(9)(*a*) of the AA. On the other hand, since the 2021 Decision does not in any way deal with the substantive merits of the Nitrogen and Removal Claims, it is also not an award that would be subject to a setting aside application under s 48 of the AA. Such an outcome is intuitively wrong. It cannot be that Parliament intended for s 21(9)(*a*) of the AA to operate in a manner as to result in such an anomaly, and it is a trite principle of statutory interpretation that a court will strive to interpret a statutory provision in a way that avoids anomaly or absurdity (*Tan Cheng Bock* at [38]). The anomaly that results from accepting the defendant's submission is a further compelling reason why its interpretation of s 21(9)(*a*) of the AA cannot be the correct one.

44 For completeness, I address two additional arguments raised by the defendant. First, the defendant relies on the difference in phrasing between ss 21(9)(*a*) and 21(9)(*b*) of the AA, to argue that the phrase "preliminary question" must refer to rulings made at an early stage of the arbitral proceedings. Section 21(9)(*a*) permits recourse to the court for positive jurisdictional rulings made as a "preliminary question", while s 21(9)(*b*) permits recourse for negative jurisdictional rulings made "at any stage of the arbitral proceedings". The defendant contends that if a party were indeed permitted to seek recourse for positive jurisdictional rulings made "at any stage of the arbitral proceedings", then s 21(9)(*a*) would be worded in a similar manner to s 21(9)(*b*) (*ie*, that a party could apply to court where there was a positive jurisdictional ruling made at "any stage of the arbitral proceedings"). According to the defendant, the fact that s 21(9)(*a*) is not worded in such a fashion goes to show

that recourse is only available in respect of positive jurisdictional rulings made at an early stage of the proceedings.[31]

45 In my view, this argument also misses the mark. As I have explained at [36]–[42] above, there is no suggestion in the legislative history of s 21(9)(*a*) that recourse under this provision should *only* be available in respect of positive jurisdictional rulings made at a certain stage of the proceedings. I therefore decline to read such a condition into s 21(9)(*a*). Moreover, while s 21(9)(*b*) of the AA constitutes a departure from the Model Law (as the Model Law does not provide for recourse against negative jurisdictional rulings, *per* Art 16(3) at [37] above), there is no interpretative evidence to indicate that the introduction of s 21(9)(*b*) was meant to alter the meaning of the phrase "preliminary question", to refer only to a ruling made at the early or initial stages of arbitration. Section 21(9)(*b*) was enacted in 2012, as it was thought that the absence of recourse against negative jurisdictional rulings may "defeat the parties' intention to arbitrate": *Singapore Parliamentary Debates, Official Report* (9 April 2012) vol 89 at p 65 (K Shanmugam, Minister for Law). There is nothing in the relevant parliamentary debates, or in any of the materials placed before me, that supports the defendant's contention that the difference in wording between ss 21(9)(*a*) and 21(9)(*b*) was *designed or intended* by Parliament to limit recourse under s 21(9)(*a*) only to rulings made at an early stage of the proceedings. I therefore do not think that the difference in wording between these two provisions is material for present purposes, and accordingly reject the defendant's argument.

46 The second additional argument pertains to a string of cases cited by the defendant, where a challenge to a tribunal's jurisdictional ruling was brought

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[31] DWS para 32(b).

under s 10(3) of the IAA (*in pari materia* with s 21(9) of the AA). The cases cited by the defendant are: *CLQ v CLR* [2022] 3 SLR 145, *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2014] 1 SLR 130, *Rakna Arakshaka Lanka Ltd v Avante Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131, and *BXY and others v BXX and others* [2019] 4 SLR 413. Ms Sim highlights that in these cases, the challenges under s 10(3) of the IAA were brought at an early stage in the arbitral proceedings.[32]

47 In my view, these cases are of limited assistance to the defendant. At best, they illustrate that as a matter of practice, jurisdictional challenges do commonly tend to arise at an early stage in the arbitral proceedings. This may well be the case, since jurisdiction is ordinarily a natural precursor to the tribunal's determination of the merits of the parties' claims. However, the cases cited go no further than that. Crucially, none of the cases referred to by the defendant stands for the proposition that a jurisdictional challenge under s 10(3) of the IAA or s 21(9) of the AA *must necessarily* be brought only at an early or initial stage of the arbitral proceedings or otherwise be barred. I therefore find these cases to be of limited assistance to the issue at hand.

48 In sum, I disagree with the defendant that s 21(9)(*a*) of the AA only permits a party to challenge a positive jurisdictional ruling made at an early stage of the arbitral proceedings. Properly understood, the phrase "preliminary question" simply means that a party is only entitled to seek relief under s 21(9)(*a*) if the jurisdictional ruling takes the form of an interim ruling or decision, which does not in any way touch on the substantive merits of the parties' claims. In the present case, it is not disputed that the 2021 Decision deals *solely* with the question of the Arbitrator's jurisdiction to issue the Further

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[32] DWS para 36.

Award. Accordingly, I find that the 2021 Decision constitutes a ruling as a preliminary question within the meaning of s 21(9)(*a*) of the AA, and that the plaintiff is therefore not barred from making the present application.

49 As a final point on this issue, I would add that *even if* the defendant is correct in its interpretation of s 21(9)(*a*) of the AA, I would be prepared to find that the 2021 Decision *is* a ruling made at the initial stages of an arbitral proceeding, and therefore, the plaintiff is in any event entitled to make the present application. The facts of this case can be distinguished from *Jeffrey Tang (HC)*, where the setting aside application was brought *after* the parties had attended a further hearing on whether the January Award should be reversed, and the arbitrator had proceeded to issue the March Award, reversing the January Award in part (as noted above at [25]). In the present case, assuming for present purposes that the Arbitrator *does* have jurisdiction to issue the Further Award, the parties would conceivably have to go on to address the merits of the defendant's claim in respect of the Nitrogen and Removal Claims by way of further submissions, and quite possibly attend another oral hearing before the Arbitrator. Accordingly, the 2021 Decision may be characterised as a ruling made at the initial stages of a *new phase* of the Arbitration subsequent to the 2014 Award, such that it is subject to challenge under s 21(9)(*a*) of the AA. It is also plain that the plaintiff could not have raised its jurisdiction objection any earlier in the Arbitration. The question whether the Arbitrator has jurisdiction to issue the Further Award only arose when the defendant requested that the Arbitrator do so – that request was made by the defendant in August 2020 (see [13] above). In response, the plaintiff raised its jurisdiction challenge on 19 October 2020, before any other step was taken.

50 Therefore, even if I am wrong in my interpretation of s 21(9)(*a*) of the AA, the plaintiff is nonetheless not barred from bringing the present application.

Having answered Issue 1 in the negative, I turn now to consider the substantive merits of the plaintiff's application.

Issue 2: Does the Arbitrator have jurisdiction to issue the Further Award?

51 As can be seen from the parties' cases summarised at [18] and [20] above, the crux of the present dispute pertains to whether the 2014 Award was a partial award on the parties' claims, or a final award. At the outset, I note that it is common ground between the parties that an award can be "final" in a number of ways. As explained by the Court of Appeal in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 ("*Persero*") at [51]–[53], an award can be "final" in the following ways:

(a) First, an award is "final" if it resolves a claim or a matter in an arbitration with preclusive effect (*ie*, the same claim or matter cannot be re-litigated).

(b) Second, a "final" award can refer to an award that has achieved a sufficient degree of finality in the arbitral seat. In other words, the award is no longer susceptible to being appealed against or being subject to annulment proceedings in the arbitral seat.

(c) Third, a "final" award can refer to the last award made in an arbitration which disposes of all remaining claims.

52 In the present case, it is not in dispute that the 2014 Award is "final" in the first and second ways described above at [51].[33] Nor is it seriously in dispute that as a general proposition, a conditional award can be "final" in all of the

[33] DWS para 43.

three ways detailed in *Persero*. In this regard, both sides rely on the case of *Konkola Copper Mines plc v U&M Mining Zambia Ltd* [2014] EWHC 2374 (Comm) ("*U&M Mining*"), as an illustration of how a conditional award can be dispositive of all of the issues in an arbitration.[34] I will return to the case of *U&M Mining* at [68] below.

53 The central question before me is whether the 2014 Award dealt with *all* the issues that were the subject of the Arbitration, such that the 2014 Award is final in the third sense described above at [51(c)]. In my view, the answer to this question is ultimately to be found by carefully interpreting the 2014 Award.

54 The principles applicable to interpreting an arbitral tribunal's decision, albeit for the purposes of determining whether a tribunal's decision constitutes an award or a procedural decision, were helpfully summarised in the English High Court decision of *ZCCM Investment Holdings Plc v Kansanshi Holdings Plc and another* [2019] EWHC 1285 (Comm) ("*ZCCM Investment*"). While the facts of *ZCCM Investment* are distinguishable, I find the following observations (with the necessary modifications) helpful in assisting a court to determine whether an arbitral award is dispositive of all the issues in an arbitration (at [40]):

> 40. A consideration of these authorities (and also of the cases of: *Michael Wilson v Emmott* [2009] 1 Lloyd's Rep 162 (Teare J), *Enterprise Insurance Company Plc v U-Drive Solutions (Gibraltar) Limited* [2016] EWHC 1301 (QB) at [39] (HHJ Moulder as she then was) and *The Trade Fortitude* [1992] 1 Lloyd's Rep 169 (Anthony Diamond QC)) however suggests the following points:
>
> > a) The Court will certainly give ***real weight to the question of substance and not merely to form:*** *Emmott* at paragraph 18 (by concession); *Russell on Arbitration* (24th edition, 2015) at [6-003].
> >
> > …

[34] PWS para 25; DWS para 45.

> d) ***There is a role however for form. The arbitral tribunal's own description of the decision is relevant, although it will not be conclusive in determining its status***: *The Trade Fortitude* at 175 *Emmott* at [19-20].
>
> e) It may also be relevant to consider ***how a reasonable recipient of the tribunal's decision would have viewed it***: *Emmott* at [18]; *Ranko* p 4.
>
> f) ***A reasonable recipient is likely to consider the objective attributes of the decision relevant. These include the description of the decision by the tribunal***, the formality of the language used, the level of detail in which the tribunal has expressed its reasoning: *Emmott* at [19 -20]; *Uttam Galva Steels* at [29]; *The Trade Fortitude* at 175; *The Smaro* at 247.
>
> g) While the authorities do not expressly say so I also form the view that:
>
> > i. A reasonable recipient would also consider such matters as whether the decision complies with the formal requirements for an award under any applicable rules.
> >
> > ii. The focus must be on a reasonable recipient with all the information that would have been available to the parties and to the tribunal when the decision was made. It follows that the background or context in the proceedings in which the decision was made is also likely to be relevant. …
>
> [emphasis added in bold italics]

55 Bearing these principles in mind, and having carefully considered the evidence before me, I find that the 2014 Award *did* deal with *all* the issues that formed the subject of the Arbitration, such that the Arbitrator is *functus officio*. I detail my reasons below.

The Arbitrator chose to make a quantum award rather than adjourn the decision on quantum

56 First, I agree with the plaintiff's argument at [18(a)] above, that it is clear from the 2014 Award that the Arbitrator made a decision on the quantum that

the plaintiff was liable to pay the defendant for the Nitrogen and Removal Claims, *instead of* reserving his jurisdiction to make a quantum award at a later point in time. The Arbitrator therefore decided to *fully resolve* the parties' disputes over the Nitrogen and Removal Claim in the 2014 Award.

57 In the 2014 Award, the Arbitrator began his discussion of the Nitrogen Claim by considering whether as a matter of law, the defendant had to first make payment to RWS, before the defendant could bring a claim against the plaintiff. After considering the English cases of *Randall v Raper* (1858) EB & E 84 and *Total Liban SA v Vitol Energy SA* [2001] QB 643, the Arbitrator concluded that there was no need for the defendant to do so.[35] The Arbitrator therefore moved on to consider the quantum that the plaintiff should be ordered to pay the defendant. However, the Arbitrator noted that there was a risk of the defendant obtaining a windfall, as the defendant had yet to pay RWS for the Nitrogen and Removal Claims. The relevant paragraphs of the 2014 Award are laid out in full as follows:[36]

> 238. …
>
> f. However, I bear in mind the need for some degree of caution as [the sum for the Nitrogen Claim] has apparently not been paid to RWS. ***Case law has recognised that the Court can make an award on quantum conditional upon the money being paid to a third party or that it is held on trust for that purpose***: in *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GMBH* [2008] EWHC 2210, the Court held at [80] that:
>
> > 'In certain circumstances where a windfall might occur it is appropriate, as identified in *Total Liban* at 663 to 664, ***for the court to adjourn the decision on quantum or, for instance, to make a quantum award on condition that the money is paid to a third party or that it is held on trust for that purpose.*** The purpose of that type of order in this case

[35] PBCP vol 1 pp 285–286, paras 238(b) and (c).

[36] PBCP vol 1 pp 288–289, paras 238(f)–(h).

> would be to prevent Biffa from obtaining a windfall and to ensure that the liability of Biffa to MEH on which the award of quantum would be premised was properly discharged.'
>
> The principle in *Biffa* recognising the need for an ***appropriate arrangement*** to be in place to prevent a windfall is uncontroversial. The [defendant] in its submissions on this item as set out in the letter dated 28 April 2014 from M/s Allen & Gledhill LLP, does not assert that considerations in relation to a windfall are irrelevant, but instead asserts that the risk of a windfall does not arise in this case.
>
> g. In my view, there is a risk of the [defendant] enjoying a windfall in the event that RWS does not proceed to make this claim from the [defendant]. …
>
> h. In the premises, I will make an order for the [plaintiff] to make payment to the [defendant] for this head of damage as itemised at page 988 of Mr Sidhwani's affidavit, up to a maximum of $1,099,162.46, ***upon the [defendant] making payment to RWS in respect of such items set out under this head of damage.***
>
> [emphasis in original omitted; emphasis added in bold italics and underlined bold italics]

58 In my judgment, it is clear from the passage above that having noted the risk of a windfall to the defendant, the Arbitrator considered that there were two ways or "appropriate arrangement[s]" by which that risk could be mitigated. Based on the extract from *Biffa Waste* quoted by the Arbitrator, the two options were to (a) adjourn the decision on quantum; or (b) make a conditional award. Crucially, the Arbitrator then chose the *second* option, *ie*, to make a conditional award – that much is clear from paragraph 238(h) of the Final Award (as reproduced at [57] above). In my view, this is also plainly evident from the fact that the Arbitrator prefaced the extract from *Biffa Waste* with a comment relating to the second option, *ie*, that "[c]ase law has recognised that the Court can make an award on quantum conditional upon the money being paid to a third party or that it is held on trust for that purpose". Further, in respect of the Nitrogen Claim, the Arbitrator then went on to make the specific order that the plaintiff make payment to the defendant up to the maximum sum of

$1,099,162.46 *conditional* upon the defendant paying RWS.[37] Such an order clearly accords with the second option in *Biffa Waste* of making a conditional award, and not the first option of adjourning the decision on quantum.

59 Likewise, the Arbitrator went on to make a similar conditional award in respect of the Removal Claim:[38]

> 239. In respect of the sub-claim of S$33,277.00 for the removal of the failed motors and installation of temporary motors, I am satisfied that this sum is related to the motor failures which I find to have been caused by the fundamental flaw. I also note that this sum had not been challenged by the [plaintiff] in cross-examination, ***and similarly make an order for the [plaintiff] to pay the [defendant] for this head of damage, up to a maximum of S$33,277.00, when the [defendant] pays RWS in respect of this head of damage.***
>
> [emphasis added in bold italics]

60 As such, it is clear to me that the Arbitrator did *not* choose to reserve his jurisdiction, and instead decided to make a conditional award in respect of both the Nitrogen and Removal Claims, *ie*, the second option in *Biffa Waste.* I note however that in the 2021 Decision, the Arbitrator appears to rely on the *first* option in *Biffa Waste*, as the basis for concluding that he still retained jurisdiction to issue the Further Award. The relevant paragraphs in the 2021 Decision are as follows:[39]

> 62. The [2014] Award is expressly conscious of the need to avoid the [defendant] enjoying a windfall in the event that RWS / DCP Sentosa did not proceed against the [defendant] for the RWS Claims. As the authorities of *Randall v Raper*, and *Total Liban* establish, in circumstances where a windfall might accrue to a party, ***it could be appropriate to decide on the liability of that party, but reserve the question of damages for future assessment where it is difficult to assess future loss***.

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37 PBCP vol 1 p 289, para 238(h).

38 PBCP vol 1 p 289, para 239.

39 PBCP vol 1 p 49, paras 62 and 64.

> …
>
> 64. Therefore I find that the issue of the quantum of damages that the [plaintiff] is liable to the [defendant] for, ***is within my jurisdiction to decide, but was not decided in the [2014] Award because at that point, RWS / DCP Sentosa had not pursued the RWS Claims against the [defendant]***. To the limited extent of this specific issue, I am not *functus officio* and retain the jurisdiction to make a Further Award on this matter.
>
> [emphasis added in bold italics and underlined bold italics]

61 This, with respect to the Arbitrator, appears to me to be a change in tack in the Arbitrator's reasoning. As detailed at [58] above, in the 2014 Award, the Arbitrator clearly decided to adopt the *second* option set out in *Biffa Waste*, of issuing a conditional award for the Nitrogen and Removal Claims. In the circumstances, I respectfully disagree with the Arbitrator that the 2014 Award reserved the question of damages for the Nitrogen and Removal Claims for future assessment. In my judgment, the Arbitrator chose to fully resolve the Nitrogen and Removal Claims in the 2014 Award and therefore cannot have retained jurisdiction in respect of these claims *after* the 2014 Award. Accordingly, the Arbitrator does not, in my judgment, have jurisdiction now to issue the Further Award.

The 2014 Award does not contain an express reservation of jurisdiction

62 Second, I also find that the Arbitrator intended for the 2014 Award to be fully dispositive of *all* issues in the Arbitration, such that he does not possess jurisdiction to issue *any* further award. In this regard, I find it significant that the Arbitrator did not expressly reserve any jurisdiction in the 2014 Award, *despite* acknowledging in the 2021 Decision that any reservation of jurisdiction would have been made "in clear and categorical language".[40] Let me elaborate further.

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[40] PBCP vol 1 p 42, para 25.

63 In the 2021 Decision, the Arbitrator considered an argument raised by the defendant that the Arbitrator's statement in the 2014 Award that he "*will make* an order for the [plaintiff] to make payment to the [defendant] for [the Nitrogen Claim]" [emphasis added] could be interpreted as a reservation of jurisdiction to make further orders. The Arbitrator roundly *rejected* this argument in the following terms:[41]

> 25. ***The reservation of jurisdiction is a significant matter that would have been expressly indicated in clear and categorical language.*** Such a reservation would not have been contained in a phrase that is capable of interpretation in two ways: either that I will presently make an order; or that I intend to make an order in the future.
>
> [emphasis in original omitted; emphasis added in bold italics]

64 Given the Arbitrator's own observations above, it is clear to me that the Arbitrator *did not* intend to reserve any jurisdiction in the 2014 Award. It is not in dispute that there was no express reservation of jurisdiction in the 2014 Award, or any similar statement expressed in "clear and categorical language". There is also no satisfactory explanation for why this is the case, if the Arbitrator had indeed intended to reserve jurisdiction in the 2014 Award. For instance, while the Arbitrator ultimately concludes in the 2021 Decision that there was a reservation of jurisdiction in the 2014 Award, there is no discussion or explanation by the Arbitrator how this is the case, particularly when the Arbitrator also acknowledged in the *very same* decision that any reservation of jurisdiction would have been made by the Arbitrator clearly and categorically. In the circumstances, I am driven to find that the Arbitrator's conclusion in the 2021 Decision (*ie*, that there was a reservation of jurisdiction in the 2014 Award) does not cohere with the objective evidence. On the contrary, the

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41 *Ibid*.

objective evidence demonstrates compellingly that the Arbitrator did *not* intend to reserve any further jurisdiction to himself in making the 2014 Award.

65 The defendant argues that the absence of an express reservation of jurisdiction in the 2014 Award is immaterial, as there is no requirement in law that a reservation of jurisdiction *must* always be made expressly.[42] While the defendant's statement of the law *may* well be correct, I do not need to decide the point for the purposes of this application and therefore do not arrive at any definitive conclusion on it. For present purposes, neither party has pointed me to any authority that stands for or supports the proposition that an arbitrator can only reserve his jurisdiction through express words. Mr Ng for the plaintiff highlighted academic commentary that encourages arbitrators to make any reservation of jurisdiction in express terms. For instance, my attention was drawn to the following observations in Ray Turner, *Arbitration Awards – A Practical Approach* (Blackwell Publishing, 2005) at para 4.3.5:

> 4.3.5 Reserved matters
>
> This relates to matters to be left over to be resolved by a subsequent award. Unless such reservation has been agreed between the parties, the arbitrator needs at some stage to decide what, if any, matters should be so reserved. There could be, for instance, remaining issues, interest, or costs; or less apparent matters such as the consequences of subsequent failure to comply with a performance award. ***He should specifically reserve those elements,*** commonly by an item following the operative part of the award and prior to his signature. He should also maintain a further checklist so as to ensure that no reserved matters are subsequently overlooked.
>
> [emphasis in original omitted, emphasis added in bold italics]

66 In the absence of any binding legal authority cited to me, I am prepared to assume (without deciding) the correctness of the defendant's argument that

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42 DWS para 48.

as a matter of law, there is no legal requirement that a reservation of jurisdiction by an arbitrator must be in express terms. Nonetheless, that argument does not assist the defendant much and in fact, misses the broader point in the present case. I have already noted above at [63] that it was acknowledged by the Arbitrator in the 2021 Decision that he would have made any reservation of jurisdiction in "clear and categorical language". In light of this, *even if* the Arbitrator was not required to expressly reserve jurisdiction as a matter of law, the *absence* of any express reservation of jurisdiction goes to show that to the Arbitrator's mind, there was *no* intention on the Arbitrator's part to reserve any jurisdiction in the 2014 Award. This, in my judgment, is strong objective evidence that the Arbitrator *intended* for the 2014 Award to be final and dispositive of all remaining issues in the Arbitration. It therefore buttresses my conclusion that the Arbitrator was *functus officio* once the 2014 Award was rendered.

The 2014 Award fully resolved the disputes between the parties

67 Third, in addition to my conclusions at [61] and [66] above, I also find that the 2014 Award did, as a matter of fact, fully resolve all the disputes that formed the subject of the Arbitration. Accordingly, there is in my view no doubt that the 2014 Award is "final" in the third sense described in *Persero* (noted at [51] above).

68 As noted above at [52], both parties rely on the case of *U&M Mining* for the general proposition that a conditional award can be dispositive of all of the issues in an arbitration. In *U&M Mining*, the arbitral award ordered that the respondent in the arbitration ("KCM") pay certain sums, "unless KCM shows cause, supported by evidence, within 14 days of the [award], why such an order should not be made" (the "Show Cause orders") (at [83(ii)]). KCM sought, *inter*

alia, a declaration by the English High Court that the Show Cause orders did not constitute a valid award (at [89]). KCM contended that a conditional award was not "a creature known to the law", as a tribunal either had to make a provisional order, or "an outright award which left nothing in abeyance at all and was final and conclusive in every sense of the word on the date it was issued so it could immediately be enforced" (at [85]).

69 Cooke J rejected the argument advanced by KCM, as follows (at [97]):

> ***I do not see why, as matter of principle … an award cannot be final and conclusive in its terms where it clearly provides for specific relief, including payments of money, which only bites at a point in the future***, in the absence of submission and evidence from an absent party to the contrary. The tribunal has made decisions which are final and complete and are not subject to further decisions on its part or of any other person or body unless a specified contingency occurs. ***Such an award is complete and final on its own terms, albeit conditional. Whilst this might present difficulties for enforcement purposes, that is nothing to the point and does not prevent it from being an award which binds the parties.*** So, here, those parts of the Second Award which contained the 'show cause' provisions were final, complete and conclusive, as between the parties, albeit conditional.
>
> [emphasis added in bold italics]

70 The above proposition of law is not disputed by either party. The defendant, however, seeks to distinguish the facts of *U&M Mining* from the present case. In this regard, Ms Sim for the defendant argues that in *U&M Mining*, once the 14-day period for KCM to show cause had expired, there was no further issue for the tribunal to decide.[43] The award in *U&M Mining* was therefore final, in the sense that it was dispositive of all of the issues in the arbitration. On the other hand, in the present case, there are "clearly remaining

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43 DWS para 45(b).

issues" for the Arbitrator to determine,[44] as the 2014 Award did not determine the "precise extent" of the plaintiff's liability to the defendant for the Nitrogen and Removal Claims.[45] Accordingly, the defendant's position is that the Arbitrator retains jurisdiction to issue the Further Award.

71 I note that in the 2021 Decision, the Arbitrator also adopts a similar line of reasoning with regard to *U&M Mining*. The Arbitrator distinguishes *U&M Mining* on the basis that the quantum that KCM was liable to pay was certain, whereas in the present case, the quantum that the plaintiff is liable to pay for the Nitrogen and Removal Claims remains to be determined. The relevant paragraphs of the 2021 Decision are reproduced below:[46]

> 60. In my opinion however, the case of *U&M Mining* is distinguishable from the present case on the key ground that the amount due from the defendant was known and certain at the point the award was made. The condition related to the question of the defendant's liability to pay.
>
> 61. By contrast, the instant case is the opposite – the [plaintiff's] liability to pay the [defendant] is certain and determined by the [2014] Award, but the question of the quantum due from the [plaintiff] to the [defendant] was unknown at the point of the [2014] Award and depended on the [defendant] making payment to RWS / DCP Sentosa in respect of the items under those heads of damage. This question has now presently arisen for determination.

72 With respect to the Arbitrator, I do not agree that the 2014 Award left the "precise extent" of the plaintiff's liability to the defendant unresolved, such that the Arbitrator necessarily retains jurisdiction to issue the Further Award.[47] The purport of the Arbitrator's orders in the 2014 Award was for the plaintiff to

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44 DWS para 45(c).

45 DWS para 41.

46 PBCP vol 1 p 48, paras 60–61.

47 DWS para 41.

pay the defendant *whatever sum* the defendant ultimately in fact paid to RWS for the Nitrogen and Removal Claims, up to a fixed maximum amount. This much is clear from the Arbitrator's caution in the 2014 Award that "there is a risk of the [defendant] enjoying a windfall" if RWS did not end up making claims against the defendant for the Nitrogen and Removal Claims, and that "[i]n the premises", the Arbitrator would make a conditional order for the plaintiff to pay the defendant for the Nitrogen and Removal Claims.[48] It is evident from the Arbitrator's reasoning that his intent was to prevent the defendant from recovering *more* than what it actually paid to RWS for the Nitrogen and Removal Claims. The purpose of the conditional orders was therefore to ensure that the plaintiff paid the defendant the *same amount* that the defendant paid to RWS for the Nitrogen and Removal Claims, up to a fixed maximum amount.

73 I therefore find that the Arbitrator *did* decide on the extent of the plaintiff's liability. As noted in David St John Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration* (Sweet & Maxwell, 24th Ed, 2015) at para 6-092, an award is sufficiently certain if it "sets out the method of calculation of the amount due to be paid". In my judgment, while the 2014 Award admittedly does not contain a *specific sum* to be paid by the plaintiff for the Nitrogen and Removal Claims, the 2014 Award nevertheless sets out the *method* by which this precise sum is to be derived (*ie*, whatever amount the defendant pays to RWS, up to a maximum amount). The 2014 Award therefore "clearly provides for specific relief", such that it is "complete and final on its own terms" (*per U&M Mining* at [97]). In the circumstances, I reject the defendant's argument that the 2014 Award left the extent of the plaintiff's liability unresolved, with a resultant implicit reservation of the Arbitrator's jurisdiction in the 2014 Award.

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[48] PBCP vol 1 pp 288–289, paras 238(g)–(h) and 239.

74 On a related point and for the avoidance of doubt, I do not agree with the plaintiff's characterisation of the 2014 Award as being "self-executing" (see [18(b)] above). In my view, the term "self-executing" distracts from the core issue in contention, which is whether the Arbitrator reserved his jurisdiction in the 2014 Award, and thus retains jurisdiction to issue the Further Award.

75 Moreover, the 2014 Award is *not* immune to difficulties in enforcement. As the facts of the present case illustrate, the 2014 Award does not state what evidence (if any) the defendant must provide before the plaintiff's liability to pay the defendant for the Nitrogen and Removal Claims crystallises, nor does it provide for how any disputes arising out of the Arbitrator's conditional orders should be resolved. As the defendant points out, it is well established that the court's approach toward the enforcement of arbitral awards is "a mechanistic one which does not require judicial investigation by the court of the jurisdiction in which enforcement is sought": *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another* [2006] 3 SLR(R) 174 at [42].[49] Accordingly, questions arise as to whether (a) the Arbitrator's conditional orders in the 2014 Award can be enforced, when there are pending disputes as to whether the plaintiff has been furnished with sufficient evidence of the defendant's payment to RWS for the Nitrogen and Removal Claims; and (b) if not, whether it is appropriate for such disputes to be resolved by a court hearing an application to enforce the 2014 Award. In my view, these are matters that remain to be determined by a court hearing an application to enforce the 2014 Award, should the defendant choose to make such an application in future and I say nothing further about them. For present purposes, I do not agree that the 2014 Award can fairly be characterised as "self-executing".

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[49] DWS para 61(a).

76 In any case, whether or not the 2014 Award is "self-executing" is ultimately ancillary to my decision – nothing turns on this. While there may be potential difficulties in enforcing the 2014 Award as highlighted above at [75], it does not inexorably follow that the Arbitrator made a reservation of jurisdiction in the 2014 Award. As was observed in *U&M Mining* at [97], a conditional award may "present difficulties for enforcement purposes" but that does not prevent the award from being complete, final and binding on the parties. To conclude otherwise would place the cart before the horse. It is the omission of the Arbitrator to make an express reservation of jurisdiction in the 2014 Award, or more specifically his choice to make a conditional award, that has, at least partly, caused the potential enforcement difficulties discussed above at [75], and not the other way around. The fact that there may be enforcement difficulties with the 2014 Award cannot be an independent reason to reverse engineer and read a reservation of jurisdiction into the 2014 Award, and more so when weighed against the other objective evidence as detailed above at [56]–[73].

The 2014 Award has the attributes of a final award

77 I turn to the fourth and final reason for my conclusion that the 2014 Award did not reserve any jurisdiction to the Arbitrator to issue a further award.

78 As noted in *ZCCM Investments* (at [54] above), in determining the nature of a tribunal's decision, it is relevant to consider how a "reasonable recipient" would view the decision, after considering the objective attributes of the decision. In this regard, I find that there are two attributes of the 2014 Award that bolster the conclusion that it is the *last* award and dispositive of all the issues in the Arbitration.

79 First, the 2014 Award is titled "Final Award". While this alone is not determinative of the nature of the award, I find that a reasonable recipient of the 2014 Award would take the title to mean that it was the last award in the Arbitration.

80 Second, I note that the 2014 Award contains a final order on costs. The relevant paragraphs are as follows:[50]

> XV. COSTS
>
> 246. The [defendant] has substantially, but not completely, succeeded in this arbitration. I however agree with the [defendant] that much of the arbitration centred around the issue of the cause of the Chiller motor failures, which I found in the [defendant's] favour.
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> 247. In the premises, I will award the [defendant] 70% of its costs plus 70% reasonable disbursements (including the arbitrator's fees and disbursements of S$154,940.28 (inclusive of GST) already paid by the parties …

81 The cost order purports to deal with *all* the costs of the arbitration, including the arbitrator's fees. As noted above at [18(c)], the plaintiff submits that a final costs order is "an unmistakable feature of a full, final and conclusive award".[51] The plaintiff highlights the following passage from *Jeffrey Tang (CA)* at [35]:[52]

> 35 We do not think there could be any doubt that the 'final award' must be the one that completes everything that the arbitral tribunal is expected to decide, ***including the question of costs.*** Costs are invariably an item of claim both in civil litigation in the courts as well as in arbitral proceedings. It was such an item in the present arbitration.
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> [emphasis added in bold italics]

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50 PBCP vol 1 p 293, paras 246–247.

51 PWS paras 68–69.

52 PWS para 70.

82 In the 2021 Decision, the Arbitrator observed that *Jeffrey Tang (CA)* is "no longer authoritative",[53] as s 19B of the IAA was subsequently enacted to statutorily reverse the Court of Appeal's finding that an arbitral tribunal is permitted to reconsider and revise its decision(s), up until a final award is given (at [38] of *Jeffrey Tang (CA)*). The plaintiff submits that the observations of the Court of Appeal in *Jeffrey Tang (CA)* at [35] are undisturbed by the enactment of s 19B of the IAA and therefore remain good law.[54]

83 I do not find it necessary to reach any definitive conclusion on this point for the purposes of deciding the issue at hand. Nor do I venture so far as to conclude that the last award in an arbitration *must* invariably include an award on costs. However, for the purposes of the application before me, I agree with the plaintiff that a final costs order would at least be reasonably common in the last award in an arbitration. As noted in Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) at para 9-18:

> All awards are final and binding, subject to any available challenges. However, the term 'final award' is customarily reserved for an award that completes the mission of the arbitral tribunal. Subject to certain exceptions, the delivery of a final award renders the arbitral tribunal *functus officio*: it ceases to have any further jurisdiction in respect of the dispute, and the special relationship that exists between the arbitral tribunal and the parties during the currency of the arbitration ends. This has significant consequences. An arbitral tribunal should not issue a final award until it is satisfied that its mission has actually been completed. ***If there are outstanding matters to be determined, such as questions relating to costs (including the arbitral tribunal's own costs), the arbitral tribunal should issue an award expressly designated as a partial award***.
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> [emphasis added in bold italics]

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53 PBCP vol 1 p 42, para 29.

54 PWS para 31.

84 In other words, it is customarily the case that costs, including the arbitrator's own costs, are the *last* issue to be dealt with by the tribunal in the arbitral proceedings. Thus, coming back to the question of how a reasonable recipient would view the 2014 Award (see [78] above), I find that from a reasonable recipient's perspective, the inclusion of a final costs order in the 2014 Award is yet another *indicium* that the 2014 Award was the *last* award in the Arbitration and dispositive of all issues therein. In my judgment, the 2014 Award is therefore final in all three senses described in *Persero* (noted above at [51]). As a consequence, the Arbitrator is *functus officio* and lacks jurisdiction to issue any further award.

85 In light of my conclusion that the Arbitrator did not reserve any jurisdiction in the 2014 Award, whether expressly or implicitly, it is not strictly necessary for me to deal with the plaintiff's remaining argument that the parties, in their post-award correspondence, treated the 2014 Award as the last award.

Does the defendant have no further recourse in respect of the Nitrogen and Removal Claims?

86 I now turn to the defendant's final argument. The defendant contends that if it is found that the Arbitrator does not have jurisdiction to issue the Further Award, the defendant would be left without recourse in respect of the Nitrogen and Removal Claims.[55] As noted at [21] above, the defendant argues that it may not be able to commence a fresh arbitration against the plaintiff in relation to the Nitrogen and Removal Claims. Further, the defendant cannot request for an additional award under s 43(4) of the AA, as the 30-day timeline to do so has long passed. I have also noted at [75] above that there are unresolved questions as to whether the Arbitrator's conditional orders in the

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55 DWS para 56.

2014 Award can be enforced without difficulty, which are ultimately questions best answered by a court hearing an application to enforce the 2014 Award.

87 In my judgment, and for reasons similar to those stated at [76] above, the fact that the defendant may have no further recourse in respect of the Nitrogen and Removal Claims cannot *itself* be a basis for finding that the Arbitrator retains jurisdiction to issue the Further Award. The central question in this case is whether the Arbitrator reserved jurisdiction to issue a further award – that inquiry begins and ends with an examination of the 2014 Award. As I have found above at [84], the Arbitrator made no such reservation of jurisdiction. That really is the end of the matter.

88 Further, even if the defendant is ultimately left with no further recourse in respect of the Nitrogen and Removal Claims, I find some force in Mr Ng's submission that this is in part a result of the defendant's own doing. For one, the defendant did not seek an additional award from the Arbitrator within the timeline provided for in s 43(4) of the AA (for example, on the evidence needed to prove that the defendant had made payment to RWS for the Nitrogen and Removal Claims, in order for the plaintiff's liability to crystallise). Likewise, while there is case law and commentary to suggest that an arbitral award may be set aside if the exact sum to be paid is unclear (see *Official Assignee v Chartered Industries of Singapore Ltd* [1977–1978] SLR(R) 435, noted in *Arbitration in Singapore: A Practical Guide* (Sundaresh Menon CJ gen ed) (Sweet & Maxwell, 2nd Ed, 2018) at para 13.092), no such setting aside application was brought by the defendant. The defendant's application in HC/OS 1107/2014 was one seeking to set aside a *different* part of the 2014 Award, unrelated to the Arbitrator's orders on the Nitrogen and Removal

Claims.[56] Finally, the defendant has not, in any event, sought to enforce the 2014 Award against the plaintiff, despite nearly eight years elapsing since the issuance of the 2014 Award. No explanation has been offered by the defendant for this lapse in time.

89 For the foregoing reasons, I do not place weight on the defendant's argument that it will be left without recourse for the Nitrogen and Removal Claims, in the event it is found (as I have) that the Arbitrator does not possess jurisdiction to issue the Further Award.

Conclusion

90 I find that the 2014 Award was final and dispositive of all the issues in the Arbitration, such that the Arbitrator became *functus officio* once the 2014 Award was issued. I therefore allow the plaintiff's application in HC/OS 952/2021 and reverse the 2021 Decision. Further, I decide and declare that the Arbitrator has no jurisdiction to make any further award in SIAC Arbitration No 61 of 2012.

91 I shall hear the parties separately on the question of costs.

S Mohan
Judge of the High Court

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[56] JM-1 para 19(b) (PBCP vol 4 p 2041).

Ng Kim Beng and Benny Santoso (Rajah & Tann Singapore LLP) for the plaintiff;
Karnan s/o Thirupathy, Charlene Sim Yan and Tan Yu Qing (Legal Solutions LLC) for the defendant.
