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

**[2019] SGHC 260**

Originating Summons No 512 of 2018

Between

(1) BRQ
(2) BRR

… *Plaintiffs*

And

(1) BRS
(2) BRT

… *Defendants*

Originating Summons No 770 of 2018

Between

(1) BRS

… *Plaintiff*

And

(1) BRQ
(2) BRR

… *Defendants*

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# GROUNDS OF DECISION

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[Arbitration] — [Award] — [Recourse against award] — [Setting aside] — [Whether three-month time limit extended by request for correction]
[Arbitration] — [Award] — [Recourse against award] — [Setting aside] — [Breach of natural justice]
[Arbitration] — [Award] — [Recourse against award] — [Setting aside] — [Excess of jurisdiction]

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# v
# BRS and another and another matter

## [2019] SGHC 260

High Court — Originating Summons No 512 of 2018 and Originating Summons No 770 of 2018
Vinodh Coomaraswamy J
16–17, 22, 28 January 2019

18 November 2019

**Vinodh Coomaraswamy J:**

1 Before me are two applications to set aside the same arbitral award. The award is largely, but not entirely, in the claimants' favour. The earlier of the two applications before me is the claimants' application seeking to set aside that part of the award which is in the respondent's favour. One of the respondents in the arbitration brings the later of the two applications before me, seeking to set aside those parts of the same award which are in the claimants' favour.

2 I heard both applications together. I have dismissed both applications, thereby leaving the award intact. The parties have appealed against my decision. I now provide my reasons.

## Facts

### *The parties*

3 The arbitration was between BRQ and BRR as the first and second claimants and BRS and BRT as the first and second respondents. To avoid confusion, I shall refer to the parties by their positions in the arbitration rather than by their anonymised names or by their positions in the cross-applications before me. I shall therefore refer to BRQ and BRR as the first and second claimants respectively and to BRS and BRT as the first and second respondents respectively.

4 All four parties to the arbitration are companies incorporated in the same country. All sums of money relevant to the parties' dispute are denominated in the currency of that country. In order to preserve the parties' anonymity, I shall call that country "Lemuria" and refer to all sums of money in their Singapore dollar equivalents, rounded off.

5 The first claimant owns and operates power plants in Lemuria and is a wholly-owned subsidiary of an international energy and water company.[1] The second claimant is a special purpose vehicle established for the sole purpose of pursuing a government concession to build and operate a hydroelectric power plant ("the Project") along a major river in Lemuria.[2] The second claimant is now a wholly-owned subsidiary of the first claimant.

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1 First affidavit of CW1 in OS512/2018 filed on 30 April 2018, para 7.

2 First affidavit of CW1 in OS512/2018 filed on 30 April 2018, para 8.

6 The first respondent constructs and develops infrastructure and power projects.[3] The second respondent is the parent company of the first respondent. Until the first claimant acquired the entire share capital of the second claimant in 2012, the first and second respondents together owned 95% of the second claimant.

7 The first respondent is the only substantive party to both applications now before me. As a result of the claimants' discontinuance against the second respondent, the first respondent is the sole remaining defendant to the claimants' application. The first respondent is also the sole plaintiff in its own application. The second respondent is therefore not a party in substance to either application. Any reference to "the respondent" (in the singular) in these grounds is therefore a reference to the first respondent only.

### *The Securities Purchase Agreement*

8 The second claimant carried on work on the Project between 2007 and 2010. By the end of 2011, however, it had run out of funds. The respondents, its controlling shareholders at the time, were not in a position to inject more funds into the second claimant.[4] They therefore sought an external investor to fund the Project to completion.

9 The first claimant came in as that external investor. Under a Securities Purchase Agreement ("SPA")[5] entered into in 2012, the first claimant agreed to buy the entire share capital of the second claimant from the respondents.

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3 First affidavit of RW1 in OS770/2018 filed on 22 June 2018, para 5.

4 First affidavit of CW1 in OS512/2018 filed on 30 April 2018, para 11.

5 Respondent's Core Bundle vol 1, Tab 5.

10 The Project was still under construction when the parties entered into the SPA. The SPA therefore anticipated that the Project would be completed and commissioned in the near future.[6] Under the SPA, the first claimant agreed to acquire the second claimant – and through it, a completed and commissioned Project – at a price of $70m. This feature of the parties' transaction is the backdrop for a number of interconnected terms in the SPA. It is necessary to introduce these terms now to understand the parties' dispute:

(a) Under cl 9.1.1, the parties recorded that the various payments under the SPA were based on the express assumption that the Project would be certified by the first claimant's engineer as being fully operational, and therefore able to supply electricity for sale and to generate revenue, no later than 31 March 2013. This event is referred to as "wet commissioning". The date on which it actually took place is referred to as the wet commissioning date ("WCD").

(b) Under cl 9.1.4, the respondent undertook to be solely liable for any Cost Overrun in the Project so that neither claimant would have to bear any overrun. "Cost Overrun" is defined in the SPA as "any and all Project Costs in excess of" a stated figure.

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6 First affidavit of CW1 in OS512/2018 filed on 30 April 2018, paras 12 to 13.

(c) The respondent's obligation to bear the Cost Overrun was reiterated in cl 10.2.4, in which the respondent undertook to "bear and contribute or indemnify and hold harmless" the claimants against any and all Cost Overrun as required by cl 9.1.4.

(d) Under cl 6.4.1(b)(iv), the first claimant agreed to pay $5.1m of the purchase consideration directly to the second claimant, to be recorded in the second claimant's books as a loan due from the second clamant to the respondent (as the seller under the SPA). The SPA defines this loan as the "seller's subordinated loan" or "SSL".

(e) Under cl 9.7, if the respondent failed to pay any Cost Overrun despite being obliged to do so, the second claimant was entitled to reduce the SSL in its books against the unpaid Cost Overrun.

(f) Under cl 6.4.7, the respondent was obliged to furnish to the first claimant an unconditional irrevocable bank guarantee valid until 30 April 2013 in the amount of $6.9m ("Security Bond I").

(g) Under cl 9.3, if the WCD was after 7 April 2013, the first claimant had the right to call on Security Bond I.

(h) Under cl 9.11, the first claimant was entitled to monitor the development and construction of the Project until the WCD. This included the right to have access to the work site and a right to information and documents.

(i) Under cl 9.10(a), if the WCD was after 31 March 2013, the first claimant was entitled to require the respondent to cede control of the construction and commissioning of the Project to the first claimant. But

> if the first claimant exercised this right, it was obliged "to undertake the construction and commissioning of the Project in *the most prudent and cost effective manner*" [emphasis added].

11 There is a separate contract, the Bulk Power Transmission Agreement ("BPTA"), which is also relevant to the parties' dispute. In 2009, while the respondents still controlled the second claimant,[7] the second claimant executed the BPTA with the company which runs the power grid in Lemuria ("the Grid Company"). Under the BPTA, the second claimant agreed to pay transmission charges to the Grid Company in exchange for access to its power grid for 25 years. Access to the grid was necessary for the second claimant to transmit electricity generated by the Project to consumers and thereby to earn revenue.[8]

12 The BPTA obliged the second claimant to begin paying transmission charges to the Grid Company even before wet commissioning. As the first claimant was paying the entire consideration under the SPA up front, it wanted to secure itself against the second claimant's potential liabilities under the BPTA if wet commissioning was delayed.[9] Accordingly, cl 11.4 of the SPA obliged the respondent (together with another party whose identity is not material) to indemnify the second claimant for any transmission charges which the second claimant became obliged to pay the Grid Company on or before the WCD.

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7 First affidavit of CW1 in OS512/2018 filed on 30 April 2018, para 22.

8 Claimants' Core Bundle, vol 6, pp 3126 to 3127, Bulk Power Transmission Agreement dated 21 October 2009.

9 First affidavit of CW1 in OS512/2018 filed on 30 April 2018, para 23.

***Delays in the Project***

13 It is undisputed that the Project failed to achieve wet commissioning on 31 March 2013 as contemplated in cl 9.1.1 of the SPA.[10] One reason for this was the failure of the penstock. The penstock is a pipe which transports water at high pressure to the turbines. A section of the penstock known as the "Y-piece" was found to be defective.[11] The Y-piece failed twice under hydrostatic testing, in March and June 2013. It passed hydrostatic testing only in October 2013. But, during further hydrostatic testing in early November 2013, cracks developed in other sections of the penstock.

14 From November 2013, the first claimant began to oversee the Project more closely. But it did so without formally exercising its right to take control of the Project under cl 9.10(a) of the SPA (see [10(h)] above). Finally, in March 2014, the first claimant did exercise that right and issued a takeover notice taking full control of the Project.

15 The first claimant's first order of business was to address the penstock failure. It did so by, amongst other things, re-lining a substantial section of the penstock with steel. At the same time, it also took steps to rectify defects in other areas of the Project such as the transmission line.[12]

16 A discrete part of the Project was eventually wet commissioned, but only on 31 October 2015. The claimants continued work on the remainder of the

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10 First affidavit of CW1 in OS512/2018 filed on 30 April 2018, para 26; First affidavit of RW1 in OS770/2018 filed on 22 June 2018, para 50.

11 Final Award dated 24 January 2018 ("Award"), paras 19 to 20.

12 First affidavit of CW1 in OS512/2018 filed on 30 April 2018, para 27.

Project. The Project as a whole, however, never achieved wet commissioning. It was eventually abandoned when the penstock ruptured and tragically killed three people.[13]

17 For purposes of the arbitration and these applications, the parties have proceeded on the basis that the Project achieved wet commissioning on 31 October 2015, *ie*, the date on which the first discrete part of the Project was wet commissioned.

## The arbitration

18 Clause 14 of the SPA provides for disputes to be arbitrated in Singapore under the SIAC Rules. On 31 December 2014, while the Project was still under construction, the claimants initiated the arbitration under cl 14 by filing a notice of arbitration with the Singapore International Arbitration Centre ("the SIAC").

### *The claims and counterclaims*

19 In the arbitration, the claimants sought to recover from the respondent the following principal sums:[14]

(a) The entire Cost Overrun up to the WCD, *ie*, 31 October 2015, amounting to $70.8m ("the Cost Overrun claim"); and

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13 First affidavit of CW1 in OS512/2018 filed on 30 April 2018, para 28.

14 First affidavit of CW1 in OS512/2018 filed on 30 April 2018, para 30; Notice of Arbitration dated 31 December 2014, Section V.

(b) The transmission charges which the second claimant paid to the Grid Company under the BPTA up to the WCD, amounting to $13.7m ("the BPTA Charges claim").

20 The respondent denied liability for both claims. Its principal contention was that it was not liable for either the Cost Overrun or the BPTA Charges because it did not breach the SPA. The respondent argued, first, that the failure to achieve wet commissioning by 31 March 2013 was due to *force majeure*; and second, that the respondent was not liable for the delay because the first claimant had in reality taken control of the Project from December 2012, long before it formally took control in March 2014.

21 The respondent also brought a counterclaim in the arbitration seeking to recover the SSL, *ie*, the sum of $5.1m.[15]

***The tribunal's award***

22 The tribunal issued its final award on 24 January 2018.

23 The tribunal found the respondent liable to the claimants for both the Cost Overrun and the BPTA Charges. But the tribunal did not award the claimants the full sums claimed because the tribunal also found that the respondent's liability on both claims terminated on 30 June 2014, *before* the WCD of 31 October 2015.

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15 Respondent's Core Bundle vol 1, Tab 12, Amended Statement of Counter Claims dated 7 September 2016, para 2.

24 The tribunal's specific findings on the claimants' claim were as follows:

(a) Under cl 10.2.4 read with cl 9.1.4 of the SPA, the respondent's liability to indemnify the claimants for the Cost Overrun arose *even if* the respondent was not in breach of the SPA.[16]

(b) The quantum of the Cost Overrun was to be determined by taking the *actual* Project cost and deducting from that figure the cost of the Project with the *original* features and design parameters that the respondent had undertaken to carry out under the SPA.[17]

(c) If, after exercising its right to take over control of the Project, the first claimant had "undertaken the construction and commissioning of the Project in the most prudent and cost effective manner" as it was obliged to (see [10(i)] above), the Project would have achieved wet commissioning by 30 June 2014. Accordingly, the tribunal found that the respondent's liability on both the Cost Overrun claim and the BPTA Charges claim ceased on 30 June 2014.

(d) The tribunal limited the respondent's liability for the Cost Overrun to $17.3m[18] comprising: (a) time-dependent components of the Cost Overrun quantified only up to 30 June 2014, and (b) all other components of the Cost Overrun, *ie*, components which were not time-dependent.[19]

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16 Award, paras 215 to 217.

17 Award, para 223.

18 Award, paras 268 to 270.

19 Award, paras 255 to 256.

(e) The tribunal likewise limited the respondent's liability for the BPTA Charges to $5.5m, being the BPTA Charges incurred up to 30 June 2014.[20]

25 The tribunal dismissed the respondent's counterclaim to recover the SSL.[21]

***The setting aside applications***

26 Both the claimants and the respondent were therefore dissatisfied with the award. The claimants applied on 30 April 2018 to set aside parts of the award, alternatively to remit those parts of the award to the tribunal. The respondent applied on 22 June 2018 to set aside other parts of the award.

27 Because the claimants were largely successful in the arbitration, the respondent's challenge to the award is far wider than the claimants' challenge. I shall therefore start by setting out the gist of the respondent's challenge.

28 The respondent seeks to set aside the following findings in the award under Arts 34(2)(*a*)(ii) and 34(2)(*a*)(iii) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") and under s 24(*b*) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"):

(a) the finding that the respondent is liable to pay the Cost Overrun;

(b) the finding that the respondent is liable to pay the BPTA Charges; and

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20 Award, paras 279 to 282.

21 Award, para 359.

(c) the rejection of the respondent's counterclaim for repayment of the SSL.

Should its application on any of these issues succeed, the respondent submits further that the tribunal's award on interest and costs should be set aside to that extent.

29 Like the respondent, the claimants brings its application under Art 34(2)(*a*)(ii) of the Model Law and s 24(*b*) of the IAA. Unlike the respondent, the claimants do not rely on Art 34(2)(*a*)(iii) of the Model Law.

30 The claimants rely on these two provisions to challenge the tribunal's finding that the respondent ceased to be liable to the claimants for the Cost Overrun and for the BPTA Charges after 30 June 2014. Thus, the claimants seek to set aside the following findings in the award:[22]

(a) the tribunal's finding that the respondent is not liable to indemnify the claimants under cl 10.2.4 of the SPA for the Cost Overrun from 1 July 2014 to 31 October 2015;

(b) the finding that the respondent is not liable to indemnify the claimants under cl 11.4 of the SPA for the BPTA Charges from 1 July 2014 to 31 October 2015; and

(c) the tribunal's rejection, as the inevitable consequence of these findings, of the second claimants' claim for interest on these sums.

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22 The claimants' written submissions in OS512/2018, para 33.

## The respondent's application

31 I shall first dispose of the respondent's setting-aside application before turning to the claimants' application starting at [167] below.

### *The preliminary point*

32 I begin by dealing with the claimants' preliminary point on the respondent's application. The claimants argue that the respondent's application should be dismissed because the respondent filed it more than three months after receiving the award, contrary to the strict three-month time limit stipulated in Art 34(3) of the Model Law.[23]

*The Model Law provisions and the chronology*

33 Article 33 of the Model Law allows a party, after receiving an award, to make a request to the tribunal within 30 days of receipt: (a) to correct computational, clerical, typographical or similar errors in the award; (b) to interpret a specified point or part of the award; or (c) to make an additional award on claims submitted to the tribunal but omitted in the award.

34 Art 34(3) of the Model Law requires an aggrieved party to apply to set aside an award within a three-month period. That three-month period commences either on: (i) the date on which the parties receive the award; or (ii) the date on which the tribunal disposes of a request for correction under Art 33:

> An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award *or, if a request had been*

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[23] The claimants' written submissions in OS770/2018, para 52.

> *made under Article 33, from the date on which that request had been disposed of by the arbitral tribunal.* [emphasis added]

35 The weight of authority in Singapore is that this three-month time limit is strict and cannot be extended: *ABC Co v XYZ Co Ltd* [2003] SLR 546 at [9]; *PT Pukafu Indah and others v Newmont Indonesia Ltd and another* [2012] 4 SLR 1157 at [30]. Most recently, it has been held that Art 34(3) is "written law relating to limitation" within the meaning of s 18(2) read with paragraph 7 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed). Therefore the three-month time limit cannot be extended under the court's general power to extend time: *BXS v BXT* [2019] SGHC(I) 10 at [39]. Whether a particular case comes within the first limb or the second limb of Art 34(3) is therefore of critical importance.

36 The chronology of the respondent's application is as follows. The award is dated 24 January 2018. The parties received the award on 31 January 2018. The respondent applied to the tribunal under Art 33 of the Model Law to correct the award on 1 March 2018. The tribunal dismissed that application on 23 March 2018. The respondent filed its application to set aside the award on 22 June 2018.

*The parties' arguments*

37 The respondent argues that it is the second limb of Art 34(3) of the Model Law which applies to its application and that the three-month time limit under Art 34(3) of the Model Law therefore commenced on 23 March 2018.

38 The claimants argue that it is the first limb of Art 34(3) of the Model Law which applies to the respondent's application and that the three-month time limit under Art 34(3) therefore commenced on 31 January 2018. The claimants

argue, further, that the respondent's request under Art 33 does not come within the second limb of Art 34(3). According to the claimants, a request under Art 33 postpones the three-month time limit under the second limb of Art 34(3) only if:

> (a) the request under Art 33 is genuinely made for one of the purposes set out in Art 33;[24] or
>
> (b) the request under Art 33 is material to the setting aside application which the aggrieved party ultimately brings.[25]

*Must the request be genuine?*

39 For the argument at [38(a)] above, the claimants rely primarily on the decision of the Supreme Court of India in *State of Arunachal Pradesh v Damani Construction Co* (2007) 10 SCC 742 ("*Damani*"). The Indian Supreme Court in that case had to interpret provisions in the Indian arbitration legislation which are *in pari materia* with Arts 33 and 34 of the Model Law. The Supreme Court noted in *Damani* that the request by the appellant ostensibly under the Indian equivalent of Art 33 was not in truth a request for clarification but was "designed as if the appellant was seeking review of the award" and was therefore "wholly misconceived" (at [8]). On this basis, the Supreme Court held that it did not trigger a postponement (at [9]).

40 The claimants argue, on the authority of *Damani*, that only a genuine request under Art 33 triggers the postponement of the time limit under Art 34(3)

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24 The claimants' written submissions in OS770/2018, paras 59 to 61.

25 The claimants' written submissions in OS770/2018, paras 65 to 70.

of the Model Law. Any other interpretation, they submit, would allow a party to abuse Art 34(3) by contriving a request under Art 33 to engineer a unilateral extension of time for its setting-aside application. That, the claimants submit, seriously undermines the finality of awards, a fundamental principle in both the Model Law and the IAA.[26]

41 The respondent responds that *Damani* should not be followed in Singapore. The plain language of Art 34(3) of the Model Law contains no indication that the "request … made under Art 33" must satisfy a qualitative test in order to trigger a postponement of the commencement of the time limit under the second limb. The respondent also refers to several decisions in other jurisdictions which have taken a position contrary to *Damani*. In particular, the respondent points to the decision of New Zealand's Court of Appeal in *Todd Petroleum Mining Co Ltd v Shell (Petroleum Mining) Co Ltd* [2015] 2 NZLR 180 ("*Todd Petroleum*").

42 In *Todd Petroleum*, the New Zealand Court of Appeal had to interpret provisions in the New Zealand arbitration legislation which are *in pari materia* with Arts 33 and 34 of the Model Law. The question in *Todd Petroleum*, as in the present case, was whether the second limb of Art 34(3) requires a request under Art 33 (in that case, for an additional award) to satisfy a qualitative test. At first instance, the New Zealand High Court held that the second limb of Art 34(3) would not be triggered unless the requesting party had a "reasonable basis" for making the request under Art 33. The High Court considered that that approach was necessary to prevent abuse of Art 33 and a circumvention of the strict time limit in Art 34(3).

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[26] The claimants' written submissions in OS770/2018, paras 56 and 61.

43 The New Zealand Court of Appeal reversed the High Court. It held that the language of Art 34(3) does not require a request under Art 33 to satisfy a qualitative test in order for it to trigger a postponement. Stevens J, delivering the judgment of the Court of Appeal, said (at [37]):

> There is no support in the statutory language of either arts 33(3) or 34(3) for a qualitative gloss on the nature of the request for an additional award. We reject [the respondent's] submission to the contrary. Adding a qualitative requirement that a request under art 33(3) be a "proper" request would mean that a party would not know whether it has made a request in terms of that article until the arbitral tribunal either grants or rejects its application. Moreover, the notion of a requirement for a proper request is inconsistent with the language of art 34(3) which speaks only of a request being "disposed of". It is not limited to cases where the request is "granted".

44 I accept this reasoning. I therefore reject the claimants' argument that only a genuine request under Art 33 of the Model Law triggers a postponement under the second limb of Art 34(3). It is no doubt a legitimate concern that the lack of a qualitative test will give a party an undesirable and unintended incentive to contrive a request under Art 33 in order to secure more time to bring an application under Art 34(3), particularly given the three-month time limit is strict.

45 Even so, that concern must not be overstated. Article 33 of the Model Law itself provides fixed timelines within which any request must be made to the tribunal and within which the tribunal must respond to any request. The party must make its request under Art 33 within 30 days of receiving the award. Unless it exercises its power to extend time, the tribunal must dispose of a request for a correction within 30 days of receiving the request and must dispose of a request for an additional award within 60 days.

46 The temporal effect of any abuse of the request mechanism in Art 33 is constrained by these provisions. Further, the tribunal need not use all the time which Art 33 affords it. The more contrived a request is, the quicker the tribunal will dispose of it. That further constrains the potential for abuse. The final constraint on abuse is the tribunal's power to award costs against a party who contrives a request under Art 33.

47 Requiring a qualitative test to be satisfied before the second limb of Art 34(3) is triggered would introduce great uncertainty post-award. As Stevens J noted in *Todd Petroleum* (see [43] above), neither party (nor indeed the tribunal or a court) can know whether a request will pass that qualitative test at the time the request is made. It is true, as the claimants suggest, that the qualitative test can be set at a very low threshold to require simply that the request that is *not* just a disguised plea for the tribunal to reconsider the merits of the award. But, however it is framed, and however low the threshold is set, a qualitative test will remain a subjective test. On the qualitative approach, nobody can ever know with certainty whether the three-month time limit under Art 34(3) has commenced, continues to run or has been halted until and unless that qualitative test is applied to the request. Consequently, nobody can ever know when an award becomes final until the qualitative determination is made. That uncertainty is equally inimical to the fundamental principle of finality of awards. When an award has become or will become final must be capable of ascertainment with certainty, and therefore by reference to objective factors.

48 The uncertainty engendered would also lead to potential wasted time and costs. The qualitative approach would encourage a party who makes a request under Art 33 to file a concurrent setting-aside application under Art 34 of the Model Law purely out of an abundance of caution. Filing both applications

concurrently is procedurally inelegant in that it forces a party to apply to set aside an award even though the award may yet be corrected, clarified or supplemented to remove the grounds for setting aside. It is also at odds with the fundamental principle that parties to an arbitration should first seek redress from the tribunal before turning to the courts (see *BLB and anor v BLC and ors* [2013] 4 SLR 1169 at [103]). It would also completely negate the very purpose of the second limb of Art 34(3).

49 Finally, there is no evidence that the drafters of the Model Law intended that the second limb of Art 34(3) be triggered by a qualitative test. On the contrary, the discussion of Art 34(3) in the seventh session of the UNCITRAL Working Group on International Contract Practices ("Report of the Working Group on International Contract Practices on the Work of its Seventh Session", UNCITRAL, 17th Sess, UN Doc A/CN.9/246 ("Report of the Working Group") at para 138) shows that the drafters were alive to the risk of abuse without a qualitative test, but considered it a constrained risk and accepted that risk in the current drafting of Art 34(3):

> … As regards the words "or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal", there was considerable support for deleting those words since they might open the door for dilatory tactics by a party and because an unbreakable time-limit for applications for setting aside was desirable for the sake of certainty and expediency. *The prevailing view, however, was to retain those words since they presented the reasonable consequence of article 33 which allowed a party to request a correction, interpretation or an additional award. It was also pointed out that the periods of time contained in article 33 enabled the arbitral tribunal to minimize the risk of dilatory tactics and provided a basis for calculating the possible extension of the time-limit prescribed in paragraph (3) of article 34*. [emphasis added]

50 Accordingly, I reject the claimants' first proposition at [38(a)] above. The commencement of the three-month time limit under Art 34(3) is postponed whenever a party makes a request to the tribunal under Art 33. Whether a request is made under Art 33 is purely a matter of form and does not depend on evaluating the substance of the request by applying any qualitative test.

*Must the request be material?*

51 The claimants' second argument on their preliminary point is that the second limb of Art 34(3) applies only where the request under Art 33 of the Model Law is "material" to the setting aside application which is ultimately made. The key authority cited for this proposition is the decision of the English High Court in *Daewoo Shipbuilding & Marine Company Ltd v Songa Offshore Equinox Ltd and anor* [2018] EWHC 538 (Comm) ("*Daewoo Shipbuilding*").[27]

52 *Daewoo Shipbuilding* is clearly distinguishable and does not assist the claimants. In that case, the court was interpreting provisions of the English Arbitration Act 1996 (c 23) (UK) which set out the applicable time limits for bringing a challenge to an award or for filing an appeal on a question of law arising from an award. Section 70(3) of the English Arbitration Act provides that any challenge or appeal against an award must be brought within 28 days of the date of the award "or, if there has been any *arbitral process of appeal or review*, of the date when the applicant or appellant was notified of the result of that process" [emphasis added]. It was accepted that the words "any arbitral process of appeal or review" under s 70(3) do not *prima facie* apply to an application to *correct* the award. However, an established line of English

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27 The claimants' written submissions in OS770/2018, paras 66 to 68.

authorities has held that s 70(3), on its true construction, could apply to an application to correct an award where the corrections sought were *material* to the intended s 70 application (at [53], [60]–[61]). In the court's view, "the test of materiality is inherent in the structure of section 70(2) and 70(3)", and this explained why the postponement of the commencement of the time limit in s 70(3) applied only to cases where there was an application for "appeal or review", and not to applications for corrections of an award (at [63]).

53 *Daewoo Shipbuilding* is distinguishable because the legislative starting point in the English Arbitration Act is quite different from that in the Model Law. Under the English Arbitration Act, the commencement of the time limit for challenging an award is not generally postponed by an application to correct the award. Under the Model Law, on the other hand, the commencement of the time limit for challenging an award *is* postponed by *every* application to correct an award. Referring again to the Report of the Working Group (cited at [49] above), the drafters believed that postponing the commencement of the three-month time limit was "the reasonable consequence of article 33 which allowed a party to request a correction, interpretation or an additional award". Thus, while the English cases require that any correction sought must be *material* before the commencement of the time limit will be postponed by way of exception to the general position, the clear wording of Art 34(3) of the Model Law postpones the commencement of the time limit for any and every type of request under Art 33. Indeed, under Art 33(1)(*a*), a request could seek correction of any errors from the material (*eg*, "errors in computation", which could be material to a setting aside application) to the purely editorial ("any clerical or typographical errors" which could never be material). *Daewoo Shipbuilding* was therefore based on an English legislative provision that is not only *not* based on the Model Law, but which adopts a diametrically different scheme for time

limits for challenging an award from that adopted in the Model Law. The approach in *Daewoo Shipbuilding* is not of assistance in the present case.

54 Accordingly, I reject the claimants' second proposition at [38(b)] above also. The commencement of the three-month time limit under Art 34(3) is postponed whenever a party makes a request to the tribunal under Art 33. Whether the request is material to the intended setting aside application is immaterial to the postponement of the time limit.

*Conclusion on the preliminary point*

55 I therefore accept the respondent's submission that the three-month time limit to bring its application commenced only on 23 March 2018, under the second limb of Art 34(3) of the Model Law, when the tribunal disposed of the respondent's request for correction. The respondent's setting-aside application has therefore been brought within time. The claimants' preliminary point is rejected.

56 I turn now to consider the law applicable to a setting-aside application under the IAA and to the respondent's application on the merits.

***The law on setting aside***

57 As grounds for setting aside the parts of the award which they challenge, both the claimants and the respondent rely principally on the ground that the tribunal acted in breach of natural justice. The respondent relies on the additional ground that the tribunal exceeded its jurisdiction. It is therefore useful to begin with a brief summary of the relevant legal principles on these two grounds which will be applicable to both cross-applications.

*Breach of natural justice*

58 It is common ground that to challenge an arbitral award for breach of natural justice, the four requirements in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") must be established, namely: (a) the of natural justice which was breached; (b) how it was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced the party's rights.

59 The rule of natural justice that both parties allege has been breached in this case is the fair hearing rule. Both parties allege that the tribunal failed to consider parts of their respective arguments and evidence in the arbitration, as a result of which they say the tribunal reached a different conclusion on certain issues than it could otherwise have reached.

60 The fundamental duty of an adjudicator is to apply his mind to the arguments put before him. This has been well-recognised as an essential aspect of the rules of natural justice (see *AKN and anor v ALC and anor and other appeals* [2015] 3 SLR 488 ("*AKN*") at [46]):

> To fail to consider an important issue that has been pleaded in an arbitration is a breach of natural justice because in such a case, the arbitrator would not have brought his mind to bear on an important aspect of the dispute before him. Consideration of the pleaded issues is an essential feature of the rule of natural justice that is encapsulated in the Latin adage, *audi alteram partem* …

61 Establishing that a tribunal wholly failed to consider an issue, however, is a difficult endeavour. In most cases, the court is asked to infer that a tribunal failed to bring its mind to bear on a particular issue at all from the tribunal's silence on that issue. But silence may be, and often is, equivocal. For that reason, the inference from the tribunal's silence that it failed to bring its mind to bear

on a particular issue placed before it must be "clear and virtually inescapable". As the Court in *AKN* went on to note (at [46]–[47]):

> … It will usually be a matter of inference rather than of explicit indication that the arbitrator wholly missed one or more important pleaded issues. However, the inference – that the arbitrator indeed failed to consider an important pleaded issue – if it is to be drawn at all, must be shown to be clear and virtually inescapable. *If the facts are also consistent with the arbitrator simply having misunderstood the aggrieved party's case, or having been mistaken as to the law, or having chosen not to deal with a point pleaded by the aggrieved party because he thought it unnecessary* (notwithstanding that this view may have been formed based on a misunderstanding of the aggrieved party's case), *then the inference that the arbitrator did not apply his mind at all to the dispute before him (or to an important aspect of that dispute) and so acted in breach of natural justice should not be drawn.*
>
> … [N]o party to an arbitration had a right to expect the tribunal to accept its arguments, regardless of how strong and credible it perceived those arguments to be … This principle is important because *it points to an important distinction between, on the one hand, an arbitral tribunal's decision to reject an argument (whether implicitly or otherwise, whether rightly or wrongly, and whether or not as a result of its failure to comprehend the argument and so to appreciate its merits), and, on the other hand, the arbitral tribunal's failure to even consider that argument.* Only the latter amounts to a breach of natural justice; the former is an error of law, not a breach of natural justice.
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> [emphasis in original omitted; emphasis added]

62 Another aspect of the right to a fair hearing is that a party must be given a reasonable opportunity to present its case. This ground comes within both s 24(*b*) of the IAA and Art 34(2)(*a*)(ii) of the Model Law (see *ADG and anor v ADI and another matter* [2014] 3 SLR 481 ("*ADG*") at [118]). In *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768, I observed that giving a party a reasonable opportunity to present its case means not only giving that party the opportunity to present the evidence and to advance propositions of law on which it *positively* relies to establish its case ("the

positive aspect"), but also giving the party a reasonable opportunity to present the evidence and to advance propositions of law necessary to *respond* to the case made against it ("the responsive aspect"). If a tribunal adopts an important line of reasoning in its award without giving a party a reasonable opportunity to address that line of reasoning, that deprives the party of the responsive aspect of its right to be heard.

63 Nonetheless, in line with the policy of minimal curial intervention, a tribunal's failure to solicit submissions from the parties on *each and every* point for decision is not a ground for setting aside the award. I adopt the guidance of the Court of Appeal in *Soh Beng Tee* (at [65]):

> (d) … Only in instances such as where the impugned decision reveals a dramatic departure from the submissions, or involves an arbitrator receiving extraneous evidence, or adopts a view wholly at odds with the established evidence adduced by the parties, or arrives at a conclusion unequivocally rejected by the parties as being trivial or irrelevant, might it be appropriate for a court to intervene. …
>
> (e) It is almost invariably the case that parties propose diametrically opposite solutions to resolve a dispute. They may expect the arbitrator to select one of these alternative positions. *The arbitrator, however, is not bound to adopt an either/or approach.* He is perfectly entitled to embrace a middle path (even without apprising the parties of his provisional thinking or analysis) so long as it is based on evidence that is before him. *Similarly, an arbitrator is entitled* – indeed, it is his obligation – *to come to his own conclusions or inferences from the primary facts placed before him. In this context, he is not expected to inexorably accept the conclusions being urged upon him by the parties. Neither is he expected to consult the parties on his thinking process before finalising his award unless it involves a dramatic departure from what has been presented to him.*
>
> [emphasis added]

64 Finally, the parties also accept that even if a breach of natural justice is proven, it must be further demonstrated that the breach actually caused

prejudice to the aggrieved party. In other words, the breach must have deprived the tribunal of arguments or evidence that had "a real as opposed to a fanciful chance of making a difference to the final outcome of the arbitral proceedings in some meaningful way" (*ADG* at [148], citing *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125).

*Excess of jurisdiction*

65 On an application to set aside an award under Art 34(2)(*a*)(iii) of the Model Law, the court must undertake a two-step inquiry and determine (*PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [40]):

> (a) first, what matters were within the scope of submission to the arbitral tribunal; and
>
> (b) second, whether the arbitral award involved such matters, or whether it involved "a new difference … outside the scope of the submission to arbitration and accordingly … *irrelevant to the issues requiring determination*" [emphasis in original].

66 In determining the scope of the parties' submission to arbitration, the pleadings filed in the arbitration provide a convenient way to define the jurisdiction of the tribunal (see *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 ("*PT Prima*") at [33]). The pleadings must also, of course, be read in the context of the issues raised in the notice of arbitration or in the response to that notice. In general, the court will not take a narrow interpretation of the issues that have been submitted to the tribunal for determination.

67 I turn now to consider the merits of the respondent's application. I begin by summarising the parties' cases on that application.

***The respondent's case***

68 The respondent's case on its own application can be summarised as follows.

(a) First, the tribunal acted in breach of natural justice in failing to consider the parties' arguments on why certain correspondence was inadmissible in evidence. The tribunal relied on the correspondence to hold the respondent liable for the Cost Overrun but without ruling on, or indeed even acknowledging, the respondent's objection to admissibility.[28]

(b) Second, the tribunal acted in breach of natural justice or in excess of jurisdiction in finding the respondent liable for the Cost Overrun even though it was not in breach of the SPA. The claimants' case in the arbitration had always been that the respondent was liable for the Cost Overrun *because of alleged lapses or breaches on the respondent's part* in carrying out the Project. In the claimants' rebuttal oral submissions in the arbitration, they changed their position and argued for the first time that the respondent *could* be liable for the Cost Overrun even if it was *not* in breach of the SPA. Even though the respondent objected to the claimants' attempt to change their case so fundamentally and at such a late stage, the tribunal added the newly-framed issue to the parties' agreed list of issues in the arbitration and accepted the claimants'

[28] The respondent's written submissions, paras 97 to 105.

submissions without giving the respondent an opportunity to respond to the new case against it.[29]

(c) Third, the tribunal acted in breach of natural justice in quantifying the Cost Overrun: (i) without considering the evidence and arguments as to whether the claimants' claim to recover transmission line costs should also be reduced because they were time-dependent, and (ii) without affording the parties an opportunity to present their respective cases on whether other components of the claimants' Cost Overrun claim were time-dependent.[30]

(d) Fourth, the tribunal acted in excess of jurisdiction or in breach of natural justice in finding that the respondent's Cost Overrun liability could not be adjusted or set off against the SSL. The parties agreed that *if* the respondent were liable for the Cost Overrun, that liability could be adjusted against the SSL. Despite this, the tribunal unilaterally decided that the SSL had already been set off or adjusted when the Project cost increased. That argument was not found in the parties' submissions and was not one which the parties had any opportunity to address the tribunal on.[31]

69 The respondent argues that the tribunal's award on the BPTA Charges should also be set aside for breach of natural justice. The tribunal overlooked the respondent's argument that the claimants had failed to adduce documentary

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29 The respondent's written submissions, paras 106 to 116.

30 The respondent's written submissions, paras 80 to 96.

31 The respondent's written submissions, paras 69 to 79.

evidence to support the BPTA Charges claim. Had the tribunal considered the respondent's argument, it would have rejected this claim in its entirety, even for the period *before* 30 June 2014.[32]

70 The respondent also argues that if the tribunal's findings on the Cost Overrun claim are set aside, its dismissal of the respondent's counterclaims for the return of other amounts related to Cost Overrun – namely, Security Bond I and a $1.2m loan made to the claimant – should also be set aside.[33]

71 Finally, the respondent argues that if it succeeds in setting aside any part of the award, the consequential awards on interest and costs relating to those parts must also be set aside. In any event, the tribunal's award of pre-award interest from 4 July 2014 should be set aside because it went beyond the relief sought by the claimant, in breach of natural justice.[34]

***The claimants' case***

72 The claimants counter the respondent's case on the Cost Overrun claim as follows:

(a) The tribunal did not fail to address the admissibility of the correspondence. It must be taken to have decided the correspondence was admissible without considering it necessary to set out its reasons.[35] In any event, there was no prejudice to the respondent, as the tribunal

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32 The respondent's written submissions, paras 117 to 123.

33 The respondent's written submissions, para 6(c).

34 The respondent's written submissions, paras 124 to 127.

35 The claimants' written submissions in OS770/2018, paras 90 to 99.

concluded that the respondent was liable for the Cost Overrun without reference to the correspondence.[36]

(b) The claimants argued from the outset of the arbitration, *ie*, in their statement of claim, that the respondent's liability for the Cost Overrun did not depend on the respondent being found in breach of the SPA. Even if it were true that the claimants raised that argument only on the last day of oral submissions in the arbitration, the respondent had ample opportunity to respond to the argument in its final written submissions filed four months later.[37]

(c) The parties had a reasonable opportunity to present their case on which components of Cost Overrun were time-dependent. There was indeed evidence before the tribunal on which it was entitled to base its findings on the issue.[38] Further, the more likely inference from the tribunal's silence on the other components of the Cost Overrun claim is that the tribunal implicitly found that these components were recoverable because they had been incurred "in the most prudent and cost-effective manner".[39]

(d) The parties did *not* have a common and agreed position that any liability for the Cost Overrun should be adjusted against the SSL. The claimants took the position from the start that the second claimant had no obligation to repay the SSL because the conditions precedent for its

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36 The claimants' written submissions in OS770/2018, paras 100 to 105.

37 The claimants' written submissions in OS770/2018, paras 113 to 116.

38 The claimants' written submissions in OS770/2018, paras 143 to 144.

39 The claimants' written submissions in OS770/2018, para 156.

repayment were never satisfied.[40] In any case, the tribunal was entitled to find, on the basis of the evidence before it, that the SSL was extinguished when Project costs increased.[41]

73 In response to the respondent's case on the BPTA Charges claim, the claimants argue that the tribunal had sufficient evidence before it to find the respondent liable for the BPTA charges. Accordingly, the tribunal's silence on the respondent's arguments does not warrant an inference that it failed entirely to apply its minds to the respondent's arguments.[42]

***The issues to be determined***

74 The issues to be determined on the merits of the respondent's application can therefore be resolved as follows:

(a) On the Cost Overrun claim:

(i) Did the tribunal act in breach of natural justice by failing to address the respondent's argument that the correspondence in question was inadmissible?

(ii) Did the tribunal act in breach of natural justice or in excess of jurisdiction by finding the respondent liable for the Cost Overrun even though it was not in breach of the SPA?

(iii) Did the tribunal act in breach of natural justice by failing to consider the respondent's arguments and evidence on the

40 The claimants' written submissions in OS770/2018, paras 164 to 165.

41 The claimants' written submissions in OS770/2018, paras 168 to 170.

42 The claimants' written submissions in OS770/2018, paras 176 to 180.

transmission line works? In the alternative, was the respondent deprived of an opportunity to present its case on whether other components of the Cost Overrun claim were time-dependent?

(iv) Did the tribunal act in breach of natural justice or in excess of jurisdiction in finding that the SSL could not be adjusted or set off against the respondent's liability for Cost Overrun?

(b) On the BPTA Charges claim, did the tribunal act in breach of natural justice by failing to consider the respondent's argument that the claim was unsupported by evidence?

(c) Finally, did the tribunal act in breach of natural justice by awarding pre-award interest from 4 July 2014 when the claimants themselves sought pre-award interest only from a later date?

***The Cost Overrun claim***

75 The respondent's attack on the tribunal's award on the Cost Overrun claim comprises four arguments. The first two go to liability (see [68(a)] and [68(b)]). The remaining two go to quantum (see [68(c)] and [68(d)]). I deal with each of the four arguments in turn.

*Liability for Cost Overrun*

(1) The disputed correspondence

76 In setting out why it held the respondent liable on the Cost Overrun claim (albeit only until 30 June 2014), the tribunal referred to certain correspondence exchanged between the respondent and the first claimant

between May 2013 and March 2014. This correspondence comprised six emails and letters from the respondent to the claimant, acknowledging that Cost Overrun was accumulating and that the parties would "settle" those issues once wet commissioning had been achieved.[43]

77 The respondent's case in the arbitration was that all of this correspondence is covered by the without prejudice privilege and was therefore inadmissible. The tribunal therefore breached the rules of natural justice by relying on this correspondence without addressing in any way the respondent's objection to admissibility.[44]

78 The respondent's arguments can be summarised as follows:

(a) The respondent objected to the claimants' producing and relying on the correspondence throughout the arbitration, such as in the memorandums and closing submissions.[45] The claimants' own witnesses acknowledged at various times that the parties exchanged this correspondence in the context of settlement negotiations.[46]

(b) Despite this, the award does not even refer to, let alone analyse, the respondent's arguments on admissibility. The tribunal thus relied on the correspondence to make a finding against the respondent without addressing the respondent's objections to admissibility.[47] The only

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43 Award, paras 253(i) to 253(vi).

44 The respondent's written submissions, paras 97 to 105.

45 The respondent's written submissions, para 100 and Annex 1.

46 The respondent's written submissions, para 101.

47 The respondent's written submissions, para 104.

inference to be drawn is that the tribunal failed entirely to apply its mind to the respondent's objections to admissibility in breach of the rules of natural justice.

(c) The breach caused direct and real prejudice to the respondent. If the tribunal had applied its mind to the respondent's objections to admissibility, it could have concluded that the correspondence was indeed covered by the without prejudice privilege and ought to be excluded under Art 9(2)(b) of the IBA Rules on the Taking of Evidence in International Arbitration or Rule 24.1(p) of the SIAC Rules 2013. Without this correspondence as evidence, the tribunal could not have found the respondent liable for the Cost Overrun at all.[48]

79 In response, the claimants argue that the fact that the tribunal admitted the correspondence in evidence without expressly setting out its reasoning for doing so does not, without more, lead to the clear and virtually inescapable inference that the tribunal failed to apply its mind to the respondent's objections to admissibility.[49]

80 The claimants accept that the respondent objected on several occasions to the admissibility of the correspondence. But the claimants turn that point against the respondent. They argue that it is unlikely that the tribunal failed entirely to apply its mind to the issue of admissibility precisely *because* the respondent repeatedly objected to admissibility. In this context, and in light of the tribunal's statement in the award (see [82] below) that it included in the

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48 The respondent's written submissions, para 105.

49 The claimants' written submissions in OS770/2018, para 97.

award only those arguments which it considered "relevant and necessary", it is likely that the tribunal decided the objection to admissibility was *irrelevant* and that it was *unnecessary* to give its reasons for holding the correspondence to be admissible.[50]

81 Further, the claimants contend, even if there was a breach of natural justice in admitting the correspondence, the respondent did not suffer any prejudice as a result. The tribunal would have reached the same finding – that the respondent *was* liable for the Cost Overrun – regardless of whether the correspondence was admitted or excluded.[51] The tribunal found the respondent liable for the Cost Overrun as a matter of law, purely on the construction of cll 10.2.4 and 9.1.4 of the SPA. Indeed, the tribunal referred to the allegedly inadmissible correspondence not to determine the respondent's liability at all, but only to determine the extent of that liability, and even then, only for the limited purpose of showing that the respondent had taken inconsistent positions on its obligation to bear the Cost Overrun.[52] The correspondence was thus not material to the tribunal's finding that the respondent was liable for the Cost Overrun.

82 The claimants rely on the following paragraph of the award:[53]

> Having considered the pleadings, evidence (oral and documentary) and arguments (oral and written submissions) of parties, the Tribunal has made this Award. The following clarifications are made in regard to this Award:

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50 The claimants' written submissions in OS770/2018, para 97.

51 The claimants' written submissions in OS770/2018, para 102.

52 The claimants' written submissions in OS770/2018, paras 103 to 104.

53 Award para 56(i).

> (i) Though considerable evidence (oral and documentary) has been led, parties have referred only to some of them in their arguments. *The Tribunal has considered the entire evidence and arguments, but has referred to only such evidence and arguments which are relevant and necessary for deciding the disputes between the parties and the reliefs*.
>
> [emphasis added]

I do not place any weight on this paragraph. It is a standard paragraph found in virtually all awards. It is self-serving in nature. That is so no matter how eminent the tribunal. A paragraph to this effect cannot, in itself, either establish or even help to establish that the tribunal has in fact applied its mind appropriately to the essential issues arising from the evidence and arguments which the parties put before the tribunal. That is to be tested and ascertained from an analysis of the award and its structure in all the circumstances of the case after applying the applicable legal principles.

83 I do, however, accept the remainder of the claimants' submissions. In my view, it is not a clear or virtually inescapable inference that the tribunal failed to apply its mind to the respondent's argument that the correspondence was inadmissible. First, the issue of admissibility was not presented to the tribunal as an important point in the arbitration. This is apparent from a review of the record in the arbitration. While the respondent lists nine instances when it expressly objected to the correspondence being admitted in evidence,[54] I note that in most of these instances, the respondent simply raised the objection without argument or elaboration. I take the respondent's rebuttal submissions as an example. In response to the claimants' reliance on a letter and an email sent by the respondent in November and December 2013, the respondent merely noted the following among other points:[55]

> … It should be noted that both documents have been written in the context of settlement and the Claimants cannot rely upon this in any manner.

The claimants, meanwhile, did not consider this point made in passing to have been made with sufficient seriousness of intent as to warrant a response.[56]

84 It is evident from this that the parties themselves did not regard the objection to admissibility to be of great importance, especially in comparison to the main issues of substance raised in the arbitration. This must be why neither party expended the effort to advance a fully-fledged argument on the admissibility of the correspondence. In these circumstances, I consider it impossible to find, as a clear and virtually inescapable inference, that the

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54 The respondent's written submissions, Annex 1.

55 Respondent's Core Bundle, vol 4, pp 195 to 196, Item 28(n).

56 Notes of Argument, 16 January 2019, p 30, lines 29 to 33.

tribunal failed to apply its mind to the issue of admissibility. I draw the inference instead that the tribunal made a decision to admit the correspondence in evidence – albeit implicitly rather than explicitly – without seeing a need to articulate its reasons for rejecting the respondent's objections.

85 It is useful at this juncture to bear in mind the observations of Chan Seng Onn J in *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM Maritima*") on the scope of a tribunal's duty to deal with arguments advanced by the parties (at [72]–[77]):

> 72 An arbitral tribunal is not obliged to deal with every argument. It is neither practical nor realistic to require otherwise. Toulson J summed up neatly the extent of the arbitral tribunal's obligation in *Ascot Commodities NV v Olam International Ltd* [2002] CLC 277 at 284 (see also *Hochtief* ([46] *supra*) at [80]):
>
> > Nor is it incumbent on arbitrators to deal with *every argument on every point raised. But an award should deal, however concisely, with all* ***essential*** *issues.* …[emphasis added in italics and bold italics]

> 73 All that is required of the arbitral tribunal is to ensure that the *essential issues* are dealt with. The arbitral tribunal need not deal with each point made by a party in an arbitration: *Hussman (Europe) Ltd v Al Ameen Development and Trade Co* [2000] 2 Lloyd's Rep 83 ("*Hussman*") at [56]. In determining the essential issues, the arbitral tribunal also should not have to deal with *every* argument canvassed under each of the essential issues.
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> 74 What then is considered "essential"? This is not easy to define. Notwithstanding, in my view, arbitral tribunals must be given fair latitude in determining what is essential and what is not. An arbitral tribunal has the prerogative and must be entitled to take the view that the dispute before it may be disposed of without further consideration of certain issues. A court may take a contrary view *ex post facto*, but it should not be too ready to intervene.
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> …
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> 76 In proposing that the issue should be determined in its favour, a party may submit different arguments that could operate cumulatively or independently. As long as one argument resolves the issue, there is no justification for insisting that the arbitral tribunal go on to consider the other arguments which have been rendered academic. In *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 ("*SEF*"), Judith Prakash J held (at [60]) that "[n]atural justice requires that the parties should be heard; it does not require that they be given responses on all submissions made". I completely agree. It is the right to be heard and not a right to receive responses to all the submissions or arguments presented that is protected. …
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> [emphasis in original in italics and bold italics; emphasis added in underline]

86 I agree with these observations. A tribunal can legitimately take the view that an evidential issue which a party raises within the context of the many substantive issues before the tribunal and which the party does not develop with any real seriousness of intent, even if it raises the issue in this way repeatedly, is not essential for it to decide and therefore does not require separate or explicit analysis. Taking that view certainly does not amount to a failure to consider the

issue entirely or to a deliberate avoidance of the issue, both of which would be grounds for a successful challenge to the award (see *ASG v ASH* [2016] 5 SLR 54 at [90]). For the reasons already given, there were reasonable grounds on which the tribunal may have arrived at the view that the objection to the admissibility of the correspondence was not an issue which was essential for it to decide. Accordingly, I reject the respondent's submission that the tribunal, by reason only of its silence on the point in the award, must have failed entirely to apply its mind to the issue of admissibility.

87 In any case, even if the tribunal did fail to consider its objections to the admissibility of the correspondence, no prejudice was caused to the respondent. The requirement of prejudice, as the authorities cited at [64] above show, is aimed at ascertaining whether the breach could reasonably have made a difference to the outcome of the arbitration in some *meaningful* way. But in this case, the issue of admissibility of the correspondence is two steps removed from the tribunal's finding that the respondent was liable for the Cost Overrun. To set aside the award on this ground, therefore, the respondent must succeed on both of those two steps. First, the respondent must establish that, had the tribunal applied its mind to the respondent's objections to admissibility, it *could* have ruled the correspondence to be inadmissible. And second, the respondent must establish that, having ruled the correspondence inadmissible, the tribunal *could* have found that the respondent was not liable for the Cost Overrun. For the reasons that follow, I find that the respondent fails at the second and more important step.

88 The respondent has incorrectly characterised the correspondence as going to the respondent's *liability* for the Cost Overrun. I accept the claimants' submission that the tribunal did not rely on the correspondence for its finding

that the respondent was so liable. Before it referred to the correspondence, the tribunal had already found that the respondent's liability for the Cost Overrun was put beyond doubt by cl 10.2.4 of the SPA. At section J of the award, titled "Nature, scope and scheme of the SPA",[57] the tribunal noted that one of the material covenants undertaken by the respondent was "a covenant vide Clause 10.2.4, to bear and contribute or indemnify and hold harmless (as the case may be) *any and all cost overrun*" [emphasis added].[58] This culminated in section K of the award, in which the tribunal made its operative finding that the respondent was liable for the Cost Overrun:[59]

> In this case, under Clause 10.2.4 of the SPA, [the respondent] agreed to bear and contribute or indemnify and hold harmless, as contemplated, any and all cost overrun (as required under Clause 9.1.4). In view of the indemnity relating to cost overrun beyond [$170m], when the project cost exceeded [$170m], that by itself was sufficient for [the second claimant] to seek indemnity from [the respondent] for reimbursement of the cost overrun. For seeking such indemnity to recover the cost overrun, [the second claimant] need not prove that there was any breach on the part of [the respondent] or that such breach was the cause for the cost overrun. It should also be noted that Clause 9.1.4 sets out one of the assumptions made by the Parties and does not require performance of any obligation by [the respondent]. Therefore, the question of 'breach' of 9.1.4 does not arise. … *The liability to indemnify [the second claimant] regarding the cost overrun arose under Clause 10.2.4 read with Clause 9.1.4 of the SPA.* [emphasis added]

89 With the italicised words in this paragraph of the award, the tribunal's finding that the respondent was liable for the Cost Overrun was complete. The tribunal referred to the correspondence only later in the award,[60] in the context

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57 Award, p 129.

58 Award, para 196(viii).

59 See also Award, para 390, Dispositif, Claim (b).

60 Award, para 253.

at most of ascertaining the *extent* of the respondent's liability for the Cost Overrun. The question faced by the tribunal in this later section of the award was whether the respondent was liable for the interest component of the Cost Overrun claim up to 31 October 2015, or only for a shorter period.[61]

90 This part of the award must be understood in context. The tribunal earlier interpreted cl 10.2.1 to mean that, if the respondent failed to achieve WCD by 31 March 2013, the first claimant could nonetheless permit the respond to remain in control of the Project and therefore remain liable for the accumulating Cost Overrun.[62] The tribunal then noted[63] that the first claimant started to take the lead in the Project only in November 2013, and issued a formal takeover notice under cl 9.10 of the SPA only in March 2014. Accordingly, the tribunal made the following finding:

> 252 … The liability of [the respondent] to meet the cost overrun till the date when [the first claimant] took control of the construction of the project in the later part of November 2013/beginning of December 2013, or in any event, from 5 March 2014 when the takeover notice was issued by [the first claimant], cannot be disputed.

91 It is apparent that the tribunal found the respondent liable for the Cost Overrun purely upon construing and applying the terms of the SPA. The tribunal relied on the correspondence only in the paragraph of the award[64] coming immediately after the paragraph cited at [90] above:

> 253 **Even though [the respondent] now contends that it is not liable to bear the cost overrun**, *inter alia,* on the ground

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61 Award, p 174.

62 Award, para 196(xv).

63 Award, para 252.

64 Award, para 253.

> that [the first claimant] took control of the execution or actively participated in controlling and supervising the execution from 19 September 2012 itself, **the following correspondence at the relevant time shows that [the respondent] had admitted its liability to bear the cost overrun beyond 31 March 2013 till wet commissioning is achieved** … [emphasis added in bold]

92 I agree with the claimants' submission that in this context, the tribunal's use of the correspondence was for the limited purpose of pointing out that the respondent's current position – that it was not liable for Cost Overrun – was inconsistent with the view that it seemed to have taken in 2013 and 2014 of its liability. The correspondence was certainly not, as the respondent argues, primary evidence "without which [the tribunal] could / would not have found that [the respondent's] Cost Overrun liability continued up to the WCD".[65] On the contrary, I find that excluding the correspondence as being inadmissible could have had *no* bearing on the tribunal's contractual analysis that the respondent was liable for the Cost Overrun simply upon the Project costs exceeding the contractual threshold of $170m.

93 Accordingly, I hold that the tribunal did not breach the rules of natural justice by failing to mention or analyse explicitly in the award the respondent's objections to the admissibility of the correspondence.

(2) Breach of SPA as condition precedent to Cost Overrun liability

94 Next, the respondent argues that the tribunal acted in breach of natural justice or in excess of jurisdiction when it found[66] that the respondent was liable for the Cost Overrun even if it was not in breach of the SPA.

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65 The respondent's written submissions, para 105.

66 Award, paras 215 to 217.

95 The respondent's argument is as follows. The case which the claimants ran on Cost Overrun in the arbitration, beginning with their amended statement of claim, was that the WCD was delayed because the respondent had breached the SPA and that that in turn triggered the respondent's liability to bear the Cost Overrun.[67] But on the very last day of oral submissions, and only in their oral *rebuttal* submissions, the claimants changed their case. Their new case was that the respondent's obligation to bear the Cost Overrun was "absolute and unconditional" and did not depend on establishing a breach of the SPA.[68] The respondent objected in its written closing submissions to the claimants' belated change of case. However, without giving the parties any notice, the tribunal accepted this new case as an issue to be determined, added it to the agreed list of issues in the arbitration and determined it against the respondent.[69] By doing so, the tribunal deprived the respondent of an opportunity to respond to this new case and also acted beyond its mandate by formulating and determining an issue not submitted to it by the parties.

96 The claimants, quite obviously, disagree with the respondent on this. They argue that it was clear from the outset of the arbitration that the basis of the Cost Overrun claim was the respondent's unconditional and unqualified indemnity obligation under cll 9.1.4 and 10.2.4 of the SPA.[70] In any event, the respondent had ample time and opportunity to respond to any alleged new

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67 The respondent's written submissions, paras 106 to 107.

68 The respondent's written submissions, para 110.

69 The respondent's written submissions, paras 112 to 114.

70 The claimants' written submissions in OS770/2018, paras 113 to 115.

argument, given that the respondent had a further four months after the tribunal heard the parties' oral submissions to file its final written submission.[71]

97 Having considered the procedural history and the way in which the arguments evolved in the arbitration, I accept the claimants' submissions and reject the respondent's. The respondent was not denied a reasonable opportunity to respond to the case that its liability for the Cost Overrun was not conditional upon a breach of the SPA.

98 I do not accept the respondent's assertion that the claimants initially framed the Cost Overrun claim as arising only if the respondent were in breach of the SPA and then changed their case radically and at a very late stage. The pleadings show that the claimants, from an early stage in the arbitration, took the position that the respondent's liability for the Cost Overrun arose directly from its express obligation to indemnify the claimants under cl 10.2.4 read with cl 9.1.4 of the SPA. The claimants pleaded the breaches of the SPA only to explain how the Cost Overrun was mounting up, not as a legal condition precedent to the respondent's liability for the Cost Overrun.

99 Thus, the claimants' amended statement of claim expressly pleaded that cll 9.1.4 and 10.2.4 of the SPA read together were the basis of the respondent's liability to both claimants for the Cost Overrun and that cl 11.5 was the basis of the respondent's liability to indemnify the first claimant in respect of the Cost Overrun:[72]

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71 The claimants' written submissions in OS770/2018, para 116.

72 Respondent's Core Bundle, vol 1, amended statement of claim dated 6 September 2016, paras 106 and 111.

> **(ii) Failure of [the respondent] to bear Cost Overrun**
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> 106. *A combined reading of clause 9.1.4 and clause 10.2.4 of the SPA makes it evident that the liability to bear any and all Cost Overrun (i.e. Project Cost exceeding [$170m]) lies with [the respondent].* Given the multiple failures and the additional time being taken to achieve the Wet Commissioning Date of the Project, additional Project Costs have been incurred by [the second claimant] on a continuing basis since the exercise of step-in rights by [the first claimant], and [the second claimant] has been incurring substantial Cost Overruns.
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> …
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> 111. *In addition to [the respondent's] obligation to provide any and all Cost Overrun amounts to [the second claimant] in terms of clause 9.1.4 read with clause 10.2.4 of the SPA*, [the respondent] has also undertaken to indemnify and hold [the first claimant] harmless against all losses incurred under the SPA, in terms of clause 11.5 of the SPA. As described in the paragraphs hereinabove, *[the first claimant] has repeatedly asked [the respondent] to pay the Cost Overrun amounts into [the second claimant]. However, [the respondent] has failed to fulfil its obligations in this regard.* Consequently, [the respondent] is in breach of its specific obligation under the SPA, and [the first claimant] is entitled to invoke the indemnity under clause 11.5 of the SPA to seek repayment of the Cost Overrun amounts from [the respondent].
>
> [emphasis added]

100 The prayers for relief in the amended statement of claim are consistent with this pleading. In relation to the Cost Overrun claim, the claimants sought a:[73]

> (b) declaration that the Respondents are in breach of clause 9.1.4 read with clause 10.2.4, and clause 11.5 of the SPA;
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> (c) direction to the Respondents to jointly and severally pay Claimant No. 2 the Cost Overrun amounts, or in the alternative, indemnify Claimant No. 1 in accordance with clause 10.2.4 of the SPA for Cost Overrun amounting to [$70.8m]; …

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[73] Respondent's Core Bundle, vol 1, amended statement of claim dated 6 September 2016, paras 155(b) and 155(c).

101 The claimants did, rather unfortunately, use the language of "breach" in prayer (b). But it is obvious in context that the claimants' plea of "breach" in this prayer is a plea that the respondent has breached its obligation under cl 9.1.4 read with cl 10.2.4 to pay the Cost Overrun and its obligation under cl 11.5 to indemnify the first claimant in respect of the Cost Overrun. It is not a reference to a breach of an obligation under the SPA to carry out the works to a particular standard.

102 In my view, the amended statement of claim makes it clear that the claimants were relying all along on their unconditional and unqualified contractual right to recover the Cost Overrun once the Project costs exceeded $170m. The claimants' case, stripped to its core, was this: the respondent's failure to pay the Cost Overrun gave rise to a claim for breach of the SPA. The claimants did not plead that the respondent was liable for Cost Overrun *because* it failed to achieve wet commissioning as stipulated in the SPA.

103 Ultimately, the tribunal characterised the claimants' claim as a "right to [an] indemnity" and not a right to *damages* as a result of a breach of an obligation to indemnify.[74] Nonetheless, the fact remains that the claimants did not plead their case on the basis that their entitlement to recover the Cost Overrun was predicated on a breach of the SPA.

104 Further, I find that the respondent understood the true nature of the claimants' case on the Cost Overrun. That is why the respondent pleaded in its statement of defence, by way of response to the claimants' amended statement

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[74] Award, para 215.

of claim, that the respondent could not be liable for the Cost Overrun unless it was first found to be in breach of the SPA:

> 135. The references to Clause 9.1.4 and Clause 10.2.4 of the SPA in Para 106 of the Claims Statement and the conclusions sought to be drawn on the basis of the same, are simplistic, and not based on a meaningful reading of the terms of the SPA. As evident …, the Claimants' case is premised on the basis that cost overrun is a consequence of the delay in achieving Wet Commissioning Date, and given the alleged failures and additional time taken to achieve Wet Commissioning Date, additional Project Costs have been incurred. …
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> …
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> 137. Without prejudice to this position, and while reiterating that [the first claimant] cannot have a claim outside these provisions, *whether as alleged losses flowing from a breach, or in terms of an indemnity provision,* even assuming such a claim can be raised, *[the first claimant] must necessarily establish that it was [the respondent's] default or breach which delayed the achievement of Wet Commissioning and that their claims arose as a direct consequence of such breach.* …
>
> [emphasis added]

The respondent's pleaded case, in short, was that whether the Cost Overrun was claimed as damages flowing from a breach of the SPA or as a contractual liability to indemnify arising under the SPA, the claimants had to demonstrate "default or breach which delayed the achievement of Wet Commissioning" on the respondent's part in order to recover the Cost Overrun.

105 This is not a situation where the respondent misunderstood the claimants' case. The respondent well understood the claimants' case and chose to defend itself by arguing that, as a matter of law, even its contractual liability for the Cost Overrun required proof that it was in breach of the SPA by delaying the WCD. In other words, the respondent defended the claimant's true case on the Cost Overrun by taking the *contrary* position: that its liability required a breach of the SPA.

106 For the same reason, even if the respondent *did* misunderstand the claimants' case and *did* believe it to be premised on a breach of the SPA, the respondent nonetheless had an adequate opportunity to respond to that case and did respond to that case. There was therefore no prejudice to the respondent.

107 I add that even if it were the case that the respondent realised, only on 26 January 2017, that the true basis of the claimants' Cost Overrun claim was a claim on an indemnity without proof of prior breach, the respondent still had a reasonable opportunity to present its case on this point. The significance of 26 January 2017 is that it was the last day of the oral submissions to the tribunal. This is the date when the claimants presented their rebuttal submissions containing the argument alleged to be a new one.[75] The respondents filed their closing written submissions almost two months later, on 21 March 2017.[76] In those submissions, the respondents highlighted what they considered to be the claimants' attempt to "adopt an approach which [was] completely different" from their initial approach on the Cost Overrun.[77] The parties continued to file submissions on costs in April and May 2017. On 22 May 2017, the second respondent asked to supplement its submissions with further authorities.[78] The tribunal allowed the request. The claimants were allowed to submit a response

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75 The respondent's written submissions, para 110(a); see also Claimants' Core Bundle, vol 1, p 4, Item 20.

76 The claimants' written submissions in OS770/2018, para 116(2).

77 Respondent's Core Bundle, vol 4, p 164.

78 Claimants' Core Bundle, vol 5, p 3019, Email from second respondent to the tribunal dated 22 May 2017 at 1.16pm.

to the further submission.[79] It was not until 27 May 2017 that the respondents confirmed that their submissions in the arbitration were to be taken as closed.[80]

108 The four months between the conclusion of the oral submissions and the close of the written submissions was a large and reasonable window of opportunity for the respondent to develop and present a response on the Cost Overrun liability, even if it was genuinely taken by surprise by a new position. The respondent claims that, if given the chance, it would have made full arguments on a particular provision of the contracts legislation of Lemuria. But there is no reason why it could not have sought permission to advance those full arguments to the tribunal in the four months between January 2017 and May 2017. Any submissions on the Lemurian legislation would have turned on matters of pure law and would not have required reopening the discovery phase or the evidential phase of the arbitration. The parties could easily have dealt with the issue in written submissions.

109 Even if it had proven necessary to reopen discovery or the evidential phase, the respondent had more than a reasonable opportunity to seek directions from the tribunal to that effect and to be heard on the substance of the issue. The respondent made no attempt to do this. The tribunal proved itself receptive to the second respondent's request for a further submission in May 2017. That indicates to me that, even in May 2017, the tribunal had *not* closed its mind to requests by the parties to be heard further on the matters before it.

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79 Claimants' Core Bundle, vol 5, p 3042, Email from the tribunal to the parties dated 22 May 2017 at 8.08pm.

80 Claimants' Core Bundle, vol 5, p 3044, Email from the second respondent to the tribunal dated 27 May 2017 at 5.20pm.

110 Accordingly, I find that the respondent was not deprived of a reasonable opportunity to respond to this aspect of its Cost Overrun liability. It had that reasonable opportunity and simply chose not to take it.

111 For the same reasons, I find that the tribunal did not exceed its jurisdiction in finding that the respondent's liability for the Cost Overrun did not depend on establishing that the respondent was in breach of the SPA. The tribunal correctly apprehended the true basis of the claimants' case on why it was entitled to recover the Cost Overrun from the respondent. That this required the tribunal to insert a new question into the parties' Agreed List of Issues does not, in and of itself, mean that the tribunal overstepped the boundaries of what the parties had submitted to it for resolution. The tribunal's jurisdiction includes not only issues specifically presented to it in the pleadings but also those questions of fact and law that arise (whether expressly or impliedly) from the pleadings (see *PT Prima* at [34]). Accordingly, the tribunal was acting perfectly within the scope of its authority in framing and answering the question of whether liability for Cost Overrun arose only upon breach by the respondent or independently of any such breach, simply by the Project costs exceeding $170m.

*Quantification of components of Cost Overrun*

112 I turn now to consider the respondent's challenges to the tribunal's quantification of its Cost Overrun liability.

113 The tribunal limited the respondent's liability to Cost Overrun incurred up to 30 June 2014. That was the date on which the tribunal found the Project would have achieved WCD if the claimants had fulfilled their obligation under cl 9.10(a) of the SPA to complete the Project in the "most prudent and cost effective manner". Quantifying the respondent's liability therefore meant that

the tribunal had to adjust the quantum of the Cost Overrun which the claimants sought to recover to account for the shorter period over which the respondent was liable for the Cost Overrun:[81]

> … This means, that [the respondent] is liable to bear the cost overrun components which were *dependant [sic] on the time factor* (namely, *interest during construction and establishment cost* incurred by [the second claimant]) only till 30 June 2014. … [emphasis added]

114 The tribunal quantified the recoverable Cost Overrun by breaking it down into four components:[82]

(a) interest during construction;

(b) establishment cost;

(c) penstock cost; and

(d) land and site development cost, electro-mechanical ("E&M") works cost, transmission line cost and civil work cost.

115 The tribunal made adjustments to components (a) and (b) to reflect that the reduced period for which the respondent was liable for the Cost Overrun.[83] The tribunal held that no adjustment was necessary for component (c).[84] The tribunal allowed component (d) in full, even though some parts of the claimants' claim related to costs incurred after 30 June 2014.[85] It is the tribunal's decision

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81 Award, para 255.

82 Award, paras 257 to 271.

83 Award, paras 257 to 260.

84 Award, paras 262 to 263.

85 Award, paras 264 to 266.

not to make any adjustments to this final component that the respondent now challenges.

116 The respondent argues that, in not making any adjustments to component (d), the tribunal breached natural justice in two ways. First, the tribunal failed to give the respondent a reasonable opportunity to address it on whether any aspect of component (d) was in fact time-dependent. Second, the tribunal at the very least failed to consider the respondent's evidence and arguments in relation to the quantum of transmission line charges, a sub-component of component (d). I deal with these two arguments in turn.

(1) Component (d) generally

117 The respondent's argument on this aspect of its challenge proceeds on two levels. First, the tribunal's finding that the Project would have been completed by 30 June 2014 if the claimants had completed the Project in the most prudent and cost effective manner did not arise from an argument advanced by either party. Because neither party raised this argument, the tribunal made findings as to which components of the Cost Overrun were time-dependent *without* hearing the parties. The parties could not reasonably have foreseen this point arising.[86] If the tribunal had given the respondent a reasonable opportunity to address this point, its arguments *could* reasonably have persuaded the tribunal that sub-components of component (d) were *also* time-dependent and should be adjusted. This would have reduced the quantum of the respondent's liability for the Cost Overrun.[87]

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86 The respondent's written submissions, paras 86 to 87.

87 The respondent's written submissions, paras 88 to 90.

118 The claimants respond that the respondent was not deprived of any opportunity to present its case on component (d), or indeed on any other component, of the Cost Overrun. The claimants tendered abundant evidence in the arbitration of the expenses incurred under each component, which "would have made clear whether each of the Cost Overrun components … were 'time-dependent'".[88] On the principles of *Soh Beng Tee*, the tribunal was entitled to reach the conclusion it did on the evidence before it. By the same token, the respondent had "plentiful opportunity" to challenge the claimants' quantification of each head of the Project costs and cannot now claim a that the tribunal breached its right to a reasonable opportunity to be heard.[89]

119 I disagree with the claimants' final point. In fairness to the respondent, it could not have known when making its submissions that it should also challenge the Cost Overrun components *in relation to whether they were time-dependent*. It is not reasonable and not realistic to suggest that the respondent could have challenged any of the methods by which the tribunal could ultimately have chosen to slice up the recoverability of these components and therefore had a reasonable opportunity to respond to each of those possible methods.

120 Nonetheless, on balance, I find that there was no breach of natural justice on this aspect of the challenge. It is true that a tribunal "should not come to decisions which surprise the parties": *AUF v AUG and other matters* [2016] 1 SLR 859 ("*AUF*") at [69]. But that general principle is qualified by another proposition – that a tribunal is not required to invite submissions on every point

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88 The claimants' written submissions in OS770/2018, para 143.

89 The claimants' written submissions in OS770/2018, para 144.

necessary for its decision: *AUF* at [70]. The situation in which the tribunal reaches a final position which rests somewhere in the vast gulf between the two parties' polar opposites in their pleaded cases is not uncommon. As was said in *Carillion Construction Limited v Devonport Royal Dockyard Limited* [2005] EWCA Civ 1358 (at [35]):

> It is often not practicable for an adjudicator to put to the parties his provisional conclusions for comment. Very often those provisional conclusions will represent some intermediate position, for which neither party was contending. It will only be in an exceptional case … that an adjudicator's failure to put his provisional conclusions to the parties will constitute such a serious breach of the rules of natural justice that the Court will decline to enforce his decision.

121 As I understand this aspect of the respondent's challenge, it is not finding fault with tribunal's finding that the respondent's liability for the Cost Overrun terminated on 30 June 2014. Indeed, the respondent cannot complain about that finding because it *reduced* the respondent's liability for the Cost Overrun. So the respondent is driven to contending, simply, that as a *result* of this finding, the tribunal ought not to have gone on to decide of its own accord how to classify each of the Cost Overrun components as time-dependent or not. Instead, it should have given the parties a reasonable opportunity to present their respective cases on time-dependence.

122 There is a delicate balance between upholding a party's right to have a reasonable opportunity to respond to the case against it and affording enough latitude to a tribunal to reach decisions without being unduly hindered by the need to refer every point to the parties for argument. I fall back on the comprehensive summation of the law by the Court of Appeal in *Soh Beng Tee* (at [65]):

> (a) Parties to arbitration have, in general, a right to be heard effectively on every issue that may be relevant to the resolution of a dispute. The overriding concern, as Goff LJ aptly noted in *The Vimeira* ([46] *supra*), is fairness. The best rule of thumb to adopt is to treat the parties equally and allow them reasonable opportunities to present their cases as well as to respond. An arbitrator should not base his decision(s) on matters not submitted or argued before him. In other words, an arbitrator should not make bricks without straw. Arbitrators who exercise unreasonable initiative without the parties' involvement may attract serious and sustainable challenges.
>
> (b) Fairness, however, is a multidimensional concept and it would also be unfair to the successful party if it were deprived of the fruits of its labour as a result of a dissatisfied party raising a multitude of arid technical challenges after an arbitral award has been made. …
>
> …
>
> (e) It is almost invariably the case that parties propose diametrically opposite solutions to resolve a dispute. They may expect the arbitrator to select one of these alternative positions. The arbitrator, however, is not bound to adopt an either/or approach. **He is perfectly entitled to embrace a middle path (even without apprising the parties of his provisional thinking or analysis) so long as it is based on evidence that is before him.** Similarly, **an arbitrator is entitled – indeed, it is his obligation – to come to his own conclusions or inferences from the primary facts placed before him**. In this context, he is not expected to inexorably accept the conclusions being urged upon him by the parties. **Neither is he expected to consult the parties on his thinking process before finalising his award unless it involves a dramatic departure from what has been presented to him.**
>
> [emphasis in original; emphasis added in bold]

123 In my view, even without the benefit of arguments specifically on whether each Cost Overrun component was or was not time-dependent, the full extent of the evidence on the Cost Overrun components was before the tribunal. The tribunal notes[90] that "[t]he Claimants have produced [the] following documents in regard to [the disputed Cost Overrun components] for the period 1 February 2014 to 31 October 2015". Merely as an example, the tribunal records[91] that it had before it copies of original invoices, correspondence and meeting minutes evidencing the accumulation of E&M costs by the claimants.[92]

124 It is true that the vast majority of those documents are not before me on these applications. But to the extent that I am satisfied that those documents were before the tribunal, and were used by the claimants to justify their expenses until *31 October 2015*, it appears that there was sufficient evidence for the tribunal to decide which components were not time-dependent, and could accordingly be awarded in their entirety, and which components were time-dependent, and therefore had to be adjusted to reflect the fact that the respondent's liability for Cost Overrun terminated on 30 June 2014.

125 I note, further, that the respondent does not suggest that there is any specific evidence it would have adduced to establish that the elements of component (d) were in fact time-dependent and which could have led the tribunal decide the issue differently. The respondent's main argument is that *the documents provided by the claimants themselves* show that some of these costs arose after 30 June 2014 and that that should have demonstrated to the tribunal

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90 Award, para 264.

91 Award, para 264.

92 Respondent's Core Bundle, vol 4, pp 557 to 604.

that these costs were time-dependent. In my view, the tribunal was entitled to form its own conclusions on the evidence which the parties actually placed before it. An error by the tribunal in coming to those conclusions is no basis for setting aside the award.

126 Accordingly, I reject the respondent's submission that there was a breach of natural justice on these grounds.

(2) Transmission line costs

127 The respondent submits, in addition, that the tribunal failed to consider its arguments on a specific element of component (d), *ie*, the transmission line costs. The respondent argues that it made extensive submissions to the tribunal on why it could not be held liable for the transmission line costs.[93] The tribunal, too, expressly acknowledged in the award that it must consider the question of whether increases in the Project costs on account of prolonged or delayed completion of the claimants' rectification works should be borne by the respondent as part of the Cost Overrun.[94] But the tribunal then found that the transmission line costs were a component of the recoverable Cost Overrun, without giving any reasons or making any reference to the respondent's submissions on the point.

128 The respondent argues that, worse still, the tribunal stated categorically that there was a total "absence of any valid and logical objection"[95] to Cost Overrun components like the transmission line costs. Therefore, the only

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93 The respondent's written submissions, paras 91 to 93.

94 Award, para 222.

95 Award, para 266.

possible inference is that the tribunal entirely failed to apply its mind to any of the respondent's submissions on the issue. This is especially so since the tribunal, earlier in the award, gave detailed reasons for making its finding on the respondent's Cost Overrun liability until 30 June 2014.[96]

129 Having reviewed and analysed the tribunal's chain of reasoning, I reject the respondent's argument.

130 In the arbitration, the respondent ran an all-or-nothing defence to the claim for transmission line costs. It challenged only liability and advanced no alternative challenge to quantum. Thus the respondent's only defence was that it had no liability whatsoever for the transmission line costs because it was the first claimant who was throughout in *de facto* control of those works.[97]

131 The tribunal, however, noted in the award that under cl 1.1 of the SPA, Cost Overrun was defined as "any and all project cost in excess of [$145m]".[98] It then went on to observe that for determining the quantum of the respondent's liability, Cost Overrun should be taken to mean "the total cost of various components of construction, the estimate of which led to the cost of the project being estimated as [$145m]".[99] In my view, in light of this observation – that the components used to calculate the Project cost were the same components of Cost Overrun for which the respondent was liable – it follows that the tribunal implicitly rejected the respondent's defence on transmission line costs. That

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96 The respondent's written submissions, para 94.

97 Respondent's Core Bundle, vol 3, pp 689 to 702, Respondent's Closing Submissions on Transmission Line, para 5.

98 Award, para 219.

99 Award, para 220.

would explain why, in assessing the *quantum* of transmission line costs for which the respondent was liable, the tribunal saw no need to refer to the respondent's argument that it was not responsible for those costs in the first place.

132 To my mind, nothing more can be made of the tribunal's omission to refer to the respondent's arguments on the transmission line costs. The tribunal is not required to acknowledge expressly all of the arguments which a party has made. That is especially so in a complex arbitration such as this one, where the respondent alone generated more than four hundred pages of closing submissions.

133 Accordingly, I reject the respondent's two-pronged attack on the tribunal's quantification of the Cost Overrun claim, and find that there was no breach of natural justice in this portion of the award.

*Set-off of SSL against Cost Overrun*

134 The respondent's final challenge on the Cost Overrun claim concerns both the quantum of the recoverable Cost Overrun and the respondent's counterclaim to recover the SSL (amounting to $5.1m). The tribunal found[100] that the respondent was not entitled to recover the SSL and that there was therefore no question of the SSL being used to set off any Cost Overrun amounts claimed. The respondent contends that the tribunal, in making that finding, acted in breach of natural justice or in excess of jurisdiction because it reached that conclusion on a line of reasoning that was not argued by either party.[101]

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100 Award, para 359.

101 The respondent's written submissions, paras 69 to 79.

135 In this part of the award, the tribunal first notes[102] that the respondent had lost its right to recover the SSL because the SSL had been written down in the second claimant's books in October 2013 pursuant to cl 9.7 of the SPA. The tribunal then went on to find that, in any event, the SSL was extinguished in December 2012 when the second claimant's board agreed in the presence of the respondent that the Project cost to increase the Project cost by more than the amount of the SSL:

> 358. In fact, as early on as 11 December 2012, at the meeting of the Board of Directors of [the second claimant] which was attended by [the respondent's representatives] as invitee, the Board noted that the project cost would exceed the originally budgeted [$145m] and accorded consent for increasing the project cost to [$170m]. *When the project cost was increased to [$170m], [the respondent] was clearly aware that the sum of [$5.1m] advanced to [the second claimant] as [the respondent]'s SS Loan stood adjusted towards the increased project cost of [$170m] and will not be repaid.*
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> 359. It may be noted that Clauses 9.6 and 9.10 also provide for [the respondent]'s SS Loan being adjusted … It is unnecessary to consider these provisions in view of the adjustment of the entire [of the respondent]'s SS Loan of [$5.1m] under Clause 9.7. *It should be noted that such adjustment took place when the project cost exceeded [$145m] and the project cost was revised as [$170m].* The claim for repayment of [the respondent]'s SS Loan of [$5.1m] is therefore rejected.
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> [emphasis added]

136 The respondent takes issue with this finding.[103] The respondent contends that: (a) this finding was contrary to the parties' "agreed and undisputed" position that any liability of the respondent for the Cost Overrun could be adjusted or set off against the SSL; and (b) neither party, in its pleadings,

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102 Award, para 357.

103 Award, para 358.

evidence or submissions, had ever alleged that the SSL had been extinguished when the Project cost was revised from $145m to $170m in December 2012.[104]

137 I pause to note that in the course of oral submissions before me, counsel for the respondent ran a rather different case from that set out in his written submissions as summarised at [135]–[136] above. In oral argument, counsel argued that the crucial flaw in the tribunal's finding on the SSL began with its finding[105] that Cost Overrun under cl 9.7 of the SPA referred to "project cost exceeding [$145m] (defined as the cost overrun)". The respondent argues that this was an "error" on the tribunal's part which went beyond the pleaded cases of the parties because it was nobody's case in the arbitration that Cost Overrun was any cost exceeding the amount of *$145m*.[106] To the extent that the tribunal exceeded its jurisdiction by accepting a *different* number as the baseline for calculating Cost Overrun, the respondent contends that the tribunal quantified the recoverable Cost Overrun to its detriment.[107]

138 The argument run by counsel for the respondent at the hearing before me can be summarily dealt with. Whether the tribunal made an error in using the figure of $145m as the baseline for issuing a Cost Overrun notice turns on an interpretation of cl 9.7 of the SPA. On the face of cl 9.7 of the SPA, it refers to Cost Overrun "[as] contemplated in Clause 9.1.4", which takes into consideration the various loans and security bonds already paid by the respondent into the second claimant. As both parties accept, the amount in

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104 The respondent's written submissions, paras 72 to 73.

105 Award, para 355.

106 Notes of Argument, 16 January 2019, p 13, lines 16 to 17.

107 Notes of Argument, 16 January 2019, pp 14, lines 29 to 36.

cl 9.1.4 adds up to $170m.[108] But this argument, at its highest, only goes so far as proving that the tribunal made an *error* in this section of the award. It does not prove that the tribunal exceeded its jurisdiction such that this part of the award is susceptible to being set aside.

139 In *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 at [37], Judith Prakash J (as she then was) explained that if an issue was within the scope of a submission to arbitration, it would not fall outside the tribunal's jurisdiction "simply because the arbitral tribunal comes to a wrong, even manifestly wrong, conclusion on it". The parties in this case submitted both liability for the Cost Overrun and the quantum of that liability to the tribunal for determination. Therefore, even if the tribunal misinterpreted the SPA and adopted an erroneous figure as its baseline, its error would not take it outside its jurisdiction to decide the issue.

140 In any case, as is apparent from its summary of findings on the Cost Overrun claim, the tribunal ultimately applied the correct baseline figure of $170m when making its final calculations on the quantum of Cost Overrun.[109] There can be no suggestion that any prejudice was caused from the reference to $145m.[110]

141 As for the respondent's argument that the tribunal exceeded its jurisdiction or deprived the parties of an opportunity to be heard on the reasoning adopted in this part of the award (see [135] above), I also reject these

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108 The respondent's written submissions, para 73.

109 Award, para 271(viii).

110 Award, para 355.

arguments. It is useful, first, to analyse the parties' arguments in the arbitration on the respondent's counterclaim for the SSL, amounting to $5.1m.

142 I find that there was in fact no "agreed and undisputed" position between parties on the SSL. The respondent's case was that *if* the respondent was found liable for Cost Overrun, *then* the SSL must be set off to reduce or extinguish the quantum of the Cost Overrun liability.[111] The claimants' case, on the other hand, was that the respondent was not entitled to recover the SSL in the first place because the conditions precedent for recovery, found in cl 9.1 of the SPA, were not satisfied. Accordingly, on the claimants' case, the respondent was *a fortiori* not entitled to set-off the SSL against the recoverable Cost Overrun.[112] In other words, the dispute over recovery of the SSL crystallised into two main questions. Was the respondent contractually entitled to recover the SSL? If so, could that amount be set off against the respondent's Cost Overrun liability? The tribunal found against the respondent on the first question. The second question therefore could not arise.

143 On the first question, the tribunal found[113] that the respondent had lost its contractual right to recover the SSL for the primary reason that the SSL had been written down in the second claimant's books in October 2013 under cl 9.7 of the SPA. The relevant part of cl 9.7 reads as follows:

> In the event of Cost Overrun contemplated in Clause 9.1.4, [the first claimant] or [the second claimant] shall notify [the respondent] (**Cost Overrun Notice**) to provide such amounts to

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111 The respondent's written submissions, para 73; Respondent's Core Bundle, vol 4, Respondent's Closing Submissions relating to Quantification of Claims of Claimant, p 68.

112 The claimants' written submissions in OS770/2018, paras 164(2) to 164(3); Claimants' Core Bundle, vol 4, p 2429, Claimants' Closing Submissions, para 28.3.

113 Award, para 357.

> the [second claimant], as is necessary to meet the Cost Overrun. *If within 14 (fourteen) Business Days of the receipt of the Cost Overrun Notice, [the respondent] fails to pay to [the second claimant] the amount specified in the Cost Overrun Notice, the Sellers' Subordinated Loans from or repayable to [the respondent] shall forthwith stand reduced in the books of [the second claimant] by such amount as is specified in the Cost Overrun Notice*. … [emphasis in bold in original; emphasis added]

The respondent failed to pay a Cost Overrun notice dated 16 October 2013 calling for payment of $9.6m. As a result, the tribunal found that the entire SSL, amounting to $5.1m, stood adjusted towards the amount specified in that Cost Overrun notice under cl 9.7. That extinguished the SSL entirely. There was therefore no question thereafter of the respondent ever recovering the SSL.[114]

144 The tribunal also relied on the secondary reason I have adverted to at [135] above. It found that the SSL was extinguished contractually even *before* the Cost Overrun notice in October 2013. The tribunal notes that the minutes[115] of a meeting of the second claimant's board showed that, in December 2012, at a board meeting attended by the respondent's representatives, the second claimant informed all those in attendance that costs for the Project had exceeded the original budget of $145m and passed a resolution increasing the Project cost to $170m. The tribunal found that this too operated to extinguish the SSL:[116]

> … When the project cost was increased to [$170m], [the respondent] was clearly aware that the sum of [$5.1m] advanced to [the second claimant] as [the SSL] stood adjusted towards the increased project cost of [$170m] and will not be repaid.

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114 Award, para 357.

115 Claimants' Core Bundle, vol 6, p 3555, Meeting minutes of the board of directors of the second claimant dated 11 December 2012.

116 Award, para 358.

145 Neither party put this argument to the tribunal. Nonetheless, insofar as this finding (whether it is correct on the merits or not) was reached on the evidence submitted to the tribunal, *ie*, the minutes of the board meeting, and articulated in the course of the tribunal determining the first question arising on the respondent's claim for repayment of the SSL, the finding was certainly within the tribunal's jurisdiction.

146 In any event, this finding[117] was unnecessary for the tribunal's decision. It comes after the tribunal had already made its primary finding that the respondent's right to recover the SSL stood extinguished under cl 9.7 of the SPA because the respondent had failed to comply with the Cost Overrun notice issued in October 2013. There was therefore no prejudice to the respondent. The tribunal would still have found, for the primary reason which it gave, that the SSL was irrecoverable.

147 Accordingly, there is no basis to set aside the tribunal's findings on the SSL for breach of natural justice or excess of jurisdiction.

***The BPTA Charges claim***

148 The respondent's next challenge is to the tribunal's award to the second claimant of $5.5m in BPTA charges. The tribunal held that, under cl 11.4 of the SPA, the respondent agreed to indemnify the second claimant for any and all BPTA charges incurred before the WCD. Following from the tribunal's finding on the Cost Overrun claim, the tribunal took the WCD to be 30 June 2014. The tribunal accordingly held the respondent liable for all BPTA charges incurred

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117 Award, para 358.

up to that date. The respondent seeks to set aside this part of the award on the basis that the tribunal acted in breach of natural justice by failing to consider its arguments on why the BPTA Charges claim should be rejected entirely.

149 The respondent's case is that it argued, in its closing submissions to the tribunal, that the BPTA Charges claim was "not proved by production of any proof of payment".[118] In particular, the respondent pointed out two things to the tribunal:[119]

> (a) The claimants had provided no proper evidence to support a table which they relied on in the arbitration summarising the type and amount of BPTA Charges paid from May 2014 to October 2015.
>
> (b) The claimants' attempt to rely on the figures in the second claimant's audited financial statements to prove the BPTA Charges paid before to February 2014 was misleading and inaccurate. All that the financial statements showed was "transmission line charges" in the sum of $3.7m. The claimants relied on this to claim BPTA Charges in a different sum, $3.3m, without offering any explanation for the variance.

150 The tribunal found in favour of the claimants on the BPTA Charges claim without addressing the respondent's arguments on the lack of evidence.[120] The respondent argues that, had the tribunal applied its mind to these arguments, the tribunal could have been persuaded that: (a) the table lacked proper

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118 The respondent's written submissions, para 118; Respondent's Core Bundle, vol 4, p 28, Closing Submissions: Liabilities under BPTA.

119 Respondent's Core Bundle, vol 4, p 28, Closing Submissions: Liabilities under BPTA.

120 Award, paras 279 to 281.

supporting invoices and moreover contained descriptions of charges that were not within the scope of the respondent's indemnity obligation; and (b) there was no evidence to support the claimants' claim for $3.3m in BPTA Charges for the period before February 2014.[121]

151 I have no difficulty in rejecting this argument. The tribunal did, in fact, *expressly* analyse the evidence supporting the BPTA Charges claim. The respondent's real complaint is simply that the tribunal's conclusion – that the charges were supported by sufficient evidence – was not the conclusion which the respondent advocated. The tribunal stated:[122]

> *The Claimants have produced the documents* to show that between 1 May 2014 and 31 October 2015, [the second claimant] had paid [$10.4m] towards transmission charges under the BPTA. *The tabular statement at pages 135 to 138 of CB17 gives the details of the payments collected from the documents on record* with reference to the exhibit numbers, volume numbers, date of payment and amount paid. … [emphasis added]

152 The tribunal's reference to the *details* provided in the "tabular statement" is a reference to the fact that the claimants' table provided not just the date, the description of the charge and the amount paid, but also incorporated exhibit numbers and Excel sheet page numbers cross-referencing the entries in the table to the primary evidence put before the tribunal.

153 I reproduce a sample entry from the table to illustrate:[123]

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121 The respondent's written submissions, para 121.

122 Award, para 279.

123 Claimants' Core Bundle, vol 7, p 3888.

| **Date** | **Amount …** | **Remarks** | … | **Ref No. and Excel sheet page number** | **Exhibit** |
|---|---|---|---|---|---|
| 14-May-14 | [$0.3m] | [The Grid Company] – March 14 POC Charges paid | | MY-57, Volume C-33, page 261 | Ex. C-308G(13), Volume C-33 |

154 Most of the evidence which the parties placed before the tribunal has not been placed before me on these applications. That is as it should be. I am not hearing an appeal from the tribunal's award. It is not my task to determine whether the tribunal erred in fact or in law in its award on the BPTA Charges claim. My task is to ascertain, applying the binding authority of *AKN*, whether the clear and virtually inescapable inference is that the tribunal overlooked the respondent's arguments that the BPTA Charges claim lacked sufficient evidential support.

155 The tribunal's chain of reasoning makes it clear that the tribunal did apply its mind to the sufficiency of the claimant's evidence. The tribunal found that the figures provided in the table were supported by details "*from the documents on record*" [emphasis added]. It therefore accepted those figures as having been proved. It is clear that the exhibit numbers and volume numbers listed in the table are references to where the original documents are to be found in the volumes of documents tendered to the tribunal.[124] That is as far as its duty to consider the respondent's objection on the adequacy of the evidence required

[124] Paragraph 232 of the Award, read together with fn 78.

the tribunal to go. As I have reiterated, a tribunal is *not* obliged to expressly refer to, analyse and reject every one of the parties' arguments on every one of the points they raise.

156 For the same reason, I reject the respondent's argument that the tribunal, by not referring to any supporting evidence in accepting the claim for $3.3m in BPTA Charges for the period before February 2014, must have failed to consider the respondent's argument on the lack of evidence for that aspect of the BPTA Charges claim also. I do not consider it a clear and virtually inescapable inference that the tribunal, having taken account of the evidence supporting the BPTA Charges paid from May 2014 onwards in making a finding on those charges, must in the same breath have overlooked the need for documentary evidence for the earlier BPTA Charges. The more likely inference is that the tribunal implicitly concluded that the claimants' claim for $3.3m for the period before February 2014 was also borne out on the evidence.

157 The entire tenor of the respondent's case on the BPTA Charges claim is that the tribunal, by finding against the respondent despite what the respondent believed to be a compelling case, *must* have overlooked the respondent's arguments on the issue. As an argument on breach of natural justice, that is fundamentally misconceived. I can do no better than to adopt the observation of Chan Seng Onn J in *TMM Maritima* (at [94]): no party has a right to expect the tribunal to accept its arguments, regardless of how strong and credible it perceives its own arguments to be.

158 I therefore reject all of the respondent's arguments challenging the tribunal's findings on the BPTA Charges claim. I find that the tribunal did not

fail to consider the respondent's arguments on the sufficiency of the claimant's evidence in rendering its award on this claim.

***Pre-award interest***

159 The respondent's final argument on its own application is that the tribunal acted in breach of natural justice when it awarded the claimants pre-award interest on the Cost Overrun claim. The tribunal awarded the claimants "(simple) interest at the rate of 12% per annum on … cost overrun awarded ([$17.3m]) *from the date of legal notice (4 July 2014)* to date of award" [emphasis added].[125]

160 The respondent complains about the tribunal's choice of 4 July 2014 as the date on which pre-award interest commenced. Neither party argued in the arbitration that pre-award interest should start as early as 4 July 2014. Even the claimant sought pre-award interest only "from 31 October 2015 until the date of the award".[126] The respondent therefore submits that the tribunal breached natural justice in finding that pre-award interest should run from 4 July 2014.

161 I reject this argument. Pre-award interest is in the discretion of the tribunal under s 20(1) of the IAA:

> **20.**—(1) Subject to subsection (3), *unless otherwise agreed by the parties*, an arbitral tribunal may, in the arbitral proceedings before it, award simple or compound interest *from such date, at such rate and with such rest as the arbitral tribunal considers appropriate*, for any period ending not later than the date of payment on the whole or any part of —

125 Award, para 382.

126 The respondent's written submissions, paras 125 to 126.

> (*a*) any sum which is awarded by the arbitral tribunal in the arbitral proceedings;
>
> (*b*) any sum which is in issue in the arbitral proceedings but is paid before the date of the award; or
>
> (*c*) costs awarded or ordered by the arbitral tribunal in the arbitral proceedings.
>
> [emphasis added]

162 The claim for pre-award interest was expressly brought under s 20(1) of the IAA as a provision of the *lex arbitri*.[127] The respondent does not appear to have made any submissions on interest, apart from a bare denial that the claimants were entitled to interest at all.[128] In particular, the respondent made no submission as to the date from which pre-award interest should run if, contrary to the respondent's only submission, the tribunal found the respondent liable for pre-award interest. The commencement date for pre-award interest was therefore not a point which the respondent put in issue before the tribunal.

163 It is clear from s 20(1) of the IAA that the award of interest is a matter entirely at the tribunal's discretion. Interest may be awarded "from such date, at such rate and with such rest as the arbitral tribunal considers appropriate". The tribunal was entitled to grant pre-award interest in its discretion commencing from a date that it considered appropriate. Its omission to give reasons for choosing the date does not render this part of its award vulnerable to being set aside.

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127 Respondent's Core Bundle, vol 3, Claimants' Closing Submissions, Issue No. 22, para 24.4.

128 Respondent's Core Bundle, vol 4, Respondent's Closing Submissions on Final Relief, p 128, para 45.

164 In any event, 4 July 2014, the date which the tribunal selected as the commencement date for pre-award interest, has legal significance. It was obviously not plucked from the air. As the tribunal itself noted, it is the date on which the claimants sent legal notice of the Cost Overrun claim and the BPTA Charges claim to the respondent. The date has a manifest and rational connection to the dispute before the tribunal. It was well within the tribunal's discretion to choose this date as the commencement date for pre-award interest. I see no basis for finding that it acted in breach of natural justice in doing so.

***Conclusion on the respondent's application***

165 For all of these reasons, I reject all of the respondent's challenges to the tribunal's decision on both the Cost Overrun claim and the BPTA Charges claim. Consequently, there is no basis to interfere with the tribunal's rejection of the respondent's counterclaim for amounts related to the Cost Overrun claim, *ie*, the respondent's counterclaim for the refund of Security Bond I and for the repayment of $1.2m. There is also no basis to set aside any part of the tribunal's award in favour of the claimants on interest and costs.

166 Having disposed of the respondent's setting-aside application, I now turn to the claimants' application.

**The claimants' application**

167 The claimants' settting-aside application is a focused challenge to a single finding of the tribunal: that the WCD should be taken to be 30 June 2014 rather than 31 October 2015. The consequence of this finding is that the claimants' right to recover the Cost Overrun and the BPTA Charges terminated on 30 June 2014.

168 To recapitulate, many of the Project's delays flowed from the defective penstock. When the first claimant formally took control of the Project in March 2014, it analysed various remedial options. It chose to reline large sections of the penstock with a secondary steel lining. The tribunal found that re-welding the affected sections of the penstock was both a faster and a cheaper option than re-lining the penstock. In other words, the tribunal found that re-welding was the most prudent and cost-effective manner of completing the Project. The tribunal also found that, had the claimants simply re-welded, the Project would have been wet commissioned by 30 June 2014.[129]

169 It is this finding which the claimants challenge. The claimants argue that this is a finding made in breach of natural justice. The claimants therefore ask that this part of the award be set aside, alternatively remitted to the tribunal.

***The parties' cases***

170 The claimants' case rests on two arguments.

171 First, the claimants argue that the tribunal failed to consider the claimants' evidence and arguments that their methods for repairing the penstock were entirely appropriate. The claimants highlight three aspects of their evidence and arguments to which they say the tribunal failed to apply its mind:

(a) A risk assessment undertaken by the claimants' senior management and an expert report by the claimants' independent engineering expert witness which both concluded that re-lining was the

[129] Award, para 255.

most prudent and cost effective method of rectifying the defects and completing the Project.

(b) The respondent's original design for the penstock was inadequate. No penstock constructed according to that design could have resulted in a wet-commissioned Project.

(c) The time taken to complete other critical components of the Project, *ie*, the transmission line, meant that the Project could not have been wet commissioned by 30 June 2014 in any event.

172 The claimants' second argument is that, in finding that the Project would have been wet commissioned by 30 June 2014, the tribunal adopted a chain of reasoning that the claimants could not have foreseen and therefore had no opportunity to address. As a result, the tribunal deprived the claimants of the opportunity to make submissions on this issue and went beyond the parties' submissions.

***Rectifying penstock defects***

173 I deal first with the contention at [171(a)]. The claimants made extensive submissions before me on this contention. The evidence in question is:

(a) An internal report by the first claimant's Vice-President dated 30 December 2013 which considered four methods for repairing the penstock. The Vice-President first evaluated re-welding and stated that it was *not recommended* given the long-term risk from "[preserving] flawed construction and design", and the possibility of "missed defects". The *only* recommended option was re-lining the penstock, as it was a

"proven fix for failed high pressure penstock", and was "deliverable in tolerable time scale".[130]

(b) The claimant's independent expert witness's report and evidence that the claimant's decision to re-line the penstock was the "technically appropriate" solution in the circumstances.[131] The claimants also point out that the respondent called no expert witnesses, leaving the claimant's expert as the only independent expert evidence before the tribunal.

174 In my view, there is a simple reason why the tribunal found it unnecessary to address or analyse the two reports to which the claimants now point. Having decided that the claimants did *not* adopt the most prudent and cost effective method of repairing the penstock, the tribunal found that:[132]

> It is made clear that the above discussion is only in the context of examining the limitations on the indemnity provided by [the respondent] to bear the cost overrun. *What is stated above is not to be construed as a finding on the question whether relining was necessary as a safety measure or not.* The issue under examination does not relate to the need for safety measures. The question under examination is whether [the first claimant], having entered into the SPA subject to a requirement that wet commissioning should be achieved *by executing the project with reference to the existing design at a particular price*, can add additional safety features which were not in contemplation when the SPA was entered and indemnity was granted, *even if such additional features were subsequently found to be necessary. Even if relining was necessary, [the respondent]'s Cost Overrun indemnity will not cover the cost of relining or the interest and establishment expenditure incurred by [the second*

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130 Claimants' Core Bundle, vol 6, pp 3589 to 3590, Report on the penstock leakage and rehabilitation dated 30 December 2013, Section 6.

131 Claimants' Core Bundle, vol 2, Independent Expert Review Report dated 28 April 2016, p 1053.

132 Award, para 256.

> *claimant] during the extended period required for completion by reasoning of the relining of the penstock.* … [emphasis added]

175 To follow the tribunal's chain of reasoning, whether a particular method for repairing the penstock was appropriate for the purposes of the SPA did *not* turn on whether that same method was appropriate on grounds of safety or for enhanced durability of the penstock or indeed even for achieving wet commissioning. The tribunal's main concern was whether the method chosen conformed best to the *original* designs and specifications for the penstock as proposed and constructed by the respondent. That is because these were the designs and specifications for the Project which the claimants had contractually accepted in the SPA.

176 Thus, the tribunal's caveat that its discussion of the evidence in the preceding paragraphs was "not … a finding on the question whether re-lining was necessary as a safety measure" is, to me, a complete answer to why the tribunal did not refer to all the evidence which the claimants put before it. To the tribunal, it did not matter if the claimants' key contention (that the re-lining method was indeed the best repair option for the long-term structural integrity of the penstock) was correct. On the tribunal's analysis, re-lining the penstock was an improvement on the original design and specifications and not a repair to conform the penstock with the original design and specifications. The claimants undertook this improvement for their own account. It was not an expense within the respondent's liability for the Cost Overrun. In this light, the obvious conclusion is that the tribunal saw no need to engage with the claimants' evidence on what the tribunal saw to be an irrelevant point.

177 Even if I am wrong on the inference to be drawn from this part of the award, the claimants still fail on the requirement of prejudice. Taking the

tribunal's reasoning[133] to its logical conclusion, even if the tribunal took account of the claimants' evidence summarised at [170] above, there is *no* possibility that the chain of reasoning which the tribunal actually adopted could have permitted it to accept re-lining as the appropriate repair method for the penstock within the contractual terms of the SPA.

178 This is sufficient for me to dismiss the claimants' arguments on the tribunal's alleged failure to consider its evidence on the penstock repair. Nonetheless, I would also observe that there are indications in the award that the tribunal did not in fact fail to consider the evidence in question. The claimants suggest that the tribunal completely overlooked the 30 December 2013 report by the first claimant's Vice-President. In fact, the tribunal expressly cited the report in its award.[134] The claimants' argument seeks to draw a fine distinction. They say that the tribunal absorbed only the *cost* analysis from the Vice-President's report which acknowledged that the re-welding method was the faster and cheaper option, but not the *risk* analysis which concluded that the more technically sustainable solution was still the re-lining method.[135] This argument is wholly unconvincing. I do not find it a clear and virtually inescapable inference that the tribunal would have read and noted the details and cost analysis of the four repair options, while ignoring the risk analysis for each option. I note that the risk analysis appears in the very next line of the report.[136]

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133 Award, para 256.

134 Award, para 254(v).

135 The claimants' written submissions in OS512/2018, para 57(2).

136 Claimants' Core Bundle, vol 6, pp 3589 to 3590, Report on the penstock leakage and rehabilitation dated 30 December 2013, Section 6.

179 Accordingly, I reject the claimant's challenge to the award based on the tribunal's failure to consider the evidence that the claimants had adopted the most prudent and cost effective method to rectify the penstock defects.

***Unfeasibility of the original penstock design***

180 The claimants also argue that the evidence in the arbitration tended to show that the original penstock design was wholly inadequate to deliver wet commissioning.[137] As the respondent itself acknowledged in June 2013, "the existing Y-piece design specifications [were] not appropriate for use in the Project".[138] The claimants also submitted to the tribunal that the respondent's obligation under the SPA was to deliver a fully operational Project. The respondent would not be excused from that contractual obligation simply because the claimants had accepted the respondent's original design after conducting its own assessment during the due diligence process leading to the SPA.[139] Thus, the thrust of the claimants' evidence on this aspect was that a complete overhaul of the penstock design was necessary in any case.

181 Even so, it is not a clear and virtually inescapable inference that the tribunal overlooked this evidence. As set out above at [173], the tribunal interpreted the scope of the Cost Overrun indemnity and held that any design features not contemplated in the SPA were not covered by the indemnity, "*even if such additional features were subsequently found to be necessary*" [emphasis added]. This was, in my view, an implicit *rejection* of the claimant's argument

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137 The claimants' written submissions in OS512/2018, paras 73 to 75.

138 Claimants' Core Bundle, vol 6, p 3559, Letter from the respondents to the claimants dated 11 June 2013.

139 The claimants' written submissions in OS512/2018, paras 76 to 80.

that relining the penstock was a necessary expense to achieve wet commissioning and that therefore the respondent should be liable for it.

182 Accordingly, I dismiss the allegation that the tribunal breached natural justice by failing to consider the evidence in this regard.

***Other components of the Project***

183 I come to the last piece of evidence which the claimants submit the tribunal overlooked. The claimants argue that in finding that the respondent's liability for Cost Overrun extended only until 30 June 2014, *ie*, the date when penstock rectification works ought to have ended, the tribunal overlooked evidence and arguments showing that wet commissioning could not have been achieved on 30 June 2014 in any event.

184 The claimants point to evidence showing that there were also defects in the transmission line (*ie*, the cable transporting electricity to the power grid) that were being rectified under the claimants' supervision concurrently with the penstock, and that this would have delayed the WCD far beyond 30 June 2014. In fact, the transmission line works were completed only on 17 October 2015.[140]

185 Despite this evidence, the tribunal made no reference to the time required to complete the transmission line works when it held that the Project ought to have been achieved wet commissioning by 30 June 2014. The claimants submit that the tribunal's failure to consider this evidence is critical,

[140] The claimants' written submissions in OS512/2018, paras 82 to 85.

because the Project could not (whether contractually or in fact) be considered fully operational without the transmission line being ready.[141]

186 There is some truth to the claimants' submission. The transmission line is a component of the Project that must be complete and in place for wet commissioning. This is apparent from the definition of "Wet Commissioning Date" in cl 1.1 of the SPA, which requires that there be no further rectifications to be done on Project components including "the loop-in-loop-out transmission line".[142] The tribunal, in finding that the Project would have been completed by 30 June 2014 if the claimants had completed the Project in the most prudent and cost effective manner, did not address or analyse the delay caused by the rectification works being carried out on the transmission line.

187 But the tribunal's omission to engage with the evidence on the time needed to rectify the transmission line must be understood in the context of the entire Project. As the tribunal noted in its summary of the facts, the transmission line works were *not* the obligation of the first respondent. Rather, the second claimant entered into separate agreements with the *second respondent* for the latter to carry out the transmission line works.[143] This was why the tribunal noted, early on in the award, that the only relation of the transmission line works to the SPA was in the achievement of the WCD, "and not … the *execution* of any civil work or transmission line work" [emphasis added].[144] A possible explanation is that the tribunal believed that in assessing the earliest time that

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141 The claimants' written submissions in OS512/2018, paras 84, 87, 88.

142 Respondent's Core Bundle, vol 1, SPA, p 381, cl 1.1.

143 Award, paras 58 to 61.

144 Award, para 60.

the Project could be completed, if the claimant had employed the most prudent and cost effective method, any ongoing transmission line works (which were the obligation of the *second* respondent) were of no factual or legal relevance. It is true that the tribunal may have been wrong on this. But if so, it is merely an error of fact or law. Even a *manifest* error of fact or law does not amount to a breach of natural justice and is not a ground for setting aside an award.

188 Accordingly, I cannot agree that the clear and virtually inescapable inference to be drawn is that the tribunal overlooked the delay caused by the transmission line works. In my view, it is at least equally plausible that the tribunal – having noted that the execution of transmission line works was not the first respondent's obligation – did not think that the time needed to complete the other components would be relevant to ascertaining the first respondent's Cost Overrun liability.

189 I therefore dismiss this aspect of the claimant's setting-aside application.

***Opportunity to be heard on the Project completion date***

190 Finally, the claimants argue that the tribunal's finding that, had the claimants completed the Project in the most prudent and cost effective manner, the Project would have been completed by 30 June 2014 was a finding that the claimants could not have expected and had no opportunity to address. Accordingly, the claimants were deprived of a reasonable opportunity to make submissions on why the Project could *not* have been completed by 30 June 2014.[145] The claimants contend that the finding that the Project could have been

[145] The claimants' written submissions in OS512/2018, paras 89 to 90.

completed within three to four months of the takeover notice on 5 March 2014 was "entirely arbitrary", and "not based on any evidence put forth by any party in the Arbitration" [emphasis omitted].[146]

191 I have no hesitation in dismissing this argument. First, the claimants' position that it was deprived of a chance to argue that the Project could not have been completed by 30 June 2014 is inconsistent with its argument above (at [171(c)]) that, on the arguments and evidence submitted on transmission line works, it should have been apparent that the Project could have been completed no earlier than 17 October 2015. If the relevant evidence was already before the tribunal, there can be no argument that a party was deprived of the chance to present new material that could have a meaningful chance of making a difference.

192 Further, the tribunal's calculation of three to four months was *not* a number plucked from the air. Ironically, it was based on the claimants' own evidence. In the 30 December 2013 report from the claimants' Vice-President (summarised above at [173(a)]), in assessing the viability of the four repair options for the penstock, he estimated that the re-welding method had a "[p]rogramme estimate [of] 4 months".[147] The tribunal adopted this time frame in the award.[148] The tribunal thus found that "the Project would have been completed within three to four months from 1 February 2014 (or from 5 March 2014, if the date of the formal step in notice issued by [the first claimant] is the

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146 The claimants' written submissions in OS512/2018, para 91.

147 Claimants' Core Bundle, vol 6, p 3589.

148 Award, para 254(v).

basis)". The tribunal's conclusion on the amount of time it would have taken to complete the Project was therefore based on the evidence before it.

***Conclusion on the claimants' application***

193 Having rejected all allegations of a breach of natural justice in the tribunal's decision to limit the claimants' recovery on the basis that WCD should have been achieved by 30 June 2014, I dismiss the claimants' application in its entirety.

**Conclusion**

194 In *AKN*, the Court of Appeal had this to say about the role of the supervisory court in a setting-aside application (at [39]):

> In the light of their limited role in arbitral proceedings, the courts must resist the temptation to engage with what is substantially an appeal on the legal merits of an arbitral award, but which, through the ingenuity of counsel, may be disguised and presented as a challenge to process failures during the arbitration. …

195 In my view, there were several arguments raised in the present applications that amounted in essence to a disguised appeal on the merits of the tribunal's decision. I reiterate, however, that in commercial arbitration, parties exercise their autonomy to choose their dispute-resolution method and to choose their dispute-resolvers. They must accept the consequences of that choice. There is no right of appeal from an arbitral award covered by the IAA. There is only a right to apply to set aside an award on limited grounds. In this case, neither party's right to a fair arbitral process carried out within the tribunal's jurisdiction was breached. Neither party's complaints come within any of the limited grounds for setting aside an award.

196 In the event, the claimants' application and the respondent's application are both dismissed. On costs, I consider that both applications entailed equal amounts of factual and legal complexity. Accordingly, I ordered that the costs of each application be fixed at $30,000 plus disbursements, to be paid by the unsuccessful party in each application to the successful party.

Vinodh Coomaraswamy
Judge

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