IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 118

Originating Summons 1521 of 2019 (Summons 6442 of 2019)

Between

CDI

… *Plaintiff*

And

CDJ

… *Defendant*

JUDGMENT

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

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v
CDJ

[2020] SGHC 118

High Court— Originating Summons 1521 of 2019 (Summons 6442 of 2019)
S Mohan JC
4, 11 March 2020

19 June 2020 Judgment reserved.

S Mohan JC:

Introduction

1 In Originating Summons 1521 of 2019 ("OS 1521"), the Plaintiff applied for leave to enforce a Final Arbitration Award (the "Final Arbitration Award") dated 26 August 2019 and an Additional Award to the Final Arbitration Award dated 25 September 2019 (the "Additional Award") (collectively, the "Award") issued by a sole arbitrator (the "Arbitrator") in a Singapore Chamber of Maritime Arbitration ("SCMA") arbitration (the "Arbitration"). The underlying dispute between the Plaintiff and Defendant involved the sale and purchase of three vessels.

2 As is common, leave was granted *ex parte* to the Plaintiff by an Assistant Registrar pursuant to an Order of Court (HC/ORC 8300/2019) dated

12 December 2019 (the "Leave Order") for the Plaintiff to enforce the Award. The Leave Order was served on the Defendant on 18 December 2019.[1]

3 In Summons 6442 of 2019 filed on 27 December 2019 ("SUM 6442"), the Defendant applied for the Leave Order to be set aside in its entirety. The Defendant did not commence separate proceedings to apply to set aside the Award itself. The parties appeared before me on 4 and 11 March 2020. I reserved judgment and now deliver my grounds of decision.

4 It was common ground during the hearing before me that s 19 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (the "IAA") read with Article 36 of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") as set out in the First Schedule ("Sch 1") of the IAA would apply in this matter, and not s 31 IAA as originally submitted by the Plaintiff in its written submissions.[2] By its plain terms, s 31 IAA only applies to *foreign* arbitral awards and would not therefore apply when enforcement of a *domestic* international arbitral award is being challenged under the IAA.

5 As explained by the Court of Appeal in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 ("*PT First Media*") at [84] – [85] and [99], the same grounds for resisting enforcement of a *foreign* award under Article 36(1) of the Model Law are equally applicable to a party resisting enforcement of a *domestic* international award under s 19 IAA. Consistent with the design of and the philosophy behind the Model Law, an award debtor has a

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1 1st Affidavit of Ng Seek Long at para 4

2 Minute Sheet (4 March 2020) at p 1; Plaintiff's Written Submissions at para 22

choice of remedies. In other words, an award debtor may actively apply to set aside the award before the seat court, or passively seek to resist recognition or enforcement of the award before the enforcing court (*PT First Media* at [65] and [71]). A party may of course, in appropriate circumstances, also seek to invoke both active and passive remedies.

Background facts

6 In Suit No. 300 of 2016 (HC/S 300/2016) (the "Suit"), [name redacted "CFA"] commenced proceedings in the High Court against various parties, including the Defendant, to recover sums owed to CFA under a loan agreement and variation agreements thereto. Those sums were secured by mortgages and collateral deeds of covenants granted to CFA over three Vessels (the "Vessels") and by corporate and personal guarantees.[3] The Vessels comprised two steel tugboats and a steel deck cargo barge.[4]

7 Pursuant to a consent Order of Court (HC/ORC 4528/2016) dated 7 July 2016 in the Suit (the "Authorisation Order"), CFA was authorised to conduct, on the Defendant's behalf, any and all activities necessary and/or incidental to the marketing, advertising and sale of the Vessels.[5] Another entity, [name redacted "CF"], in turn acted as an agent for CFA in relation to those activities.[6] In these grounds, and for avoidance of doubt, I shall refer to CFA and CF collectively as "CF".

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3 1st Affidavit of Ng Seek Long at p 428 (Statement of Claim (HC/S 300/2016) at para 8)

4 1st Affidavit of Ng Seek Long at p 81 (MOA lines 10 – 23)

5 1st Affidavit of Ng Seek Long at p 41; Final Arbitration Award at para 5.4.8

6 1st Affidavit of Ng Seek Long at p 42; Final Arbitration Award at paras 5.4.9–5.4.12

8 The Plaintiff (the claimant in the Arbitration) and the Defendant (the respondent in the Arbitration) entered into a contract in the form of a Memorandum of Agreement (the "MOA") dated 3 August 2016 for the sale and purchase of the Vessels.[7] The Plaintiff was the buyer and the Defendant the seller.

9 Clauses 11 and 12 of the MOA were central to the dispute between the parties in the Arbitration and provided as follows:

> **11. Buyer's Default**
>
> Should the Purchase Price not be paid in accordance with Clause 3 (Payment) or the Buyer fails to take delivery of the Vessels in accordance with this Agreement for any reason whatsoever attributable to the Buyer, the Sellers shall have the right to cancel this Agreement, in which case the Sellers shall be entitled to forfeit and withhold the Deposit which shall be for the account of the Seller, provided that the Buyer shall have the right to cancel this Agreement and be entitled to a full refund of the Deposit in the event that, whichever occurs earlier: (a) CF rejects the grant of the loan facilities to the Buyer for the purchase of the Vessels; (b) CF does not approve the grant of the loan facilities to the Buyer for the purchase of the Vessels within one month of the date of this Agreement and the date which the Buyer delivers its management accounts to CF for its 2015 financial year (whichever is later); or (c) the terms and conditions in relation to CF's loan facilities to be granted to the Buyer are materially different from the Indicative Offer and the Buyer rejects such terms and conditions within 15 calendar days of CF's signed commitment letter to the Buyer.
>
> **12. Seller's Default**
>
> Should the Sellers fail to validly complete a legal transfer of the Vessels in accordance with this Agreement by the Date of Closing, the Buyers shall have the right to cancel this Agreement, in which case the Buyers shall be entitled to a full refund of the Deposit and any other monies already paid by the Buyer (which shall be non-interest bearing) under this Agreement and for the avoidance of doubt, Buyer's sole claim against the Sellers for such failure to deliver the Vessels shall

[7] DBOD Tab 1, p 5

> only be for the refund of the Deposit and any other monies already paid by the Buyer under this Agreement and Buyer agrees that it shall not institute any other claims or proceedings against the Seller or against CF for such failure.

10 It is undisputed that in accordance with the terms of the MOA, and in particular Clause 2, the Defendant received a deposit amounting to US$335,000 (the "Deposit") for the purchase of the Vessels. The Deposit represented 10% of the total purchase price for the Vessels of US$3.35 million.[8]

11 CF issued a Term Commitment Letter (the "First TCL") dated 30 September 2016 to the Plaintiff, which constituted its offer to the Plaintiff to finance a loan for the purchase of the Vessels.[9] The First TCL was never signed by the Plaintiff and was subsequently superseded by the issuance of a second Term Commitment Letter (the "Second TCL") dated 14 November 2016.[10] It was accepted by the parties that the Plaintiff entered into the loan agreement with CF upon the Second TCL being signed.[11] Both the First TCL and Second TCL were issued to [*name redacted "XYZ"*], a company nominated by the Plaintiff.[12]

12 It is also undisputed that on or about 20 February 2017, CF informed the Plaintiff that it was no longer able to fund the purchase of the Vessels.[13] This

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8 1st Affidavit of Ng Seek Long at p 37; Final Arbitration Award at paras 5.3.2-5.3.4

9 1st Affidavit of Ng Seek Long at pp 159-169 (Annex 3 to the Statement of Case, Tab 1 of NSL-4); 1st Affidavit of Ng Seek Long at p 133 para 10(b) (Statement of Case)

10 1st Affidavit of Ng Seek Long at p 133 para 10(c) (Statement of Case); 1st Affidavit of Ng Seek Long at p 170–180; Final Arbitration Award at paras 5.5.1-5.5.2

11 Final Arbitration Award at para 6.28

12 Final Arbitration Award at para 5.7.1

13 1st Affidavit of Ng Seek Long at p 134 (Statement of Case at para 11); Final Arbitration Award at para 5.7.6

development threw the completion of the sale and purchase into disarray and spawned the dispute between the parties. The Plaintiff's position was that as the loan facilities from CF were no longer forthcoming, it was entitled, under Clause 11(a) and/or 11(b) of the MOA, to cancel the MOA and obtain a refund of the Deposit, essentially on the basis that "the grant of the loan facilities" had been rejected or had not been approved.[14] On 23 March 2017, the Plaintiff (through its solicitors) demanded that the Defendant return the Deposit but the Defendant refused.[15] The Defendant's position (as intimated in its solicitors' letter of 24 April 2017) was that the Defendant was entitled to cancel the MOA on the basis that the Plaintiff failed to take delivery of the Vessels due to a "reason…attributable to the Buyer" within the meaning of Clause 11 of the MOA and thereafter, to forfeit and withhold the Deposit. The Defendant then proceeded to do so.[16]

13 The dispute between the parties was referred to arbitration pursuant to Clause 13 of the MOA. Clause 13 of the MOA is reproduced as follows:[17]

> **13. Law and Arbitration**
>
> (a) This Agreement shall be governed by and constructed in accordance with Singapore law and any and all disputes arising out of or in connection with this contract, including any question regarding the existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore Chamber of Maritime Arbitration ('SCMA rules') for the time being in force at the commencement of the arbitration, which rules are deemed to be incorporated by reference to this clause or any statutory modification or re-enactment thereof save to

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14 Final Arbitration Award at para 5.3.12

15 1st Affidavit of Ng Seek Long at pp 182 – 185; Final Arbitration Award at para 6.63

16 1st Affidavit of Ng Seek Long at pp 187 – 188; Final Arbitration Award at para 6.64

17 DBOD at p 5

> the extent necessary to give effect to the provisions of this Clause.
>
> The reference shall be to three (3) arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator within fourteen (14) calendar days of that notice and stating that it will appoint its arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the fourteen (14) days specified. If the other party does not appoint its own arbitrator and gives notice that is (sic) had done so within the fourteen (14) days specified, the party referring a dispute to arbitrator (sic) may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of sole arbitrator shall be binding on both Parties as if the sole arbitrator had been appointed by agreement.

Although Clause 13 of the MOA provided for any arbitral reference to be referred to a tribunal comprising three arbitrators, the parties mutually agreed for the dispute in question to be determined by the Arbitrator as a sole arbitrator.[18]

14 In the Arbitration, the Plaintiff claimed that it was entitled to a return of the Deposit pursuant to Clauses 11 and 12 of the MOA, or on the basis that the Defendant had been unjustly enriched and was liable in restitution. Alternatively, the Plaintiff claimed that it was entitled to damages. The Plaintiff claimed the release and/or return and/or repayment and/or reimbursement of the sum of US$335,000 representing the Deposit for the purchase of the Vessels.[19] The rival contentions of the parties were summarised by the Arbitrator in the following paragraphs of the Award:

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18 Final Arbitration Award at paras 3.1–3.3

19 Final Arbitration Award at paras 4.2.12- 4.2.16

> 6.19 In sum, the Respondents' position is that a 'grant' took place at the point when CF committed to funding the Claimants' purchase of the Vessels and not at the time of the execution of the loan and security documentation or the disbursement of the loan monies. Such commitment took place when the TCLs were issued.
>
> 6.20 The Claimants have taken the position that loan facilities can only be considered to have been granted to them at the point when CF allowed them to drawdown on the facilities.
>
> 6.21 Such drawdown could not take place until the loan and security documentation had been entered into and CF was ready and able to disburse the funds.
>
> 6.22 That situation had not been arrived at when CF informed the Claimants that it would not assist the latter in the funding of the purchase of the Vessels.

15 An oral hearing took place with both parties calling witnesses to testify, following which both parties tendered written closing and reply submissions.

16 The Award was in all material aspects in the Plaintiff's favour. In essence, the Arbitrator made the following findings:

(a) the sale and purchase of the Vessels was contingent on the grant of loan facilities by CF to the Plaintiff and the two limbs were tied into one transaction;[20]

(b) by the terms of the Second TCL, if the loan transaction had not been completed by the final funding deadline of 15 December 2016 and if that deadline was not extended in writing, CF was entitled to cancel the loan transaction with no further obligation;[21]

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20 Final Arbitration Award at para 6.1

21 Final Arbitration Award at para 6.2

(c) having carried on with the transaction beyond the final funding deadline of 15 December 2016 thereby leading the Plaintiff to believe that the Second TCL was still "alive", CF was estopped and/or had waived its rights to terminate its obligations under the Second TCL without giving the Plaintiffs reasonable notice of its intention to do so;[22]

(d) in order to determine when the grant of the loan facilities took place under Clause 11, the Arbitrator may examine the documents which comprised commitment letters and/or loan agreements entered into by CF and the Plaintiff subsequent to the MOA, including the Second TCL;[23]

(e) even though the parties had incorporated the SCMA Rules into the MOA, which rules would have given the Arbitrator the ability to consider, if necessary, pre-contractual evidence as an aid to the interpretation of Clause 11, the Arbitrator's ability to do so was taken away by the parties by reason of Clause 15 of the MOA (an entire agreement clause);[24]

(f) by way of contract, the parties had precluded themselves and each other from adducing evidence of their pre-contractual agreements or other pre-contractual extrinsic evidence as an aid to construing Clause 11 of the MOA;[25]

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22 Final Arbitration Award at para 6.4

23 Final Arbitration Award at para 6.26

24 Final Arbitration Award at para 6.23(c)

25 Final Arbitration Award at para 6.24

(g) considering, *inter alia*, various provisions in the Second TCL, the grant of the loan facilities under Clause 11 took place not when the Second TCL was issued but when (i) CF and the Plaintiff were in the position where the Plaintiff had executed and delivered all of the documents required of it under the Second TCL, (ii) all conditions precedent set out in the Second TCL and the other documents contemplated in the transaction had been met and both sides were ready for the disbursement and (iii) the receipt of the loan on a date not later than the final funding deadline of 15 December 2016;[26]

(h) the conclusion in (g) above meant that there was no need for the Arbitrator to go further and examine whether Clause 11(a) was ambiguous in terms such that a contextual interpretation had to be given to what the clause means;[27]

(i) the position in (g) above was not reached when CF informed the Plaintiff on 20 February 2017 that they were no longer able to help fund the purchase of the Vessels;[28]

(j) given the finding in (i), it was not necessary for the Arbitrator to consider the impact of Clauses 11(b) and 11(c) of the MOA;[29]

(k) there was no difficulty in interpreting the three sub-clauses in Clause 11 as they stood and they were each distinct and separate;[30]

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26 Final Arbitration Award at para 6.39

27 Final Arbitration Award at para 6.40

28 Final Arbitration Award at para 6.41

29 Final Arbitration Award at para 6.42

30 Final Arbitration Award at para 6.47(b)

(l) CF's conduct indicated that it had carried on with the transaction beyond the final funding deadline,[31] and it had thereby indefinitely extended the deadline beyond 15 December 2016;[32]

(m) CF, in extending the deadline under the MOA, had done so as an agent of CFA, which was empowered pursuant to the Authorisation Order to act as an agent of the Defendant in and about the sale and purchase of the Vessels;[33]

(n) when CF told the Plaintiff that they were no longer able to fund the purchase of the Vessels, the grant of loan facilities under Clause 11(a) of the MOA did not take place, thus allowing the Plaintiff to cancel the MOA and be entitled to a full refund of the Deposit.[34]

17 Accordingly, the Arbitrator found in the Plaintiff's favour and awarded the Plaintiff the sum of US$335,000, the payment of which was to be made by the Defendant to the Plaintiff either by procuring the release and return to the Plaintiff of the sum paid into the Defendant's nominated account or by paying the sum to the Plaintiff directly. The Arbitrator also awarded interest on the sum at the rate of 2% per annum from the date of the Notice of Arbitration until payment.[35]

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31 Final Arbitration Award at paras 6.54–6.56

32 Final Arbitration Award at para 6.57

33 Final Arbitration Award at paras 6.60-6.61

34 Final Arbitration Award at paras 6.9, 6.39-6.41

35 Additional Award at para 10

18 As I shall elaborate below, the findings summarised at paragraphs 15(e), (f), (j) and (k) above were at the heart of the Defendant's grievances and its application.

19 In SUM 6442, the Defendant applies to set aside the Leave Order on the following grounds:

(a) Pursuant to Article 36(1)(b)(*ii*) of the Model Law, recognition or enforcement of the Award would be contrary to the public policy of Singapore (the "Public Policy Objection"); and

(b) Pursuant to Article 36(1)(a)(*iii*) of the Model Law, the Award deals with matters not contemplated by, or not falling within, the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (the "Scope of Submission Objection").

Breach of natural justice and the Public Policy Objection

20 In respect of its first ground to set aside the Leave Order (see [19(a)] above), the Defendant's main argument is that there was a breach of natural justice in the making of the Award which caused the Defendant to suffer material prejudice, and that this breach would empower the court to refuse leave to enforce the Award on the ground that allowing its enforcement would be contrary to the public policy of Singapore. The Defendant submitted that the breach of natural justice arose as a result of first, the Arbitrator's "decision to exclude evidence of pre-contractual negotiations",[36] and second, the Arbitrator's

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36 Defendant's Submissions at p 7

"selective consideration of matters" that it had submitted on (namely, the Arbitrator's alleged failure to consider the Defendant's arguments on the interplay between sub-clauses 11(a), 11(b) and 11(c) of the MOA).[37] Consequently, the Defendant submits, leave to enforce the Award should be refused having regard to Article 36(1)(b)*(ii)* of the Model Law.

Legal Principles

21 As mentioned at [4] above, it is common ground between the parties that the same grounds available to a party seeking to resist enforcement of a foreign award as set out in Article 36(1) of the Model Law are available to a party resisting enforcement of a domestic international award under s 19 IAA.

22 Both parties had argued their respective cases on the basis that if an award was made in breach of natural justice, enforcing it would be against the public policy of Singapore. As such, in considering this ground, I have proceeded on the *assumption* that if natural justice was indeed breached in the making of the Award and prejudice was thereby suffered by the Defendant, allowing its enforcement would be contrary to the public policy of Singapore. Although it does not directly impact upon the outcome of this case, I express some reservations about the parties' asserted legal position, for the reasons elaborated below. Nevertheless, as this point was not fleshed out by either party during the hearing, I make no decision on it and leave it to be decided in an appropriate case where the court is assisted with full submissions on the point.

23 It is settled law that a party seeking to challenge an arbitral award on the basis that it is against public policy must specifically identify the public

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37 Defendant's Submissions at p 11

policy that, by virtue of upholding the arbitral award, would be breached (*Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 (*"Sui Southern Gas"*) at [44]; *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443 at [25]). The concept of public policy in the IAA has been discussed by the Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi*") at [59]:

> Although the concept of public policy of the State is not defined in the Act or the Model Law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope. In our view, it should only operate in instances where the upholding of an arbitral award would "shock the conscience" (see *Downer Connect* ([58] *supra*) at [136]), or is "clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public" (see *Deutsche Schachbau v Shell International Petroleum Co Ltd* [1987] 2 Lloyds' Rep 246 at 254, per Sir John Donaldson MR), or where it violates the forum's most basic notion of morality and justice: see *Parsons & Whittemore Overseas Co Inc v Societe Generale de L'Industrie du Papier (RAKTA)* 508 F 2d 969 (2nd Cir, 1974) at 974.

24 The principles enunciated above apply equally to a case where enforcement of an arbitral award is resisted on the basis that it would be contrary to public policy. As such, it may not be sufficient for a party to simply assert that if there was a breach of natural justice in the making of an arbitral award, enforcing it would, *ipso facto*, be contrary to the public policy of Singapore. A party should identify, with adequate specificity, the public policy alleged to have been breached and how allowing the enforcement of that arbitral award would be contrary to *that* particular public policy.

25 In its written submissions, the Defendant submitted that if the court finds that there has been a breach of natural justice, it "would be empowered to set aside the Award on the grounds that the enforcement of the Award would be

against the public policy of Singapore."[38] It however, cited no authority for this proposition. The Plaintiff, in its written submissions, appears to have cited *AJU v AJT* [2011] 4 SLR 739 ("*AJU*") in support of the proposition that the public policy ground encompasses breach of natural justice.[39] In *AJU*, the Court of Appeal stated (at [66]):

> In this connection, we would reiterate the point which this court made in *PT Asuransi Jasa* ([27] supra) at [53]–[57], *viz*, that even if an arbitral tribunal's findings of law and/or fact are wrong, such errors would not *per se* engage the public policy of Singapore. In particular, we would draw attention to the following passage from [57] of that judgment:
>
> > … [T]he [IAA] … gives primacy to the autonomy of arbitral proceedings and limits court intervention to only the prescribed situations. The legislative policy under the [IAA] is to minimise curial intervention in international arbitrations. Errors of law or fact made in an arbitral decision, per se, are final and binding on the parties and may not be appealed against or set aside by a court except in the situations prescribed under s 24 of the [IAA] and Art 34 of the Model Law. While we accept that an arbitral award is final and binding on the parties under s 19B of the [IAA], we are of the view that *the [IAA] will be internally inconsistent if the public policy provision in Art 34 of the Model Law is construed to enlarge the scope of curial intervention to set aside errors of law or fact. For consistency, such errors may be set aside only if they are outside the scope of the submission to arbitration. In the present context, errors of law or fact, per se, do not engage the public policy of Singapore under Art 34(2)(b)(ii) of the Model Law when they cannot be set aside under Art 34(2)(a)(iii) of the Model Law.*
>
> This passage recognises the reality that where an arbitral tribunal has jurisdiction to decide any issue of fact and/or law, it may decide the issue correctly or incorrectly. **Unless its decision or decision-making process is tainted by fraud, breach of natural justice or any other vitiating factor, any errors made by an arbitral tribunal are not per se contrary to public policy.**

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[38] Defendant's Submissions at para 4

[39] Plaintiff's Written Submissions at paras 23 – 24

[emphasis in original in italics, emphasis added in bold]

26 From the last sentence in the passage quoted above, there appears to be some support in *AJU* that a breach of natural justice can be encapsulated within the public policy ground as a basis on which enforcement of an arbitral award may be refused. However, it does not, in my view, stand for the wider proposition that recognising or enforcing an award made in breach of natural justice would, *ipso facto,* necessarily be contrary to the public policy of Singapore in *every* case. As stated at [22], the parties did not address me fully on this point. As my decision does not turn on this point, it is unnecessary for me to consider it any further.

27 In any event, both parties were in agreement that I could have regard to the grounds set out in Article 36(1) of the Model Law (see [4] above). I am therefore of the view that I can consider, in the alternative, whether the Leave Order should be set aside on the basis of Article 36(1)(a)*(ii)* of the Model Law, namely that enforcement of the Award should be refused on the basis that the party against whom the Award was invoked (*ie*. the Defendant) was otherwise unable to present its case. Even though this ground was not specifically raised in SUM 6442 or in the Defendant's affidavits, both parties nevertheless argued their cases comprehensively on the basis of the breach of natural justice ground. There is therefore no injustice or prejudice that would be caused to the Defendant (or for that matter, the Plaintiff) if this court were to consider whether enforcement should be refused pursuant to Article 36(1)(a)*(ii)* of the Model Law (see *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 231 at [18] in the context of the court's powers to allow an unpleaded claim being raised). Given the manner in which the parties argued their respective cases, Article 36(1)(a)*(ii)* of the Model Law would, in my view, have been more relevant since

that particular provision specifically encompasses the breach of natural justice ground.

28 Either way, I now move on to consider the applicable legal principles in respect of the breach of natural justice ground, on which both parties presented detailed submissions.

29 It must now be considered hornbook law that a party challenging an arbitral award on the ground that there has been a breach of natural justice must establish all of the following elements (*Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [29], reaffirmed by the Court of Appeal in *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 ("*L W Infrastructure*") at [48] and *China Machine New Energy Corp v Jaguar Energy Guatemala LLC* [2020] 1 SLR 695 ("*China Machine*") at [86]):

(a) which rule of natural justice has been 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 rights of the challenging party.

30 The approach of the courts to challenges to arbitral awards (or their enforcement) based on the breach of natural justice ground is undergirded by the overarching principles of limited curial intervention and recognition of the autonomy of the arbitral process (*Soh Beng Tee* at [65(c)]). As explained by the Court of Appeal in *AJU* ([25] *supra*) at [65], the "policy of the IAA is to treat IAA awards in the same way as it treats foreign arbitral awards where public

policy objections to arbitral awards are concerned", and as such, findings of fact made in an IAA award are "binding on the parties and cannot be reopened except where there is fraud, *breach of natural justice* or some other recognised vitiating factor" (emphasis added).

31 From the cases that have come before the courts, it is possible to distil a number of specific principles and pointers regarding the overall approach adopted by the courts when dealing with a challenge to an award based on a complaint of breach of natural justice. These principles would apply with equal force to an application to resist the recognition or enforcement of an arbitral award. Drawing together various strands from the cases, I would summarise some of the more pertinent points as follows:

(a) the burden on the party seeking to persuade the court to intervene, whether to set aside or refuse enforcement of an arbitral award, is a high one and it is only in exceptional cases that a court will find that threshold crossed (*China Machine* at [87]);

(b) the standard of proof for such a challenge is on the balance of probabilities (see *Beijing Sinozonto Mining Investment Co Ltd v Goldenray Consortium (Singapore) Pte Ltd* [2014] 1 SLR 814 at [48] on s 31(4) of the IAA in respect of whether enforcement of a foreign arbitral award would be contrary to the public policy of Singapore; see also *Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd* [2010] 3 SLR 661 at [43], *Strandore Invest A/S and others v Soh Kim Wat* [2010] SGHC 151 at [23] and *Galsworthy Ltd of the Republic of Liberia v Glory Wealth Shipping Pte Ltd* [2011] 1 SLR 727 at [11] in respect of refusing enforcement of a foreign arbitral award under s 31(2) of the IAA, which requires the challenging party to

prove grounds that are largely identical to those enumerated in Article 36(1)(a) of the Model Law);

(c) an arbitral award is to be read generously and in a reasonable and commercial way, in the sense that the general approach of the courts is to strive to uphold the award; in this context, consideration may be given to the eminence of the arbitrator in his or her field and experience in the area of law concerned (*TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 (*"TMM"*) at [44] - [45] citing *Atkins Limited v The Secretary of State for Transport* [2013] EWHC 139 (TCC) and *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14);

(d) flowing from (c), an arbitral award should be read supportively, meaning it should be given a reading which is likely to uphold it rather than to destroy it (*Soh Beng Tee* at [59]);

(e) the corollary of (d) is that it is not the court's function to assiduously comb an arbitral award microscopically in its attempt to determine if there was any blame or fault in the arbitral process (*Soh Beng Tee* at [65(f)]; in short, the court should not nit-pick at the award (*TMM* at [45]);

(f) the overarching inquiry (which must be contextual and based on the facts and circumstances of each case) is whether the arbitral process was conducted in a manner that was fair, and whether what was done (or not done as the case may be) by the arbitral tribunal culminating in the arbitral award fell within the range of what a reasonable and fair-minded tribunal in those circumstances might have done (*China Machine* at [104(c)]).

Analysis and decision

32 With these various principles in mind, I turn to the first ground on which the Defendant seeks to set aside the Leave Order, namely, that allowing the Award to be enforced would be against the public policy of Singapore by reason of the breach of natural justice in the making of the Award.

First Objection: The Arbitrator Excluded Evidence of Pre-contractual negotiations

33 The gravamen of the Defendant's complaint is that there was a breach of natural justice as the Arbitrator decided to exclude evidence of pre-contractual negotiations in interpreting Clause 11 of the MOA. The Defendant's case is that the Arbitrator did so without inviting parties to make any submissions on the admissibility of such evidence, and in particular, whether Clause 15 of the MOA, an entire agreement clause, precluded the use of such evidence.[40]

34 For ease of reference, Clause 15 of the MOA reads as follows:

> **15. Entire Agreement**
>
> *The written terms of this Agreement comprise the entire agreement between the Buyers and the Sellers in relation to the sale and purchase of the Vessels and supersede all previous agreements whether oral or written between the Parties in relations thereto.*
>
> Each of the Parties acknowledges that in entering into this Agreement it has not relied on and shall have no right or remedy in respect of any statement, representation, assurance or warranty (whether or not made negligently) other than as is expressly set out in his Agreement.
>
> Any terms implied into this Agreement by any applicable statute or law are hereby excluded to the extent that such exclusion

[40] Defendant's Submissions at paras 10 and 15; Final Arbitration Award at para 6.24

> can legally be made. Nothing in this clause shall limit or exclude any liability for fraud.
>
> [emphasis added]

35 Counsel for the Defendant, Mr Chenthil Kumar Kumarasingam, submitted that the Arbitrator unilaterally excluded the evidence on the basis of Clause 15 of the MOA. This was, Mr Kumarasingam contended, wholly unforeseen and surprising as the Arbitration had proceeded on the basis that pre-contractual negotiations would be considered in, and were central to, the determination of the dispute. Further, in the Arbitration proceedings, both parties had submitted on the use and relevance of pre-contractual negotiations in interpreting Clause 11 of the MOA.[41] The Defendant also argued that at no time during the evidential hearing did the Arbitrator (or the Plaintiff) raise any objections to the relevant witnesses (in particular, the Plaintiff's witness [name redacted "Mr X"]) being cross-examined on the pre-contractual extrinsic evidence.[42]

36 Counsel for the Plaintiff, Ms Magdalene Chew, submitted that the parties' cases in the Arbitration had been mischaracterised by the Defendant in the proceedings before me. Ms Chew contended that it was not the case that the Arbitration had taken place on the basis that both parties agreed that pre-contractual evidence was relevant and admissible.[43] Moreover, the parties were in fact allowed to make submissions on whether pre-contractual negotiations were admissible, and in any event, the Arbitrator had applied his mind to the

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41 Minute Sheet (4 March 2020) at p 2; Defendant's Submissions at paras 16–18

42 Minute Sheet (11 March 2020) at pp 1–2

43 Minute Sheet (4 March 2020) at p 4

issue of pre-contractual negotiations.[44] In addition, the Arbitrator's reasoning in reaching the outcome in the Award was not based on Clause 15 of the MOA.[45] Alternatively, even if there had been any breach of natural justice, the breach was immaterial to the outcome of the proceedings. Therefore, the Defendant did not suffer, and in fact could not point to, any material prejudice.[46]

37 As a preliminary note, there appears to be two facets to the Defendant's case that evidence was excluded by the Arbitrator resulting in a breach of natural justice: first, that the Arbitrator did not ask parties to submit on the admissibility of pre-contractual evidence, and secondly, that the Arbitrator did not ask parties specifically to submit on the applicability of Clause 15 of the MOA in precluding the use of such evidence.[47]

38 Given the heavy burden on the challenging party, I find that the Defendant has not crossed the threshold to make out a case of breach of natural justice on the facts before me.

39 With regard to the first aspect of the Defendant's case, I observe that the Defendant did in fact present submissions on the admissibility of extrinsic evidence, albeit only at the stage of presenting its closing submissions in the Arbitration. The Defendant had, for example, highlighted the principles in *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 and argued that various facts asserted by the Plaintiff were based on *inadmissible* extrinsic evidence and should be

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44 Plaintiff's Written Submissions at para 36(a)

45 Minute Sheet (4 March 2020) at p 4

46 Plaintiff's Written Submissions at para 36(b)

47 Defendant's Submissions at para 15

excluded for purposes of contractual interpretation.[48] I accept that the focus of the Defendant's closing submissions was on whether the facts asserted by the Plaintiff had been sufficiently pleaded and/or particularised (as opposed to the effect of Clause 15). Nonetheless, the point remains that the general question of whether extrinsic evidence was admissible to aid the Arbitrator in the interpretation of Clause 11 of the MOA was an issue which the Defendant had submitted on. That issue was therefore clearly within its contemplation. Further, the Defendant also presented submissions on the relevance of extrinsic evidence, including pre-contractual evidence, to advance its own case on when the grant of the loan facilities took place.[49]

40 As for the second aspect of the Defendant's case, I find that there was no breach of natural justice even though parties were not asked to submit on the impact of Clause 15 on the Arbitrator's ability to consider pre-contractual evidence. I say so for three reasons. First, the Arbitrator's decision was aligned to the primary position of the Plaintiff in the Arbitration and by reason thereof, could not be said to be surprising or unforeseeable. Second, the Arbitrator was entitled to decide on the question of admissibility of pre-contractual evidence without calling for submissions from the parties. Third, any potential impact that Clause 15 of the MOA could have on the Arbitrator's decision-making should have been foreseeable to the parties. I elaborate below.

(1) The Arbitrator's decision was not surprising or unforeseeable

41 The crux of the dispute between the parties centred on whether Clause 11(a) and/or 11(b) of the MOA applied and in particular, how the words "the

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48 DBOD at pp 386-387, 397 (Respondent's Closing Submissions)

49 DBOD at pp 394–396 (Respondent's Closing Submissions)

grant of the loan facilities" that appeared in both sub-clauses were to be construed; that was the decisive issue in the Arbitration.

42 Based on a reasonable and commercial reading of the Award, it is clear enough to me that the position taken and conclusion reached by the Arbitrator on the decisive issue of the interpretation of Clause 11(a) of the MOA was, ultimately, aligned to the *primary position* of the Plaintiff in the Arbitration.

43 The primary position of the Plaintiff, as fleshed out in, *inter alia*, its Opening Statement and closing submissions, was that the wording of Clause 11(a) of the MOA was clear and unambiguous and that primacy should be given to the text of the words used.[50] This primary position was consistent with the Plaintiff's pleaded case in its Statement of Case.[51] The Plaintiff's alternative position (premised on a finding by the Arbitrator that Clause 11 was not clear and unambiguous) was that it would still be entitled to a refund of the Deposit on its interpretation of Clause 11, having regard to the context against which the MOA came about.[52]

44 The reasoning which the Arbitrator adopted to reach his conclusion on the decisive issue may be summarised as follows. In determining when the grant of the loan facilities took place, the Arbitrator examined in some detail the documents executed by the Plaintiff and CF subsequent to the MOA.[53] In

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50 Affidavit of Tan Cheng Xi at pp 15–17 (Claimant's Opening Statement at paras 32–40); DBOD at pp 278–290 (Claimant's Closing Submissions at paras 35 - 55)

51 DBOD at pp 13–15 (Statement of Case at paras 11–12(b))

52 DBOD at p 290, Claimant's Closing Submissions at para 55

53 Final Arbitration Award at para 6.26

particular, the Arbitrator considered that both Term Commitment Letters stated:[54]

> Our [CF's] commitment [to provide a loan to the Plaintiff] is conditioned upon finalization, execution and delivery of the loan, security and related documents consistent with the Term Sheet and otherwise reasonably satisfactory to us.

In this respect, the Arbitrator found that the Term Commitment Letters set out "in clear terms (that) the offer was conditional upon the execution of the various documents" set out in the Second TCL.[55]

45 The Arbitrator also considered that the Term Commitment Letters contained the line:[56]

> This Term Sheet outlines the basic points of business understanding around which binding legal documentation will be structured.

The Arbitrator interpreted this to mean that further documentation had to be completed by a mutually agreed date in respect of the grant of the loan facilities, and funding thereafter disbursed according to the final deadline set out in the Second TCL, *ie* by 15 December 2016. This interpretation accorded with the Arbitrator's analysis of the terms "commitment fees", "collateral" and "governing law" in the Second TCL.[57] The Arbitrator then found that examining the evidence as a whole, it was "clear…that the issuance of the Second TCL is not the point in time at which the grant of the facilities took place".[58]

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54 Final Arbitration Award at para 6.33

55 Final Arbitration Award at para 6.34

56 Final Arbitration Award at para 6.35

57 Final Arbitration Award at para 6.36–6.37

58 Final Arbitration Award at para 6.38

46 Having reached that conclusion on the terms of the Second TCL, the Arbitrator found that "the grant of the loan facilities" referred to in Clause 11(a) of the MOA took place "when CF and the [Plaintiff] were in the position where the [Plaintiff] (had) executed and delivered all of the documents required of them under the Second TCL, all conditions precedent set out in the Second TCL and the other documents contemplated in the transaction had been met, and both sides were ready for the disbursement and receipt of the loan on a date not later than 15 December 2016".[59] This paragraph, in my view, represented the *ratio decidendi* of the Award. As summarised at [15(l)] above, the Arbitrator also found that CF, by its conduct, had indefinitely extended the final funding deadline beyond 15 December 2016.

47 The Arbitrator therefore construed the terms of both TCLs and in particular those of the Second TCL to determine when the grant of the loan facilities took place according to the terms of the Second TCL, before turning his attention to Clause 11(a) of the MOA. The Arbitrator then considered the meaning of the words in Clause 11(a), *viz*, "CF rejects the grant of the loan facilities to the Buyer for the purchase of the Vessels…". Having considered and interpreted the terms of the Second TCL, culminating in his conclusion (at paragraphs 6.38 and 6.39 of the Award) on when the grant of the loan facilities took place, the Arbitrator then concluded that there was thus "no need…to go further *to examine whether Clause 11(a) is ambiguous in terms such that a contextual interpretation has to be given to what that clause means*" (emphasis added). The Arbitrator found that the position as set out at [46] above had not

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[59] Final Arbitration Award at para 6.39

arrived when CF informed the Plaintiff that they could no longer fund the purchase of the Vessels on 20 February 2017.[60]

48 The key question here is whether the Arbitrator's reasoning as summarised above, which led to the outcome on the decisive issue in the Award, could be characterised as unforeseeable or surprising. In summarising the law in this area, the Court of Appeal in *Soh Beng Tee* ([29] *supra*) at [65(d)] stated that:

> In so far as the right to be heard is concerned, the failure of an arbitrator to refer every point for decision to the parties for submissions is not invariably a valid ground for challenge. Only in instances such as where the impugned decision reveals a dramatic departure from the submissions…might it be appropriate for a court to intervene. In short, there must be a real basis for alleging that the arbitrator has conducted the arbitral process either irrationally or capriciously. To echo the language employed in [*Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452], the overriding burden on the applicant is to show that a reasonable litigant in his shoes could not have foreseen the possibility of reasoning of the type revealed in the award. It is only in these very limited circumstances that the arbitrator's decision might be considered unfair.

49 In my judgment, the Arbitrator's reasoning was neither unforeseeable nor surprising. The Arbitrator's analysis and conclusions on when the grant of the loan facilities took place and consequently, his finding that it was not necessary to consider a contextual interpretation of Clause 11(a), meant, *in pith and substance*, that the Arbitrator was agreeing with the Plaintiff's primary position. This is so even if this may not have been that clearly articulated by the Arbitrator in the Award. It thus cannot be said, in my view, that the Arbitrator's reasoning or ultimate decision was unforeseeable or surprising or that the

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60 Final Arbitration Award at paras 6.40–6.41

manner in which the decision was reached by the Arbitrator was irrational or capricious.

50 Whilst the Arbitrator may not have considered the pre-contractual extrinsic evidence or invited parties to submit on the applicability or relevance of Clause 15 of the MOA, the reasoning employed and decision reached by the Arbitrator in the Award on the decisive issue did not, in my view, involve any significant or dramatic *departure* from the parties' submissions. To put it slightly differently, it could not be said by the Defendant to be unforeseeable or surprising that the Arbitrator would agree or align himself with the Plaintiff's primary position, and in doing so, find it unnecessary to consider pre-contractual extrinsic evidence in construing the words in Clause 11(a) of the MOA. In my view, that the Arbitrator did not call for submissions on the issue of admissibility of pre-contractual evidence or the applicability of Clause 15 of the MOA is, therefore, in and of itself insufficient to amount to a breach of natural justice that would warrant setting aside the Leave Order.

(2) The Arbitrator was entitled to decide on the admissibility of pre-contractual evidence without calling for submissions

51 Further, I find that the Arbitrator was entitled to decide on the question regarding the admissibility of pre-contractual evidence in the interpretation of Clause 11(a) without having to invite the parties to present submissions on the point. I elaborate below.

52 Before me, Mr Kumarasingam contended that the Arbitrator's decision to exclude pre-contractual evidence on the basis of Clause 15 of the MOA was wholly unforeseeable as both parties had proceeded on the basis that such evidence was admissible. In support of that contention, Mr Kumarasingam submitted that the Plaintiff's witness, Mr X, was cross-examined on pre-

contractual evidence.[61] He also submitted that the Arbitrator had allowed the Defendant's application for discovery of documents on negotiations between CF and the Plaintiff in respect of two other vessels (the "Other Vessels") which are not subject of the present proceedings. According to the Defendant, it had argued in the specific discovery application that these documents were relevant and necessary for the fair disposal of the proceedings.[62] Considering all these points in the round, Mr Kumarasingam argued, it would follow that the Arbitrator's decision to exclude pre-contractual evidence was unforeseeable.

53 On the other hand, Ms Chew submitted that it was inaccurate to contend that the parties had proceeded on any such agreed basis at all. In relation to the discovery application, Ms Chew submitted that the documents sought by the Defendant were in support of the Plaintiff's argument that CF did not extend the deadline for compliance with the Second TCL beyond 15 December 2016, rather than on any issue pertaining to the relevance of pre-contractual extrinsic evidence in interpreting Clause 11. Whilst the Arbitrator had allowed discovery on the basis of the Defendant's assertions as to why the documents were relevant, it nevertheless did not impinge on the Arbitrator's discretion to decide on the materiality of the evidence or the weight to be accorded to it at a later stage.[63]

54 It bears repeating that the decisive issue before the Arbitrator was whether the Plaintiff was entitled to repayment of the Deposit under Clause

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61 Defendant's Submissions at para 13

62 Defendant's Submissions at para 14

63 Minute Sheet (4 March 2020) at p 6; 1st Affidavit of Ng Seek Long at pp 1804–1807 (Redfern Schedule)

11(a) and/or 11(b) of the MOA and the meaning of the words "the grant of the loan facilities".

55 Despite the Defendant's submission that pre-contractual extrinsic evidence was "front and centre" in the Arbitration,[64] the relevance of pre-contractual extrinsic evidence to the determination of the decisive issue was not raised in the parties' pleadings; it certainly did not feature in any of the Defendant's pleadings. Nor was it expressly or clearly flagged in the Memorandum of Issues ("MOI") or the Defendant's Opening Statement. Arguments on pre-contractual extrinsic evidence only came into play in the parties' closing submissions. With regard to the Defendant's pleadings, Mr Kumarasingam referred me to paragraphs 10 and 11 of the Defendant's Statement of Defence but those paragraphs refer, if at all, only to *post*-contractual as opposed to pre-contractual extrinsic evidence.[65]

56 Reverting to the cross-examination of the Plaintiff's witness Mr X, testimonies of witnesses are, ordinarily, only helpful or relevant insofar as they support the pleaded cases of the parties. The relevance (let alone any alleged centrality) of pre-contractual extrinsic evidence was not explained or highlighted by the Defendant in the Arbitration prior to its cross-examination of the Plaintiff's witness. Moreover, any link or relevance between the pre-contractual extrinsic evidence and the decisive issue was only raised by the Defendant at the stage of closing submissions. As such, it would be incorrect, in my view, for the Defendant to contend that parties had proceeded with the Arbitration on the agreed basis that pre-contractual evidence was admissible.

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64 Minute Sheet (4 March 2020) at p 3

65 Minute Sheet (11 March 2020) at p 4

57 As for the Arbitrator allowing the Respondent's application for discovery, that fact *per se* does not support the Defendant's argument that pre-contractual extrinsic evidence was a central feature of the case. Whilst the Arbitrator allowed discovery of some of the extrinsic documentary evidence sought by the Defendant in relation to the financing of the Other Vessels, I agree with the Plaintiff that the Arbitrator's decision was made on the basis of the Defendant's submission in the Redfern Schedule that the documents were relevant to why CF did not further extend time to complete the transaction. However, in the Award, the Arbitrator decided that it would be "inappropriate and incorrect to link the financing arrangements of the Other Vessels" with the vessels in question, as the Second TCL and the MOA do not make mention of the Other Vessels.[66] Quite clearly, at the stage in the Arbitration when the Arbitrator allowed discovery of the said documents, questions of admissibility and weight to be accorded to the documents had not yet arisen. The Arbitrator's decision to allow discovery of pre-contractual evidence did not mean that such evidence would therefore necessarily feature in the Arbitration or in the Arbitrator's reasoning when the Award was eventually published. I therefore do not place weight on this argument.

58 Even if I were to accept that both parties proceeded on the basis that pre-contractual extrinsic evidence was admissible and relied on it in the course of their closing submissions, the Arbitrator was not bound to simply accept that position without demur. As noted in *TMM* ([31(c)] *supra*) at [65], an arbitrator is not bound to accept or adopt only the premises put forward by the parties. In addition, an arbitrator is entitled to infer a related premise from an argued

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66 Final Arbitration Award at para 6.7

premise placed before it, without asking parties to submit new or further arguments.

59 As held in *AQU v AQV* [2015] SGHC 26 at [18], the "principles of natural justice are not breached just because an arbitrator comes to a conclusion that is not argued by either party as long as that conclusion reasonably flows from the parties' arguments". A particular chain of reasoning would be open to an arbitrator if the links in the chain flow reasonably from the arguments actually advanced by either party or *are related to those arguments* (*JVL Agro Industries v Agritrade International Pte Ltd* [2016] 4 SLR 768 at [156]). Conversely, as noted in *Soh Beng Tee* ([29] *supra*), there may be a breach of natural justice if an arbitrator "decides the case on a point which he has *invented* for himself" (original emphasis) (at [41]), citing Sir Michael J Mustill & Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed, 1989) at p 312), and that an arbitrator "should not make bricks without straw" (at [65(a)]).

60 After considering the wording of Clause 15 of the MOA, the Arbitrator opined that the parties had "by contract, precluded themselves and each other from adducing evidence of their pre-contractual agreements or other pre-contractual evidence as an aid to construing Clause 11 of the MOA".[67] The parties had submitted on the interpretation of the words "the grant of the loan facilities" both *without* (in the case of the Plaintiff in relation to its primary case)

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67 Final Arbitration Award at paras 6.23-6.24

and with reference to extrinsic contextual evidence in their respective closing submissions.[68]

61 In my view, the logically *antecedent* question of whether pre-contractual extrinsic evidence was even admissible in the first place and ought to be considered by the Arbitrator is one that reasonably flowed from or was, at the very least, related to the parties' submissions on the relevance of such evidence. In the circumstances, the Arbitrator was, in my view, entitled to explore and make a finding on the admissibility point even if the parties did not submit on it and were not asked to. In similar vein, the applicability of Clause 15 of the MOA is also a connected or related point that the Arbitrator would be entitled to consider, even if parties had not been invited to submit on it.

62 I turn now to address some of the submissions that were made in relation to the MOI. Mr Kumarasingam submitted that it could not, as was argued by Ms Chew for the Plaintiff, be plausibly contended that the applicability or effect of Clause 15 of the MOA were sub-issues falling within the ambit of Issues 2(a) and 3 in the MOI. However, Mr Kumarasingam also submitted that Issues 6, 8 and 9 in the MOI read with paragraphs 10 and 11 of the Statement of Defence, viewed together with how the issues were ventilated during the Arbitration, brought evidence of pre-contractual negotiations and contextual interpretation into the arena.[69] For ease of reference, the aforementioned issues in the MOI are reproduced below:[70]

> **Issue 2** Did CF reject the grant of the loan facilities to the buyer

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68 DBOD Tab 8 (Plaintiff's Closing Submissions) at paras 55 – 102; DBOD Tab 9 (Defendant's Closing Submissions) at paras 63-71

69 Minute Sheet (11 March 2020) at p 3

70 DBOB Tab 7

for the purchase of the Vessels?

> (a) Was it a condition precedent of the Second TCL that the grant of the loan facilities by CF to the Claimants, was subject to the finalization, execution and delivery of the loan, security and related documents consistent with the Term Sheet?

…

Issue 3 Did CF approve the grant of the loan facilities to the Claimants within one month of 10 September 2016?

…

Issue 6 Was the Claimants' failure to take delivery of the Vessels or pay the Purchase Price due to a reason attributable to the Claimants?

> (a) What constitutes a reason attributable to the Claimants for the purposes of Clause 11 of the MOA?

…

Issue 8 On the construction of Clause 11(a) of the MOA read with the facts, did CF reject the grant of the loan facilities to the Claimants for the purchase of the Vessels so as to entitle the Claimants to a full refund of the Deposit pursuant to Clause 11(a) of the MOA?

Issue 9 On the construction of Clause 11(b) of the MOA read with the facts, did CF not approve the grant of the loan facilities to the Claimants within one month of the date of the MOA and the date on which the Claimants delivered their management accounts to CF for its 2015 financial year (whichever is later) so as to entitle the Claimants to a full refund of the Deposit?

63 The first point I would make in relation to the submissions at [62] is that paragraphs 10 and 11 of the Statement of Defence make reference *only* to *post*-contractual evidence (see [55] above). Be that as it may, even if I were to accept Mr Kumarasingam's latter submission at face value, the applicability of Clause 15 of the MOA and whether pre-contractual extrinsic evidence was excluded by it would then constitute points (even if unargued) that the Arbitrator could decide without inviting submissions from the parties. If indeed Issues 6, 8 and 9 of the MOI read with paragraphs 10 and 11 of the Statement of Defence brought pre-contractual extrinsic evidence and contextual interpretation into the

arena, then the question of the admissibility of such evidence would, in my view, reasonably flow from or would, at the very least, be related to those issues in the MOI *and* the arguments advanced in relation to those issues.

64 As such, the Arbitrator was, in my judgment, entitled to consider Clause 15 of the MOA in his reasoning and come to a conclusion on it without first inviting submissions from the parties.

(3) The potential impact of Clause 15 was foreseeable to the parties

65 I now move on to consider whether the Defendant could have foreseen or anticipated that the question of admissibility of pre-contractual evidence would form part of the Arbitrator's decision-making process. The key inquiry here is whether the Defendant could or ought to have anticipated the possible impact, if any, of Clause 15 on the Arbitrator's decision.

66 In *Glaziers Engineering Pte Ltd v WCS Engineering Construction Pte Ltd* [2018] 2 SLR 1311 (*"Glaziers"*) at [56] to [62], the Court of Appeal discussed three scenarios which may result in surprising outcomes for the parties:

(a) In the first scenario, the parties addressed a question *which the decision-maker posed as a decisive issue*, but the decision-maker answered that question in a manner that was "so far removed from any position which the parties have adopted that neither of them could have contemplated the result" ("Type One") (at [56]).

(b) In the second scenario, the parties did not address the question *which was posed by the decision-maker as a decisive issue* because they

did not know and could not reasonably have expected that it would be an issue ("Type Two") (at [58]).

(c) In the third scenario, the parties did not address a particular issue "even though they could reasonably have foreseen that the issue would form part of the court's decision" (at [60]) ("Type Three"). A Type Three scenario could occur because the parties "failed to apply their minds to it, or failed to appreciate its significance, or because they each assumed that the decision-maker would adopt their position on that issue". Regardless of the reason for which the parties did not address the issue, the Court of Appeal held that this type of decision "cannot be set aside on the basis of any breach of natural justice because if the parties could reasonably have foreseen that the issue would arise, and if they choose not to address that issue, they cannot complain that they have been deprived of a fair hearing" (at [60]).

67 The Plaintiff submitted that the case before me is a Type Three scenario. According to the Plaintiff, Clause 15 of the MOA could reasonably be expected to be relevant to the determination of whether pre-contractual evidence may be admitted to aid in the interpretation of the terms of the MOA.[71] The Defendant, on the other hand, submitted that the case fell within either a Type One or Type Two scenario. The Defendant argued that this was not a Type Three scenario because the Arbitrator relied on Clause 15 of the MOA to exclude pre-contractual evidence when neither party had submitted on the impact of Clause 15. According to the Defendant, there was no reason to think that the Arbitrator would adopt that reasoning, as Clause 15 excluded only prior agreements and

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[71] Plaintiff's Submissions at paras 56, 67

not pre-contractual evidence. The Defendant reiterated that pre-contractual evidence was a central feature of the Arbitration.[72]

68 In my view, the present case bears a closer resemblance to a Type Three scenario and therefore, enforcement of the Award should not be refused as there was no breach of natural justice.

69 First and foremost, pre-contractual extrinsic evidence or the relevance of Clause 15 of the MOA was not posed, *either by the parties or by the Arbitrator*, as *decisive issues*. Neither of these points featured in the parties' pre-arbitration legal correspondence[73] or their pleadings; nor was any clear or specific reference made to such points in the MOI or the Defendant's opening statement. I have summarised the decisive issue at [41] and it was highlighted by the Arbitrator in the Award as follows:

> 5.3.12 The Claimants argue that they are entitled to a full refund of the Deposit pursuant to Clause 11(a) and/or Clause 11(b) of the MOA because CF had not approved or had rejected the grant of loan facilities to the Claimants for the purchase of the Vessels.
>
> 5.3.13 The Respondents strenuously resist this assertion.

70 Extensive arguments were canvassed by the parties on this issue. After considering the evidence put forth by the parties, the Arbitrator reached his decision on the issue in paragraphs 6.38 and 6.39 of the Award (see [45] - [47] above). I agree with the Plaintiff's submission that the Arbitrator's decision *did not* turn on the admissibility of pre-contractual evidence or on Clause 15

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72 Minute Sheet (4 March 2020) at p 3

73 1st Affidavit of Ng Seek Long at pp 182–185, 187–188

precluding the use of such evidence. In other words, *none* of those points was decisive or determinative as far as the Arbitrator's conclusion on the decisive issue is concerned. For this reason, the present case does not fit easily or comfortably into the Type One and Type Two *Glaziers* scenarios.

71 In my opinion, this case bears a closer resemblance to a Type Three scenario. As I stated at [61] above, admissibility must logically be a precursor to the question of the impact or relevance, if any, of pre-contractual extrinsic evidence. The question is whether, objectively, on the facts of this case, the potential issue of admissibility or exclusion of pre-contractual evidence was a reasonably foreseeable issue or question that the parties (or more specifically, the Defendant) could or should have anticipated or foreseen. In my judgment, it was. In the circumstances, the Defendant can have no cause for complaint that it was deprived of an opportunity to address the Arbitrator on this point.

72 Adopting *Glaziers* ([66] *supra*) at [64], where a party fails (knowingly or otherwise) to apply its mind to and address a reasonably foreseeable issue (*even if that issue was subsidiary to the ultimate issue before the tribunal*), it cannot subsequently complain that it has been deprived of the right to a fair hearing or denied a reasonable opportunity to be heard. Overall, I am of the view that the Defendant is, in reality, seeking an opening to challenge the Award on its merits in the guise of a complaint dressed up as a breach of natural justice.

73 I find that there was no breach of natural justice occasioned by the Arbitrator in this case in not inviting submissions from the parties on the admissibility of pre-contractual extrinsic evidence or the effect of Clause 15 of the MOA. This ground of the Defendant's objection therefore fails.

(4) No actual or real prejudice

74 Even if I had been persuaded that there was a breach of natural justice, the Defendant's objection would still fail as it would not be able to show that the Arbitrator's decision caused its rights to be prejudiced. It is trite that there must be a causal connection or nexus between the alleged breach of natural justice and the making of the award to establish actual or real prejudice (*L W Infrastructure* ([29] *supra*) at [50], citing *Soh Beng Tee* ([29] *supra*) at [86] and [91]). As further elucidated by the Court of Appeal in *L W Infrastructure* at [54], the inquiry is whether as a result of the breach, the tribunal was "denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to his deliberations" and whether "the material *could reasonably* have made a difference to the arbitrator rather than whether it *would necessarily* have made a difference" (emphasis in original).

75 On the facts, any alleged breach did not cause the Defendant to suffer any actual or real prejudice. Based on the overall tenor of the Award[74], any submissions advanced by the Defendant on the admissibility of pre-contractual evidence and/or the impact of Clause 15 could not reasonably have made a difference to the outcome of the Arbitrator's decision.

76 The Defendant contended that it could, if it had been given the opportunity to, rely on cases such as *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 (at [36] - [37]) to make a case that an entire agreement clause such as Clause 15 does not exclude extrinsic evidence for the purposes of contractual interpretation.[75] The Defendant also contended that if

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74 For example, Final Arbitration Award at paras 6.8 to 6.10, 6.38 to 6.40 and 6.47

75 Minute Sheet (11 March 2020) at p 4

the Arbitrator had taken into consideration the pre-contractual evidence, the outcome of the case would have been different.[76]

77 The Plaintiff's response was that the principles on contractual interpretation have been set out and explained by the Court of Appeal in cases such as *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* [2015] 5 SLR 1187 at [31] - [33], which held, *inter alia,* that the court should look at the text of an agreement as the first port of call. If the text is itself plain and unambiguous, and giving effect to it does not give rise to an absurd result, the court will give effect to the meaning in the text. The Plaintiff contended that this was in substance the approach taken by the Arbitrator and that it was entirely unobjectionable to do so.[77]

78 I note at the outset that in an application such as the one before me, it is not the court's role to assume the function of the Arbitrator in deciding whether the Arbitrator would have admitted the extrinsic evidence based on the parties' submissions at [76] – [77] had those submissions been made in the course of the Arbitration (*L W Infrastructure* ([29] *supra*) at [54]). To do so would be antithetical to the overarching objectives of limited curial intervention and autonomy of the arbitral process that permeate throughout the IAA.

79 I also need not be satisfied that a different result would ensue had the Arbitrator received the benefit of submissions on Clause 15 of the MOA. On a close reading of the Award as a whole, it is my view that any submissions on

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76 Defendant's Submissions at para 25

77 Minute Sheet (11 March 2020) at p 5

the admissibility of pre-contractual evidence and the impact of Clause 15 were unlikely to have had any impact on the decision of the Arbitrator on Clause 11(a) of the MOA and the words "the grant of the loan facilities" in that clause. The underlying tenor of the Award was that the wording of Clause 11(a) of the MOA was clear and unambiguous and therefore, the Arbitrator needed to go no further and consider pre-contractual extrinsic evidence for context. I agree that in substance, the Arbitrator appeared to have given primacy to the text of the words in Clause 11(a) of the MOA and found the wording clear enough. Therefore, even if the Arbitrator had invited submissions on the admissibility of pre-contractual extrinsic evidence and such evidence was admitted, it could not reasonably have made any appreciable difference to the Arbitrator's conclusion on the decisive issue. As such, if necessary, I would also dismiss the Defendant's objection on this ground.

Second Objection: Selective Consideration of Matters by the Arbitrator

80 The next complaint of the Defendant in terms of the breach of natural justice ground was that "for unknown reasons", the Arbitrator did not consider its submissions on the interplay between the three sub-clauses in Clause 11 of the MOA, and that the structure of those sub-clauses was important to the interpretation of Clause 11.[78] In my view, this objection is wholly without merit.

81 In order to conclude that a tribunal had failed to consider an important issue thus resulting in a breach of natural justice, the inference must be shown to be "clear and virtually inescapable" (*AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 at [46]).

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78 Defendant's Submissions at para 26

82 On the facts, the Arbitrator had focused his mind on the issue and cannot be said to have failed to consider it. First, the Arbitrator stated in the Award that in light of his conclusion on Clause 11(a), it was *not necessary* to deal with the arguments on Clauses 11(b) and 11(c) of the MOA.[79] Any issue on the interplay between the three limbs in clause 11 was thus ancillary at best and not dispositive to the outcome of the Arbitration.

83 More importantly, the Arbitrator *did* in fact address the issue of the interplay between the sub-clauses in the Award[80]. Having set out the Defendant's arguments on the interplay at paragraphs 6.43 to 6.46 of the Award, the Arbitrator then stated his position "on this argument" in paragraph 6.47. The Arbitrator concluded, firstly, that it was "not for the Tribunal to re-write or give sense to clauses in the MOA which might be perceived as not making sense when set against each other"; and secondly, that there was "no difficulty in interpreting the clauses as they stand", as each sub-clause in Clause 11 of the MOA was "distinct and separate".[81]

84 The Arbitrator had clearly considered the issue and came to a conclusion on it. The Defendant's complaint was, in my view, an unabashed attempt to re-litigate before me the merits of its arguments on the interplay between the sub-clauses in Clause 11. This was, simply put, impermissible under the IAA.

85 For all of the reasons given above, I am of the view that the Defendant has failed to establish its case that, on the balance of probabilities, there was a breach of natural justice in the making of the Award or that by reason thereof,

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79 Final Arbitration Award at para 6.42

80 Final Arbitration Award at para 6.47

81 Final Arbitration Award at para 6.47

allowing the Award to be enforced would be contrary to the public policy of Singapore. In my judgment, what was done by the Arbitrator in this case fell within the range of what a reasonable and fair-minded tribunal might have done in those circumstances. I also find that the Defendant has failed to establish that any real or actual prejudice has been suffered by it. I therefore reject this ground of the application accordingly.

The Scope of Submission Objection

86 The second ground on which the Defendant seeks to set aside the Leave Order may be disposed of fairly quickly. The Defendant asserted that the Arbitrator did not adhere to the scope of reference in the Award, as the Arbitrator's decision to *exclude* evidence of pre-contractual negotiations fell *outside* the scope of the terms of reference. According to the Defendant, the Arbitrator exceeded his jurisdiction in finding that evidence of pre-contractual negotiations was inadmissible. For that reason, leave to enforce the Award should be refused having regard to Article 36(1)(a)*(iii)* of the Model Law.[82]

87 I find no merit in the Defendant's submissions and have no hesitation in rejecting them.

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[82] Defendant's Submissions at paras 31 and 32

88 The applicable principles which guide the court in response to a claim that an arbitral award (or part thereof) was not within the scope of submission to arbitration are set out in *PT Asuransi* ([23] *supra*) at [44] and *Sui Southern Gas* ([23] *supra*) at [34]. The task of the court is to ascertain:

(a) the matters which were within the scope of submission to the arbitral tribunal; and

(b) whether the arbitral award (or the part being impugned) involved such matters, or whether it was a "new difference" which would have been "irrelevant to the issues requiring determination" by the arbitral tribunal.

89 As a preliminary point, I find it somewhat inconsistent for the Defendant to argue that the Arbitrator's finding that pre-contractual evidence was inadmissible was irrelevant to the issues requiring determination and therefore outside the scope of submission. As highlighted at [41], the *decisive issue* placed by the parties before the Arbitrator for his determination centred on the interpretation of Clause 11(a) and/or 11(b) of the MOA and the meaning to be ascribed to the words "the grant of the loan facilities" contained therein. The Defendant argued that pre-contractual extrinsic evidence was relevant, and indeed, central to aid the interpretation of Clause 11 of the MOA. If so, it must logically follow that the Arbitrator *was* acting within his jurisdiction in considering the *admissibility* of pre-contractual extrinsic evidence and the effect of Clause 15 of the MOA in the process of coming to a decision on the decisive issue. Therefore, on this score alone, the Arbitrator's finding on the admissibility of pre-contractual extrinsic evidence and the effect of Clause 15 cannot be said to be a matter falling outside the scope of the parties' submission.

90 Finally, it is insufficient for a party to simply demonstrate that an arbitrator decided on a matter outside the scope of submission. As with a challenge founded on a breach of natural justice, the court has to go further and determine whether there has been any real or actual prejudice caused to either or both of the parties (*CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [32]). For the same reasons given at [75] to [79] above, even if I were to accept that the Arbitrator's decision to exclude evidence of pre-contractual negotiations fell outside the scope of the terms of reference, the Defendant has, in my view, suffered no real or actual prejudice. Therefore, this ground of objection also necessarily fails.

Conclusion

91 For the reasons set out in these grounds of decision, I dismiss the Defendant's application in SUM 6442. I will hear the parties separately on costs.

S Mohan
Judicial Commissioner

Chew Sui Gek Magdalene, Cai Jianye Edwin and Tan Chengxi (AsiaLegal LLC) for the plaintiff;
Chenthil Kumar Kumarasingam and Sherah Tan Ying Zhong (Oon & Bazul LLP) for the defendant.