IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 23

Originating Summons No 215 of 2019

Between

CBP

… *Plaintiff*

And

CBS

… *Defendant*

JUDGMENT

[Arbitration] — [Award] — [Recourse against award] — [Setting aside] — [Breach of natural justice] — [Witness gating]

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CBP
v
CBS

[2020] SGHC 23

High Court — Originating Summons 215 of 2019
Ang Cheng Hock J
7 August, 23, 25 October 2019

31 January 2020 Judgment reserved.

Ang Cheng Hock J:

Introduction

1 Central to this judgment is the scope of the right to a fair hearing. The arbitrator in this case declined to hear evidence from all seven of the plaintiff's witnesses because he was of the view that he was empowered by the procedural rules governing the arbitration to do so. The plaintiff now seeks to set aside the arbitrator's award by alleging that there has been a breach of the rules of natural justice.

2 Alternatively, the plaintiff claims that the arbitrator lacked the jurisdiction to determine the matter. In this regard, the defendant argues that the plaintiff is precluded from raising issues of jurisdiction past the statutorily permitted time frame given that the plaintiff participated in the arbitration proceedings. In connection with this, issues relating to the assignment of the

arbitration agreement to the defendant have also been raised for my consideration.

Facts

3 The plaintiff ("the Buyer") is a company incorporated in India, which is engaged in the business of steel manufacturing and power generation. The defendant is a bank ("the Bank"), incorporated in Singapore.[1]

Agreement to purchase coal

4 On or around 19 November 2014, as recorded in an email sent on that date, the Buyer entered into an agreement to buy 50,000 metric tonnes ("MT") of coal from the Seller, a Singapore incorporated company, at a price of US$74 per MT. The coal was to be delivered in two tranches, with the first 30,000 MT to be delivered in December 2014, and the second 20,000 MT to be delivered in January 2015.[2]

5 The agreement in relation to the two tranches of coal was subsequently recorded in two separate sale and purchase contracts, detailing the parties' obligations with respect to the 50,000 MT of coal that was to be purchased by the Buyer ("agreements"). As per the email dated 19 November 2014, they stipulated that the price of the coal was to be US$74 per MT of coal, and that the coal was to be delivered in two tranches, with 30,000 MT delivered first ("the first agreement"), and the remaining 20,000 MT delivered thereafter ("the second agreement").[3] Both agreements were executed on 7 January 2015 but

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1 Ajay Tipte's first affidavit ("AT1") at para 6.

2 AT1 pp 70 to 71.

3 AT1 pp 79 and 89.

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backdated to 24 November 2014 for the first agreement and 20 December 2014 for the second agreement.[4]

6 For both agreements, the Buyer and the Seller also agreed that "[a]ny dispute arising out of or in connection with this contract … shall be referred to and finally resolved by arbitration under the Rules of Singapore Chamber of Maritime Arbitration as amended and in force, from time to time" ("the Arbitration Clause").[5]

7 There were, however, slight differences between the two agreements. First, while there was no assignment clause in the first agreement, clause 22 of the second agreement provided that:

> …The Seller is permitted to assign any receivables due under the Agreement to any bank or other Institution as part of its financing agreement. The Buyer hereby agrees to execute any deeds, documents or letters or do such other things as may be reasonable [*sic*] be required by the Seller to give effect to or recognise any such assignment.[6]

8 The payment terms in the two agreements also differed. While the first agreement provided that the Buyer was to provide a letter of credit in favour of the Seller for the payment of 100% of the cargo value payable at 180 days from the date of a bill of exchange,[7] the second agreement provided that the Buyer would have to pay 100% of the cargo value 150 days after the date of a bill of

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4 AT1 paras 13 and 16.

5 AT1 pp 82–83 and 93, clause 14.1.

6 AT1 p 95.

7 AT1 p 81, clause 10.

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exchange to be drawn by the Seller, which would evidence the maturity date and the value of the cargo.[8]

Dispute in relation to the second tranche of coal

9 No dispute appears to have arisen in relation to the delivery of the first tranche of 30,000 MT of coal.[9]

10 On 21 December 2014, the Seller shipped the second tranche of 20,000 MT of coal from Newcastle, Australia to the Buyer in India.[10] The coal arrived at the port of Gangavaram, India, on 14 January 2015.[11] Discharge of the coal took place from that date until 28 January 2015. According to the Buyer, it was unable to lift 5,000 MT of coal from the port because the Seller only procured the issuance of delivery orders for 15,000 out of the 20,000 MT of coal.[12]

11 In the meantime, the Seller had entered into an Accounts Receivable Purchase Facility with the Bank, which provided for the assignment of the Seller's trade debts to the Bank. Pursuant to the facility agreement, the Seller wrote to the Buyer on 19 January 2015, informing the latter that, pursuant to clause 22 of the second agreement, the Seller had assigned "all of [its] trade debts so that … all amounts due both now and in the future, in respect of invoices, must be paid only to [the Bank]".[13]

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8 AT1 p 91, clause 10.

9 See See Sang Lye's first affidavit ("SSL1") p 10, para 23.

10 AT1 p 9, para 23 and pp 98 and 100; See Sang Lye's second affidavit ("SSL2") Tab 11.

11 AT1 p 9, para 24 and SSL2 Tab 12.

12 AT1 p 10, para 28.

13 AT1 p 111, paras 2 and 3; SSL1 p 10, para 23.

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12 On 22 January 2015, the Bank sent over the bill of exchange drawn by the Seller requiring the Buyer to pay US$1,480,400 by 22 June 2015 ("the Bill of Exchange") to the order of the Bank.[14]

13 On 12 February 2015, the Buyer's bank, IDBI Bank Limited Raipur, sent a SWIFT message to the Bank, indicating in unequivocal terms that the Buyer "has accepted the Bill [*ie,* the Bill of Exchange] and will make payment on due date" ("the SWIFT message"). The SWIFT message also made clear that the "*Mat Dt*" (*ie,* due date) was 22 June 2015 and that the "*Amt Accepted"* (*ie,* amount due) was US$1,480,400, as per the Bill of Exchange sent by the Bank.[15]

14 However, the Buyer failed to make payment of the US$1,480,400 ("the outstanding price"), or any amount part thereof, on the due date of 22 June 2015.[16]

15 After the due date, from 6 July 2015 to 20 October 2015, the Bank sent chasers to the Buyer seeking payment of the outstanding price.[17] During this period, the Buyer responded twice, via email, stating that it was "trying [its] level best to arrange maximum funds so that [the] liabilities can be paid at the earliest", and explaining that the delay in payment was occasioned by annual maintenance to its plant, which affected its cash flow. References were also made to the fact that the market conditions were unfavourable, such that the

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14 AT1 p 114.

15 SSL2 Tab 13.

16 SSL2 p 12, para 26.

17 SSL2 Tab 14.

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prices of its goods were decreasing due to the lack of demand ("the July 2015 emails").[18]

16 In a sudden departure from this position, in October 2015, the Buyer alleged in an email to the Bank, for the first time, that (1) only 15,000 MT of the second tranche of 20,000 MT of coal had been supplied to it, such that it had to source for 5,000 MT of coal from elsewhere, and (2) that the market price of the coal had been reduced such that it would only pay for the coal at a reduced price of US$61 per MT, rather than the agreed price of US$74 per MT.[19]

The December 2015 meeting

17 It is undisputed that, on or around 2 December 2015, representatives of the Seller met with the Buyer's representatives ("the December 2015 meeting") to discuss the issue of the outstanding payment and the short delivery.[20] However, what transpired at this meeting is at the heart of the parties' dispute.

18 According to the Buyer, this meeting took place at one of the Buyer's plants in India. Four of the Buyer's representatives were present at the meeting. Three other persons represented the Seller and an Entity C. [21] Entity C is in the trade credit insurance business. While the presence of Entity C has not been explained by the parties, it is likely to have been involved in insuring the receivables that had been assigned to the Bank.

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18 SSL2 Tab 15, pp 83 and 85.

19 AT1 pp 119 to 122.

20 The Bank does not dispute that a meeting took place: AT1 p 64, para 101.

21 AT1 p 15, para 33 and pp 28 to 29, paras 68 to 69.

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19 The Buyer claims that a global settlement was reached between the parties at the meeting. It was orally agreed that, as there had been a decrease in the market price of coal, the price of the coal would be revised to US$61 per MT for all 50,000 MT of coal.[22] However, the Seller subsequently failed to honour the oral agreement that had been reached at the December 2015 meeting, and maintained its claim for the second tranche of coal at the price of US$74 per MT.[23] In contrast, the Bank wholly denies that the Seller had agreed to a new price at the meeting.

Commencement of arbitration

20 Subsequently, on 21 October 2016, the Bank commenced arbitration proceedings against the Buyer, claiming the outstanding price and late payment interest. As per the Arbitration Clause in the second agreement, the arbitration was to be governed by the Arbitration Rules of the Singapore Chamber of Maritime Arbitration (3rd Edition, 2015) ("SCMA Rules").[24] A sole arbitrator was appointed on 25 April 2017, pursuant to the SCMA Rules.[25]

Jurisdictional challenge

21 As a preliminary point, the Buyer raised a jurisdictional objection to the arbitration proceedings on the basis that there was no arbitration agreement between the Buyer and the Bank.[26] The Buyer argued that there only existed an

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22 AT1 p 15, paras 33 to 34.

23 AT1 p 15, para 35.

24 AT1 pp 134 to 136.

25 AT1 p 155.

26 AT1 p 152, para 5.

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arbitration agreement between the Buyer and the Seller. In its submissions to the tribunal, the Buyer argued that:

> … the assignment of receivables between [the Seller] … and [the Bank] does not *ipso facto* lead to the assignment of the arbitration agreement without the consent of [the Buyer].[27]

22 The arbitrator considered the issue of jurisdiction as a preliminary issue in the arbitral proceedings. After considering the parties' submissions, the arbitrator issued a partial award on 6 December 2017 ("the partial award"). In the partial award, the arbitrator concluded that:

> … pursuant to the plain language of [clause 22 of the second agreement] and the applicable law in Singapore[,] the assignment of receivables by the Seller included [the] assignment of the entire Agreement including the Arbitration Clause.[28]

23 Accordingly, the arbitrator found that there had been a valid assignment of the Arbitration Clause, such that he had jurisdiction to deal with the merits of the Bank's claim.[29]

Circumstances relating to the arbitration proceedings on the merits

(1) The Buyer's delay in filing its defence

24 After having decided the issue on jurisdiction in the Bank's favour, the arbitrator directed the Buyer to file its defence to the Bank's statement of case by 8 January 2018. The Buyer failed to comply with the arbitrator's directions.[30]

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27 AT1 p 213, para 5.

28 AT1 p 242, para 54.

29 AT1 pp 243 to 244.

30 SSL1 p 14, paras (12) to (13).

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25 Subsequently, on 16 March 2018, the Buyer wrote to the arbitrator stating that it wished to contest the arbitration on its merits, albeit under protest as to the issue of the tribunal's jurisdiction. The Buyer further sought eight weeks "for [the] preparation and finalisation of reply" to the Bank's statement of case.[31]

26 The Bank objected to any extension, but the arbitrator granted the Buyer 14 days to file its defence and counterclaim to the Bank's statement of case.[32] Consequently, a tentative hearing date that had been fixed on 21 March 2018 was vacated. At this stage, the arbitrator also asked the parties to "review and agree on the necessity of an oral hearing. *Should the parties not be able to agree that the decision should be based on documents only then pursuant to SCMA Rule 28 we will schedule a hearing*"[33] [emphasis added].

27 On 8 April 2018, one day before its defence and counterclaim was due, the Buyer sought a further extension of two days.[34] The arbitrator rejected the Buyer's request. However, he granted an extension for the Buyer to submit its list of witnesses.[35]

28 On 10 April 2018, the Buyer submitted its defence and counterclaim, which it titled its "reply on merits", along with a list of seven named witnesses. Save for one witness, six out of the seven witnesses were persons which the Buyer claimed were present at the December 2015 meeting, as described above

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31 SSL2 Tab 18, p 144.

32 SSL2 Tab 18, p 136.

33 SSL2 Tab 18, p 136 para 6.

34 SSL2 Tab 24, p 393.

35 SSL2 Tab 24, pp 390 to 392.

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at [18].[36] In substance, the Buyer claimed that the parties had agreed to a reduction of coal price for the entire 50,000 MT of coal (from US$74 per MT to US$61 per MT) during the December 2015 meeting. The Buyer further asserted that the Seller had not delivered the outstanding balance of 5,000 MT of coal.[37] To account for this alleged shortfall in delivery, the Buyer counterclaimed for Rs 16,640,000 along with 18% interest as it alleged that it had to procure the 5,000 MT of coal from the open market.[38]

(2) Disposing of the need for witnesses

29 After the Buyer submitted its "reply on merits", which was in substance its defence and counterclaim, the Bank submitted its reply and defence to the Buyer's counterclaim on 24 April 2018. In its covering email, the Bank suggested to the arbitrator that there was *no necessity for witnesses to be called* as the dispute between the parties turned "primarily on the *contractual interpretation"* of the second agreement only [emphasis in original]. Furthermore, while the Buyer had put forward a list of witnesses, "it [had] not explained its position/reasons for calling these witnesses".[39] On its part, the Bank informed the arbitrator that it was not intending to call any witnesses or submit any witness statements. Accordingly, the Bank submitted that the arbitration should proceed on a documents-only basis. Alternatively, should the arbitrator find that an oral hearing was necessary, the Bank suggested that, pursuant to r 28.1 of the SCMA Rules, such a hearing could be conducted for

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36 SSL2 Tab 24 p 384 and Defence's Core Bundle ("DCB") Tab 3 p 338; AT1 p 29, para 69 and p 338.

37 AT1 pp 322 to 323.

38 AT1 pp 330 to 331.

39 SSL2 Tab 24 p 381 paras 3(2) and 3(4).

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the hearing of oral submissions only, without the need for any witnesses to be called.[40]

30 At this juncture, two points must be noted. The first is in relation to the arbitrator's request that parties consider a "documents-only" arbitration (see [26] above). While there is no fixed definition of a documents-only arbitration, this commonly refers to an arbitration that is to be determined without an oral hearing. The arbitral tribunal will review the written documents and arguments submitted by the parties before making its decision. The tribunal does not hold an oral hearing for the presentation of evidence or for oral argument (see *Arbitration in Singapore: A Practical Guide* (Sundaresh Menon *et al*) (Sweet & Maxwell, 2nd Ed, 2018) at para 11.041). The written documents that parties submit may include pleadings, documentary evidence and, in certain instances, witness statements (see, *eg, Taigo Ltd v China Master Shipping Ltd* [2010] HKEC 952 at [5]). It would be obvious from my description that a documents-only arbitration, where parties have submitted witness statements, would only be available if all parties are of the view that (i) there is no need to cross-examine any of the witnesses on their witness statements, and (ii) they are content to make written submissions to the arbitral tribunal, without the need for any oral submissions.

31 The second point is that the precise request of the Bank was for the arbitrator to decide whether there was any need for witness testimony, be it by way of witness statements or oral evidence, in order for the dispute in the arbitration to be determined. The Bank's position was that there was no need for any witness testimony. This is quite different from a request that the

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40 SSL2 Tab 24 p 382 paras (7) and (8).

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arbitrator proceed on a documents-only basis which, as I have explained above, may include the submission of witness statements, but with no cross-examination of the makers of the statements.

32 Following the Bank's proposal for the disposition of witnesses, the arbitrator asked the Buyer to provide "its position/reasons for calling the 7 witnesses and/or the need for their oral testimony."[41] In response, the Buyer replied, emphasising that "an Oral Hearing is required and necessary."[42] No detailed arguments were furnished, except that the witnesses had "to be examined and evidenced [*sic*] adduced with respect to the submissions made by [the Buyer] in its defence."[43] Finding the Buyer's response to be unsatisfactory, the arbitrator again requested "a descriptive basis of what [the Buyer] expects to develop with the introduction of the proposed witnesses".[44] To this, the Buyer re-asserted that "[t]here is a necessity of examining the witnesses" as "the case does not solely turn on the documents (*sic*) interpretation as submitted by" the Bank.[45]

33 After the above exchange, the arbitrator then made a direction on 1 June 2018 that, *before he was to rule on whether it would be a "documents-only" proceeding or if an oral hearing was necessary*, he would require detailed written statements from each of the Buyer's named witnesses.[46]

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41 SSL2 Tab 24 p 380.

42 DCB Tab 6, p 347.

43 DCB Tab 6, p 349.

44 DCB Tab 7.

45 DCB Tab 8, p 259.

46 DCB Tab 9, p 254.

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34 The Buyer replied on the same day, stating that it was a breach of the rules of natural justice for the arbitrator to require the Buyer to submit a written statement from each witness before he decided whether to hold an oral hearing for the witnesses to be examined. It was also highlighted than some of the witnesses which it intended to call were representatives of the Seller. Further, it was submitted that an oral hearing was necessary for the Buyer to cross-examine these witnesses. In closing, the Buyer refused to provide any of the witness statements that was requested by the arbitrator, stating that any submission of such statements before the arbitrator's decision as to whether an oral hearing would be held was "contrary to [the] interest of justice and law."[47]

35 The arbitrator replied to the Buyer's email on 4 June 2018, assuring parties that he had not made any decisions on whether a hearing ought to be held and if so, what the form of such hearing would be. The arbitrator also informed parties that, pursuant to r 33.1(c) of the SCMA Rules, he had the authority to "conduct such enquiries as may appear to the Tribunal to be necessary or expedient".[48]

36 The Buyer replied on 6 June 2018, stating that the calling of witnesses was within its entitlement under r 28.1 of the SCMA Rules, which provides that an arbitrator "*shall* hold a hearing for the presentation of evidence by witnesses, including expert witnesses, or for oral submissions" [emphasis added] *unless* parties have agreed on a documents-only arbitration. This rule, in the Buyer's view, was "clear and simple"; since the Buyer had not agreed to a documents-only arbitration, an oral hearing ought to be held for it to present its witness

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47 DCB Tab 10, p 365.

48 DCB Tab 10, pp 363 to 364.

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testimony. The Buyer further stated that the SCMA Rules did not impede its ability to call witnesses even if it failed to provide detailed written statements of its witnesses.[49]

37 The arbitrator replied on 7 June 2018 stating, with unmistakable sarcasm, that it was "encouraging to see that [the Buyer had] a copy of the applicable SCMA rules to hand". Further, he denied the Buyer's request to dispose of the need to provide detailed written statements of its named witnesses.[50] The Buyer did not respond to this email.

38 On 4 July 2018, the arbitrator wrote to both counsel, again requesting for written witness statements from the Buyer, as well as a brief of what constitutes a breach of natural justice. The arbitrator then stated quite unequivocally that, if the Buyer still did not submit its witness statements, it would be taken to have "waived" its right to present witness evidence in the event of an oral hearing.[51]

39 On 16 July 2018, the Buyer replied, simply stating that it was reiterating the contents of its earlier emails where it had asserted that it was entitled to call its witnesses notwithstanding the lack of written statements for each witness.[52] The arbitrator replied stating that he regarded the Buyer's response as evidence of its "non participation".[53]

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49 DCB Tab 10, pp 369 to 370.

50 DCB Tab 10, p 373.

51 DCB Tab 13, p 252.

52 DCB Tab 14, p 249.

53 DCB Tab 14, p 249.

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40 On 20 July 2018, the arbitrator made his direction that, since parties had not agreed to a documents-only arbitration, pursuant to r 28.1 of the SCMA Rules, an oral hearing would be conducted on 21 August 2018. However, the arbitrator also stated that, *pursuant to the same rule*, *there would be no witnesses presented at the hearing* as the Buyer had "failed to provide witness statements or any evidence of the substantive value of presenting witnesses." Finally, it was directed that the Buyer's counterclaim would not be heard at the oral hearing as the Buyer had failed to deposit the necessary funds with the SCMA despite having been requested to do so on several occasions.[54]

41 A day before the hearing was due to be conducted, on 20 August 2018, the Buyer wrote to the arbitrator to reiterate that the denial of witness examination was "a violation of [the] principles of natural justice and also against the principles of [a] full and fair hearing." In the absence of a full and fair hearing of its witnesses, it asserted that the hearing would be a "mere formality", and that the arbitrator had pre-judged the matter.[55] In response, the arbitrator wrote to the parties assuring them that he had not made up his mind on the matter, and that he had only briefly reviewed the submissions.[56]

The hearing

42 On 21 August 2018, the arbitrator conducted the hearing via telephone, which was delayed from 15:00 to 15:15 to give the Buyer additional time to phone in to participate. After the Buyer failed to do so, the arbitrator allowed the Bank to make its oral submissions which took about ten minutes. No new

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54 DCB Tab 15.

55 DCB Tab 16 p 1.

56 DCB Tab 16 p 1.

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or additional documents, evidence or submissions were presented by the Bank during the hearing.[57]

The award

43 The final award was issued on 16 November 2018.[58] The arbitrator found that two of the main issues were (a) whether the contractual quantity and quality of coal had been delivered pursuant to the terms of the second agreement; and (b) whether there was an agreement between the Buyer and the Seller for a price adjustment.[59]

44 With regard to the first issue, the arbitrator found that 20,000 MT of coal had been delivered by the Seller, as this was supported by the documentation provided. He also found that there was no written supporting documentation presented by the Buyer in support of its allegation that there had been a short delivery of 5,000 MT of coal. Thus, the Buyer's claim of short delivery was rejected as being "without merit".[60]

45 As for the second issue, the arbitrator found that, although the Bank acknowledged that a meeting had been held in December 2015, the submission of an oral agreement for a price adjustment was also without merit as:[61]

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57 AT1 p 61, para 81.

58 AT1 p 68.

59 AT1 p 62, paras 84 and 86.

60 AT1 pp 63 to 64, paras 98 to 99.

61 AT1 p 64, para 101.

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(a) the first tranche of coal (30,000 MT) had been delivered and paid for, and there was no written evidence that the Seller or the Buyer intended to change this price during the December 2015 meeting;

(b) the Buyer's admissions in the July 2015 emails that it was trying its level best to arrange maximum funds to meet its liabilities was a clear acknowledgment and admission that the coal had been delivered and that it owed the Bank the outstanding price;

(c) clause 19 of the second agreement required all amendments to be in writing and signed by the legal representative of both parties. However, there was no written evidence signed by the authorised agents for each party in support of an agreement to change the contractually agreed price of US$74 per MT of coal; and

(d) clause 20 of the second agreement stated that the agreement constituted the entire understanding between the parties and that any changes had to be written and signed by an authorised agent of each party. However, no written evidence in this regard had been provided to show that the second agreement had been amended or changed.

46 Accordingly, the arbitrator allowed the Bank's claim for the outstanding price in full.[62] He also allowed interest of US$503,371.17 on the outstanding price.[63] However, as indicated in the email of 20 July 2018 (see [40] above), the Buyer's counterclaim for having to purchase 5,000 MT of coal to meet the

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62 AT1 p 67, para 122.

63 AT1 p 67, para 125.

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alleged shortfall in delivery was dismissed without a consideration of its merits as the Buyer had failed to deposit the necessary funds with SCMA.[64]

47 The present proceedings is the Buyer's application to set aside the entirety of the arbitrator's award.

The issues

48 In support of its application, the Buyer submits that:[65]

(a) there was no valid arbitration agreement between the Buyer and the Bank;

(b) there was a breach of the rules of natural justice in connection with the making of the award and the rights of the Buyer have been prejudiced as a result; and/or

(c) the Buyer was unable to present its case.

49 Notwithstanding the order in which parties set out their written submissions, I will deal with issue (b) first. This is because, if I find that the award ought to be set aside due to a breach of natural justice which caused prejudice to the Buyer, issues of the tribunal's jurisdiction would be rendered moot.

50 Further, a careful perusal of the Buyer's case also reveals that issues (b) and (c) are in substance the same. In support of both issues, the Buyer refers to

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64 DCB Tab 15, p 384; AT1 p 60, para 77(b) and p 68, para 130.

65 Plaintiff's Written Submissions ("PWS") para 2.

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s 24(*b*) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") and Art 34(2)(*a*)(ii) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law").[66] The former provides that an arbitral award may be set aside if "a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced", while the latter provides that an arbitral award may be set aside if "the party making the application … was otherwise unable to present his case". It has been accepted that there is "no distinction" between the right to be heard as an aspect of the rules of natural justice under s 24(*b*) of the IAA and Art 34(2)(*a*)(ii) of the Model Law (*ADG and another v ADI and another matter* [2014] 3 SLR 481 at [118]), and the Buyer has not dealt with issue (c) separately from issue (b) in its submissions. Therefore, I will deal with issues (b) and (c) together.

51 Finally, under issue (a), a sub-issue arises as to whether the Buyer is precluded from raising jurisdictional objections because it ought to have but failed to apply to court for a review of the jurisdictional ruling in the partial award within the time limit of 30 days set out in s 10(3) of the IAA read with Art 16(3) of the Model Law.[67]

52 Given the above, I find that the issues which arise for my consideration are as follows:

(a) First, whether there was a breach of natural justice in connection with the making of the award, and whether the rights of the Buyer were prejudiced as a result.

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66 PWS paras 32 and 35.

67 PWS pp 5 – 16; Defendant's Submissions (5 August 2019) ("DWS") para 48(1).

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(b) Second, if the award is not set aside under issue (a), whether the Buyer is precluded from raising jurisdictional objections.

(c) Third, if the Buyer is not precluded from raising jurisdictional objections, whether the arbitrator was properly seised of jurisdiction.

The first issue: Breach of natural justice

53 A party challenging an arbitration award as having contravened the rules of natural justice must establish four requirements (*Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [29], citing *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443 at [18] with approval):

(a) which rule of natural justice was breached;

(b) how it was breached;

(c) in what way was the breach connected to the making of the award; and

(d) how the breach prejudiced its rights.

Breach of the rule of natural justice that parties must have the opportunity to be heard

54 The Buyer submits that its right to have an adequate opportunity to be heard has been breached.[68] In its written submissions, there were also some arguments by the Buyer that the arbitrator was biased, but this point was not seriously pursued in the hearing before me. I will thus say no more about it,

[68] PWS at paras 36 to 37.

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save that there is clearly insufficient evidence on the record to show even a *prima facie* case of reasonable suspicion of bias on the part of the arbitrator: *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR(R) 85 at [91] and *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [122]. I shall focus on the arguments in relation to the alleged failure to give the Buyer an adequate opportunity to present its case.

55 In this regard, much of the parties' focus was devoted to the correct interpretation to be given to r 28.1 of the SCMA Rules, which provides as follows:[69]

> *Unless* the parties have agreed on a documents-only arbitration or that no hearing should be held, the Tribunal *shall* hold a hearing for the presentation of evidence by witnesses, including expert witnesses, or for oral submissions.
>
> [emphasis added]

56 On its face, this rule appears to be consonant with the commonly accepted understanding amongst arbitration practitioners that, unless all parties agree, the arbitral tribunal cannot decide on its own accord to hold a documents-only arbitration. Thus, a plain reading of r 28.1 of the SCMA Rules makes it clear that, where parties have not come to an agreement that the arbitration should only be on a documents-only basis, an oral hearing *must* be held. This does not appear to be disputed, but the Bank submits that an oral hearing was in fact held on 21 August 2018,[70] albeit only for submissions. According to the arbitrator:[71]

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69 Defendant's Bundle of Authorities Vol 1 ("DBOA1") Tab 5.

70 DWS p 49, No 7.

71 DCB Tab 15.

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> Pursuant to SCMA Rule 28.1 the final hearing shall be limited to oral submissions only. There will be no witnesses presented at the final hearing as [the Buyer] has failed to provide witness statements or any evidence of the substantive value of presenting witnesses. The final hearing shall not be used as an evidentiary mechanism.

57 Hence, the key dispute in relation to r 28.1 of the SCMA Rules is whether the latter portion, which relates to the conduct of an oral hearing in the event that parties do not agree to a documents-only arbitration, permits the arbitrator to decide to dispense with the need for the presentation of witnesses even where one of the parties insists on the need for witness testimony.

58 The Bank submits that the arbitrator had such a power under r 28.1 and did exercise that power in this case. It points out that the rule only requires that "the Tribunal shall hold a hearing for the presentation of evidence by witnesses, including expert witnesses, ***or*** for oral submissions" [emphasis added]. The use of the word "or" shows that r 28.1 is disjunctive, and the arbitrator was therefore entitled to decide to either to hold a hearing for the presentation of evidence *or* for oral submissions (*ie,* without the presentation of evidence).[72]

59 The Bank argues that it is widely accepted that a tribunal has the power to decide not to hear from a witness. In support, they rely on several commentaries which suggest that there is a "consensus" that a tribunal has the power to refuse or limit the appearance of witnesses giving oral testimony, or to 'gate' such witnesses.[73] The Bank further submits that, while the SCMA Rules are silent on whether the arbitrator has the power to exclude the oral testimony of witnesses, such a power may be implied from other provisions

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72 DWS pp 51 to 54.

73 Defendant's Further Submissions ("DFS") at paras 3 to 4.

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under the SCMA Rules, which provide the arbitrator with significant control over the arbitral procedure. Hence, r 25.1 of the SCMA Rules provides the arbitrator with the "widest discretion … to ensure the just, expeditious, economical and final determination of the dispute", while r 25.2 enables the arbitrator "to decide the arbitration procedure, including all procedural and evidential matters".[74]

60 Finally, the Bank refers to the decision in *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223 ("*Dalmia*"), where the English Court of Appeal upheld an award despite the arbitrator's rejection of a party's application to call witnesses on a number of occasions (at 270). This decision, according to the Bank, shows that "national courts … have expressly recognised a tribunal's power to 'gate' witnesses, including by declining to set aside arbitral awards solely on the ground of a tribunal's decision to refuse to hear witness testimony."[75]

61 The Buyer disagrees with the Bank's interpretation of r 28.1 of the SCMA Rules. The Buyer submits that, since it never agreed to a documents-only arbitration, an oral hearing must be held for the presentation of oral evidence (meaning the leading of oral evidence from subpoenaed witnesses) and/or cross-examination of witnesses (whether on their oral evidence-in-chief or their witness statements). It is only when parties agree that there is no need for cross-examination or no need to lead oral evidence that an oral hearing may be held purely for submissions. This is when the parties are not satisfied with simply making written submissions to the arbitrator.

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74 DFS at paras 5 and 8.

75 DFS at para 7.

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62 The Buyer argues that there is no provision in the SCMA Rules that would empower the arbitrator to 'gate' any of its witnesses, let alone all of its witnesses. It claims that it was denied the right to call all of its witnesses due to the arbitrator's direction for a submissions-only oral hearing. There was thus a breach of the rules of natural justice because it had not been afforded a fair chance to be heard and to present its case.

Structure of Rule 28.1

63 I deal first with the Bank's disjunctive reading of r 28.1. In my judgment, the structure of r 28.1 of the SCMA Rules does not support the Bank's assertion that the arbitrator was given the power to reject all of the Buyer's witnesses.

64 In Simon Davidson (SCMA Head of Procedure Committee), *Commentary on the 3rd Edition of the Rules of SCMA* (21 October 2015), it is stated that:[76]

> Unless the parties have agreed documents only, the Tribunal *shall* hold a hearing for the *presentation of evidence by witnesses*. However, the testimony of witnesses can be submitted in written form and the Tribunal may place such weight on the written testimony as it thinks fit, in particular if the witness does not attend the hearing to give oral evidence…
>
> [emphasis added]

65 This suggests that the latter portion of r 28.1, which provides that "the Tribunal shall hold a hearing for the presentation of evidence by witnesses, including expert witnesses, or for oral submissions" must be read *holistically*, such that oral submissions cannot be utilised as an *alternative* to the presentation

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[76] PBOA Tab F, p 5.

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of evidence by witnesses. Instead, the SCMA Rules envisage that, where parties have not agreed to a documents-only arbitration, parties must be allowed to call witnesses to give evidence, if they wish to do so. The point is reinforced by r 30.5 of the SCMA Rules, which allows witnesses to submit their evidence in written form, and for the tribunal to place such weight on the written testimony as it thinks fit:

> Subject to such order or direction which the Tribunal may make, the testimony of witnesses may be presented in written form, either as signed statements or by duly sworn/affirmed affidavits. If a witness does not attend the hearing to give oral evidence, the Tribunal may place such weight on his written testimony as it thinks fit.

66 Thus, if a party wishes to present witness testimony, an oral hearing must be held, whether for the leading of oral evidence or for the other party to cross-examine the witnesses on their witness statements. It is only where *all* parties have decided not to lead oral evidence, or cross-examine any of the witnesses on their witness statements, that a hearing *only* for oral submissions can be held. Of course, in that situation, the parties may decide that such an oral hearing is not needed and they may be content to rely on written submissions. If that transpires, the parties would then have agreed to a documents-only arbitration. In my view, this holistic reading of r 28.1 of the SCMA Rules appropriately explains the use of the word "or" prior to the words "for oral submissions".

67 In my judgment, r 28.1 of the SCMA Rules has nothing to do with granting the arbitrator the power to limit the evidence that a party may adduce. It simply deals with when an oral hearing should or should not be held. Put starkly, it should always be held unless parties agree otherwise. As to what happens during the oral hearing, this depends on whether the parties wish to lead oral evidence, cross-examine witnesses or just make oral submissions.

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68 The result of the Bank's reading of r 28.1 of the SCMA Rules would be to grant the arbitrator far wider witness-gating powers (*ie,* allowing the arbitrator to elect for an oral submissions only hearing) than other arbitrators who have been given *express* witness gating powers under other arbitration rules. For example, Art 16(*a*)(ii) of the London Maritime Arbitrators Association Terms (2017) ("LMAA Terms") permits the tribunal to limit the number of expert witnesses that each party may call "to avoid unnecessary delay or expense". Similarly, Art 8.2 of the International Bar Association Rules on the Taking of Evidence in International Arbitration (2010) ("IBA Rules") allows a tribunal to "limit or exclude any … appearance of a witness" which it considers to be "irrelevant, immaterial, unreasonably burdensome [or] duplicative".[77] The SCMA Rules do not expressly provide for *any* witness gating powers. Yet, to accept the Bank's reading would be to grant arbitral tribunals, notwithstanding the *absence* of a witness gating provision, a broad and seemingly uncircumscribed witness gating power for arbitrations that are governed by the SCMA Rules. In my view, the disjunctive reading proposed by the Bank would be an untenable interpretation of r 28.1.

Witness gating

69 It is important to bear in mind that the arbitrator's direction on 20 July 2018 (see [40] above) meant that *all* of the Buyer's witnesses were thereby gated. The Bank has suggested that this is permissible as the tribunal has the "widest discretion" in relation to all procedural and evidential matters under the SCMA Rules.[78]

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77 See DFS Annex A.

78 DFS at para 8.

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70 In Lew, Mistelis *et al, Comparative International Commercial Arbitration* (Kluwer Law International, 2003) ("Lew and Mistelis"), it is observed at para 22-61 that parties are not "always entitled to call and examine witnesses irrespective of the circumstances and the nature of the dispute". At para 22-63 of Lew and Mistelis, it is then observed that:

> As a matter of emerging practice written witness testimonies are submitted to or exchanged … within agreed periods of time. This may well expedite proceedings, especially if the tribunal decides to *limit* the (direct) oral examination of witnesses…
>
> [emphasis added]

71 This suggests that arbitral tribunals may be impliedly vested with the powers to limit the oral testimony of witnesses, and that such powers flow from their power to control the conduct of the arbitration proceedings. However, while the expeditious disposition of matters is a relevant consideration in arbitration, I think that this does not grant the arbitrator free reign to reject all witness evidence in the interest of efficiency. Rule 25.1 of the SCMA Rules requires the arbitrator to "ensure the *just, expeditious, economical and final* determination of the dispute" [emphasis added]. It is thus clear that the expeditious resolution of the dispute is but part of the considerations which an arbitrator must have in mind when determining the process to be adopted; it cannot be the paramount consideration above all other considerations, such as the need to ensure a *just* determination of the dispute.

72 The conflict between achieving expediency and a just and fair result was explored in Judith Levine, "Can arbitrators choose who to call as witnesses? (And what can be done if they don't show up?)" in Albert Jan Van den Berg (ed), *Legitimacy: Myths, Realities, Challenges* (Kluwer Law International, 2015) ("Levine"). According to Levine at pp 334 and 336, while "there is consensus that … a tribunal has the power to decide *not* to hear from a witness",

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"[m]ost commentators acknowledge that ***the authority to limit witness testimony 'must be tempered by a tribunal's duty to afford the parties a fair opportunity to present their case"***" [emphasis in italics in original, emphasis added in bold italics].

73 This is consistent with the authorities which show that, even if arbitral tribunals have the general power to gate witnesses in the interests of efficiency, this cannot be an absolute power that is used to override the rules of natural justice, which demand that parties must be given a fair hearing. As observed in *Dalmia* at 270 (citing with approval Shanbhu Dayal Singh's Law of Arbitration at p 375):

> *Refusal to examine witnesses.* Whether the arbitrators should or should not hear evidence and the parties, must depend on the particular circumstances in every case; and the arbitrators should exercise their discretion in a judicial manner. ***If the reference be such that the arbitrators cannot decide the dispute without hearing evidence, the refusal to hear evidence will amount to misconduct. Refusal on the part of the arbitrator to examine witnesses for a party is judicial misconduct warranting the court to set aside the award*** … Where, however, there is nothing to show that the arbitrator was not acting within his powers and where in the exercise of a prudent and wise discretion he declined to summon the witness, or where the evidence was unnecessary and would not have in any way influenced the decision of the arbitrators, the awards were upheld.
>
> [emphasis added in bold italics]

74 Similarly, in *ADG and another v ADI and another matter* [2014] 3 SLR 481 ("*ADG*"), Vinodh Coomaraswamy J was concerned with r 16.1 of the Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010), which, like r 25.1 of the SCMA Rules in the present case, grants the arbitral tribunal wide and flexible procedure powers "to ensure the fair

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expeditious, economical and final determination of the dispute." At [112] of *ADG*, the judge observed as follows:

> The ***wide and flexible procedural power of the Tribunal is, of course, not unqualified: it is subject to the standards set by the rules of natural justice and in particular the right to be heard***. But the right to be heard too is not unqualified: it is subject to the standard of reasonableness. By the parties' agreement, therefore, the Tribunal is entitled to make procedural decisions which give each party a *reasonable* right to present its case, after weighing the competing considerations. This includes the need to ensure the fair expeditious, economical and final determination of the dispute (see [*TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972] at [103]). That is not just an ideal which the Tribunal is to pursue; it is an obligation which the Tribunal is to achieve, in consultation with the parties …
>
> [emphasis in italics in original, emphasis added in bold italics]

75 The same point was made in *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 ("*Triulzi*") at [131], where Belinda Ang Saw Ean J observed that, while an arbitral tribunal is the master of its own procedure, its case management powers are not without limits, and are subject to the rules of natural justice, which include the right to be heard.

76 Therefore, even if I accept that the arbitrator has the power to gate witnesses under the SCMA Rules, this must be exercised subject to the fair hearing rule. If the calling of a witness is plainly relevant to a particular issue, an arbitral tribunal cannot gate the witness on the basis of its procedural powers. Such would be to utilise a procedural power to defeat the substantive rights of the parties. As observed in Jeffrey Maurice Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) ("Waincymer") at p 888:

> A tribunal has a duty to promote fairness and efficiency and cannot allow parties to have an open-ended right to have as

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> many witnesses as possible over an extended hearing period. *However, a tribunal will need to be careful to ensure that legitimate due process challenges are not encouraged.* These might be made on the grounds of failure to allow an adequate presentation of case and/or unequal treatment. Judgment will be needed on a case-by-case basis …
>
> The first principle is that the parties can designate the witnesses that they wish to rely upon. It would not be the norm for a tribunal to allow a preliminary debate about whether a particular witness may be called although this is entirely possible under proactive arbitration as a means to *exclude superfluous and irrelevant witnesses*. Bockstiegel suggests, however, that every witness and expert proposed should be invited to be heard unless the tribunal is sure that the testimony is irrelevant to the outcome of the case.
>
> [emphasis added]

77 In my judgment, unless the arbitral tribunal has a substantive basis to conclude that all the witnesses sought to be presented are irrelevant or superfluous, such witnesses ought not to be rejected on the basis of efficiency or savings of costs. Indeed, it is "perfectly acceptable for a tribunal to impose reasonable limits if an excessive number of witnesses are proposed" (Waincymer at p 889), but the tribunal should not reject all the witnesses simply because it is of the *preliminary* view that all the witnesses would be irrelevant. Gating must not be utilised as an indirect means of achieving a hearing-by-submissions only, as its fundamental utility is to prevent *unnecessary* delay. This can be seen by the relevant arbitration rules which expressly provide for witness gating: apart from the LMAA Terms and the IBA Rules (see [68] above), the World Intellectual Property Organisation Rules (2014) also provides that the tribunal "has discretion, *on the grounds of redundance and irrelevance*, to limit or refuse the appearance of any witness" [emphasis added]. Many other sets of arbitration rules which have been cited to me by the Bank provide for similar limitations on the arbitral tribunal's witness-gating powers. Therefore, consistent with the observations of the commentators above, it is clear that an

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arbitral tribunal's witness-gating powers are not absolute, and can only be utilised if it can be seen that the witnesses' evidence are plainly irrelevant or repetitive.[79] Indeed, it has been observed that witness gating is "especially appealing if the testimony of that witness would be irrelevant or duplicative" (Levine at p 335).[80] This applies *a fortiori* to the present case, as the SCMA Rules do not even contain an express witness-gating provision, thereby casting significant doubt as to whether the arbitrator even had any power to deny the calling of any, let alone all, of the witnesses.

78 Reviewing the Buyer's defence in the arbitration, it can be seen that it had pleaded that the Buyer and the Seller had entered into an *oral* agreement at the December 2015 meeting, whereby the parties purportedly agreed to reduce the coal price to US$61 per MT of coal. The issue of the short delivery of 5,000 MT of coal was also pleaded.[81] Although the Buyer's defence may be faulted for being vague and imprecise, a careful and patient reading shows that a central plank of its defence to the Bank's claim was that the parties had entered into an oral settlement agreement of all the disputes between the parties:[82]

> … the price which has to be paid is a matter between the parties ([the Seller] and [the Buyer]) and it is the price which is seriously disputed between [the Buyer] and [the Seller] as it is the entire case of [the Buyer] that officials of [the Seller] … had meetings with [officials of the Buyer] on 2.12.2015 at [the Buyer's] plant office … wherein they had specifically agreed that since there had been decrease in the price of coal, therefore, they shall be reviewing the contract price and the mutually agreed price shall then be payable …

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79 See DSBOA and DFS Annex A.

80 DSBOA Tab 17.

81 AT1 pp 322 to 327.

82 AT1 pp 322 to 324, at paras 18 to 19 and p 327, at para 22.

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> It was specific admission on the part of the officials of [the Seller] that the contracted coal price shall be suitably modified to take into account the reduced coal prices that [the Buyer] took delivery of the 15000 MT of coal. It is submitted that [the Seller] had also agreed to a price of 61$ per MT during the meetings however it later reneged on the same. However as disputes arose the Delivery Order for the balance 5000 MT of coal was not given by [the Seller] and the said quantity is still present at the port in India … It is submitted that it was [the Seller] which has misled, breached and defaulted [the Buyer] when it specifically agreed in the personal meetings that it shall review coal price and also agreed to a new coal price during the meeting of 61$ per MT and then later reneged on its representation and promise and agreement.
>
> …
>
> [The Buyer] has never denied paying the rightful amount and if the instant [Bank] on behalf of [the Seller] is ready and willing to accept the payments as per the reduced coal price @61$per MT, then the entire issue can be disposed-off as being settled.

79 It is thus clear that the purported oral settlement, and the specific terms thereof, were issues that were fundamentally important to the Buyer's defence. Yet, despite being alive to such issues,[83] the arbitrator decided to reject *all* of the Buyer's proposed witnesses, confining the parties to their oral submissions only. Even if the Buyer had been uncooperative, and unclear as to precisely why the witnesses were necessary,[84] I do not think that this justifies the arbitrator's decision when it was obvious that the purported oral agreement was fundamental to its defence. This is all the more so as four of the seven witnesses which the Buyer intended to call were either from the Seller or Entity C,[85] and were accordingly not even in the employ of the Buyer, rendering it

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83 AT1 pp 62 to 64.

84 See DWS at paras 98 and 99.

85 Entity C: See AT p 129.

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impracticable for the Buyer to procure witness statements from those four witnesses.[86] The Buyer would have had to subpoena those witnesses.

80 By acting as he did, the arbitrator denied the Buyer the right of a fair opportunity to present a fundamental aspect of its defence. I recognise that a tribunal has to take into account a myriad of factors when exercising its case management powers to ensure a fair and expeditious conduct of the matter. Hence, the supervisory role of the court over the tribunal's exercise of his case management powers ought to be "exercised with a light hand" in the context of a challenge based on the fair hearing rule (*Triulzi* at [132]). However, where the conduct complained of is "sufficiently serious or egregious so that one could say a party has been denied due process", the court may have to step in and find that there has been a breach of the rules of natural justice, in particular the fair hearing rule (*Triulzi* at [134]; *ADG* at [116]).

81 The present case involves a sufficiently serious breach of the fair hearing rule such that it *prima facie* warrants curial intervention. Such a breach cannot be justified on the arbitrator's implied witness-gating powers, nor on the wide discretion granted to an arbitrator to determine issues of procedure and evidence in the arbitral proceedings.

82 In the circumstances, even if the arbitrator was empowered under the SCMA Rules to gate certain witnesses, I find that it was improper for the arbitrator to have denied the Buyer the right to call *all* of its witnesses, on the basis that r 28.1 of the SCMA Rules purportedly allowed him to do so.[87]

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86 AT1 p 38, paras 90 to 91.

87 DCB Tab 15.

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83 Accordingly, I find that the rule of natural justice which requires that each party be given a fair hearing and a fair opportunity to present its case (*Soh Beng Tee* at [43]) has been breached.

The breach was directly connected to the making of the award

84 The Bank submits that, in any event, there is no causal connection between the breach of the rules of natural justice and the arbitrator's award, since the lack of evidence in relation to the alleged oral agreement was due to the Buyer's own failure to adduce evidence by way of written witness statements despite being directed by the arbitrator to do so.[88] In other words, the Buyer's wounds were self-inflicted.

85 In my judgment, the circumstances that led to the Buyer's failure to produce the witness statements are significant and must be scrutinised carefully. It is only then that the Buyer's conduct can be evaluated in the proper context.

86 From a review of the correspondence, it is clear that the arbitrator's reason for directing the Buyer to produce the witness statements was *in order for him to decide whether to hold a "documents-only" arbitration*. This was unequivocally set out in the arbitrator's email to the Buyer on 1 June 2018, after the Buyer had repeatedly stated that an oral hearing was necessary for the witnesses which it intended to call to be examined:[89]

> *Before I rule on whether the arbitration will be on [a] documents only or an oral hearing* is necessary I require the following:
>
> a. Detailed written statements from each of the witnesses [the Buyer] plans to call …

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88 DWS para 124.

89 DCB Tab 9 p 254.

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> b. A brief submitted separately by [the Bank] and [the Buyer] regarding what constitutes "breach of natural justice" under the laws of Singapore. …
>
> [emphasis added]

87 The above text makes clear that, at the time of his email on 1 June 2018, the arbitrator was acting in the belief that it was within his remit to determine whether the arbitration would be on a documents-only basis, or whether an oral hearing would be held, even though there was no consent by the Buyer to a documents-only arbitration. He thus started this exercise of requiring the Buyer to submit its witness statements on the basis of a misapprehension as to his powers to 'gate' the Buyer's witnesses under r 28.1 of the SCMA Rules.

88 In response, the Buyer referred the arbitrator to the text of r 28.1, which makes clear that "*unless the parties have agreed on a documents-only arbitration* or that no hearing should be held, the Tribunal *shall* hold a hearing for the presentation of evidence by witnesses, including expert witnesses, or for oral submissions" [emphasis added].[90] Based on the text, the Buyer reiterated its stance that an oral hearing was required, and that "submissions (*sic*) of detailed statement[s] of witness[es] is not necessary or mandatory" *before a decision is made whether to hold an oral hearing*.[91] This was the correct interpretation of the rule, which makes plain that a documents-only arbitration can be held only if the *parties have agreed* to it; absent the parties' agreement, the arbitrator would have no discretion to direct a documents-only arbitration. Hence, one could say that the Buyer was justified in refusing to produce those witness statements as directed, as the reason for the direction was for the arbitrator to exercise a discretion which he did not have under the SCMA Rules.

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90 DCB Tab 10, p 369.

91 DCB Tab 10, p 370.

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In any event, as has been already mentioned at [79], it was not practicable for the Buyer to produce witness statements for four of its witnesses.

89 At some point, it must have dawned on the arbitrator that the Buyer's position on r 28.1 was correct. The arbitrator's position then shifted. In his 4 July 2018 email to the parties, he now stated that the Buyer would be considered to have *waived any right to submit witnesses in the event of an oral hearing should it fail to comply with his directions for written statements*.[92] With the Buyer still failing to provide the witness statements, the arbitrator then directed on 20 July 2018 that, while an oral hearing would be held, the Buyer would not be allowed to call any witnesses during the hearing because of such failure to provide witness statements:[93]

> Pursuant to SCMA Rule 28.1 the final hearing shall be limited to oral submissions only. There will be no witnesses presented at the final hearing as [the Buyer] has failed to provide witness statements or any evidence of the substantive value of presenting witnesses. The final hearing shall not be used as an evidentiary mechanism.

90 Such a position taken by the arbitrator might possibly have been warranted if he had made a direction for the submission of the witness statements for the purposes of facilitating the adducing of witness testimony and the presentation of evidence at the oral hearing, and the Buyer then defied, or failed without justification to comply with, such a direction. But, this was not the reason the arbitrator had directed the Buyer to produce its witness statements in the first place. It was for a different reason altogether - for him to decide whether to hold a documents-only arbitration. Ironically, the arbitrator started

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92 DCB Tab 13, p 252.

93 DCB Tab 15 p 384.

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his email of 20 July 2018 with an acknowledgement that he was bound to hold an oral hearing since both parties had not agreed to a documents-only arbitration. This was effectively an admission that the Buyer's position on r 28.1 was right all along.

91 In my judgment, insofar as the arbitrator wanted to see the Buyer's witness statements *before* deciding whether to allow them to present such evidence at the oral hearing, this was not a power that was available to him under the SCMA Rules. As explained at [65] to [67] above, the right of a party to call witnesses in support of its case is at the heart of the SCMA Rules. There is no express witness gating provision in those rules. Further, the arbitrator seemed to have obtusely ignored the point made by the Buyer's counsel that four of the witnesses which it intended to call were representatives of the Seller and Entity C, and it was thus impracticable for the Buyer to obtain the written witness statements of those witnesses.

92 What the arbitrator could have done in the circumstances was to fix the hearing dates for the presentation of evidence and direct the Buyer to produce the witness statements for those witnesses it intended to call at the hearing, insofar as the Buyer was able to do so. For those witnesses whom the Buyer could not produce witness statements, the onus would then be on the Buyer to procure the necessary subpoenas for those witnesses to be issued by the High Court before the arbitration hearing. At the hearing, the arbitrator would then have been entitled, pursuant to his powers to manage the hearing efficiently, to set appropriate limits on the amount of time which the Buyer would be entitled to lead oral evidence from the subpoenaed witnesses. If the arbitrator were to find the evidence of the witnesses to be irrelevant or repetitive, he could *further* limit the time for the leading of evidence of such witnesses. In such a situation,

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he could also make the appropriate costs orders against the Buyer in his award, even if the Buyer succeeded in its defence.

93 Instead, the arbitrator rejected all of the Buyer's witnesses. Following from this, the arbitrator dismissed the Buyer's contention that it had entered into an agreement with the Seller at the December 2015 meeting to reduce the price of the entire 50,000 MT of coal, as there was no evidence before him of any such agreement.[94] But, if the Buyer had not been disallowed from presenting its witnesses at the hearing, it *could* have provided evidence to prove the existence and content of the alleged *oral* agreement, and thus might have had a partial defence to the Bank's claim for the outstanding price. Hence, I find that the breach of the fair hearing rule was directly connected to the making of the award.

Prejudice to the Buyer

94 As explained in *Soh Beng Tee* at [91], an applicant seeking to set aside an arbitral award must show that "some actual or real prejudice" had been caused by the alleged breach by the arbitrator. This is a lower hurdle than substantial prejudice, but,

> …it certainly does not embrace technical or procedural irregularities that have caused no harm in the final analysis. There must be more than technical unfairness … [and] the breach of the rules of natural justice must, at the very least, have altered the final outcome of the arbitral proceedings in some meaningful way…

95 The Bank submits that no real prejudice was caused to the Buyer as the Buyer has not explained how the evidence of the seven witnesses would have

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94 AT1 p 64, para 101.

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supported a finding of the alleged oral agreement.[95] This is inaccurate; a representative of the Buyer stated on affidavit that six out of seven of the witnesses which the Buyer intended to call for the arbitration proceedings were present at the December 2015 meeting. They could, therefore, have given evidence in relation to the oral agreement.[96]

96 The Bank also argues that, in light of the clear and undisputed documentary evidence in support of its claim, it was unlikely that the arbitrator would have reached a different result on the issues of the alleged price revision and short-delivery.[97]

97 I accept that the documentary evidence does *prima facie* support the Bank's claim for the entirety of the outstanding price. In relation to the alleged shortfall in delivery, I note that the Buyer has presented evidence to suggest that, while bills of lading were issued for 20,000 MT of coal, the Seller only procured the issuance of delivery orders for 15,000 MT of coal.[98] Two delivery orders dated 25 May 2015 and titled "Delivery Order No. 1" and "Delivery Order No. 2A" certifying delivery of 10,000 and 5,000 MT of coal respectively were exhibited to support its case. The Bank has also exhibited a third delivery order, dated 29 May 2015 and titled "Delivery Order No. 2B", which certifies delivery of a further 5,000 MT of coal to the Buyer.[99] The agent of the vessel on which the 20,000 MT of coal was shipped also confirmed by email that the

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95 DWS para 126.

96 PWS para 59(a); AT1 para 69.

97 DWS para 127.

98 AT1 p 10, para 28 and pp 116 to 117.

99 SSL2 Tab 12, p 54.

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entire consignment of 20,000 MT of coal had been shipped.[100] These, along with the Buyer's earlier concession via email[101] and through the SWIFT message sent by its bank that the outstanding price was due, do suggest that there was in fact no shortfall in delivery.

98 Nonetheless, the Buyer's pleaded defence relates to a purported oral agreement that was entered into by the Buyer and the Seller in December 2015, *after* the documentary evidence above had been recorded. Therefore, it *could* be the case that the parties had agreed, at the December 2015 meeting that notwithstanding the Buyer's earlier concession that the outstanding price was due, a payment of US$61 per MT of coal would constitute a settlement of the outstanding dispute between the parties. In this regard, I note that, notwithstanding the fact that the receivables to the second agreement had already been assigned by the Seller to the Bank by December 2015, it was not argued by the Bank before me that the representatives of the Seller and or Entity C had no power or authority to enter into the purported settlement agreement on the Bank's behalf.

99 Hence, although there is documentary evidence in support of the Bank's claim, the strength of such a claim might possibly have faltered had the arbitrator found that an oral agreement existed between the parties. Such could have clearly led to a different result, in that the Bank's claim would not have been allowed in its entirety.

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100 SSL2 Tab 12, pp 55 to 56.

101 SSL2 Tab 15, pp 83 and 85.

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100 Finally, a point that was made by the arbitrator in his award was that the oral agreement could not have superseded the second agreement in any case. This is because the second agreement contains the following clauses 19 and 20:[102]

> **19** **Amendments** – The Contract cannot be changed except by written instrument duly signed by legally authorised representatives of both parties.
>
> **20** **Entire Contract** – This instrument contains the entire agreement between the parties in relation to the sale and purchase of Product … and supersedes all prior negotiations, understandings and agreements, whether written or oral, in relation to that Product. The parties shall be bound only by the express provisions of this Agreement and documents executed in the future by duly authorised representatives of the Parties.

101 Collectively, clauses 19 and 20 appear to preclude the formation of a binding *oral* agreement. In my view, however, this is not determinative. The Buyer and Seller could have agreed during the December 2015 meeting to dispense with the strict application of the clauses, or it may be that the terms of the oral agreement are such that the Bank would be estopped from relying on clauses 19 and 20. The effect of clauses 19 and 20 on the oral agreement is an issue that can only be determined after the testimonies of the witnesses have been considered, which did not happen here.

102 In totality, I am satisfied that there was some actual or real prejudice suffered by the Buyer as a result of the arbitrator's decision to shut out the evidence of *all* of its witnesses. The evidence of such witnesses could have shed light on the existence, as well as the terms, of the purported oral agreement, which could have operated to defeat part of the Bank's claim in the arbitration.

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102 AT1 pp 94 to 95.

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103 As all four requirements (see [53] above) for setting aside an arbitration award have been established, I allow the setting aside of the arbitrator's award in this case.

The second and third issues

104 As the award has been set aside of the grounds of breach of natural justice, there is no need for me to deal with the issues surrounding the arbitrator's jurisdiction, which was relied on as an alternative basis to set aside the award. In this regard, there is no need to deal with the second issue of whether the Buyer is precluded from raising an objection as to the arbitrator's jurisdiction by reason of its participation in the arbitral proceedings after the issue of the preliminary award. There is also no need to deal with the third issue which is, if the Buyer is not so precluded from raising jurisdictional objections, whether the arbitration agreement had not been or could not have been assigned to the Bank, such that the arbitrator was not properly seised of jurisdiction in the matter.

Conclusion

105 I find that the arbitrator's decision to deny the Buyer its right to call all seven witnesses amounted to a breach of the fair hearing rule. This caused prejudice to the Buyer as the result of the award could have been altered if it had been allowed to lead evidence from the witnesses in relation to the oral agreement, which was fundamental to the Buyer's defence. That being the case, I set aside the arbitration award.

106 I will deal with the issue of costs separately.

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Ang Cheng Hock
Judge

Clarence Lun Yaodong, Tan Yingxian Selwyn, Lim Jia Ying, Samuel Lim Jie Bin, Giam Zhen Kai and Lin Yu Mei (Foxwood LLC) for the plaintiff;
Peh Aik Hin, Lee May Ling and Chia Su Min, Rebecca (Allen & Gledhill LLP) for the defendant.

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