IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA(I) 4

Civil Appeal No 42 of 2021 and Summons No 91 of 2021

Between

CKH

… *Appellant*

And

CKG

… *Respondent*

In the matter of Originating Summons No 3 of 2021

Between

CKG

… *Plaintiff*

And

CKH

… *Defendant*

GROUNDS OF DECISION

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

CKH
v
CKG and another matter

[2022] SGCA(I) 4

Court of Appeal — Civil Appeal No 42 of 2021 and Summons No 91 of 2021
Sundaresh Menon CJ, Judith Prakash JCA and Jonathan Hugh Mance IJ
22 November 2021

8 April 2022

Jonathan Hugh Mance IJ (delivering the judgment of the court):

1 This is an appeal against the judgment in *CKG v CKH* [2021] SGHC(I) 5 ("the Judgment") by which the High Court judge ("the Judge"), pursuant to Article 34(4) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") scheduled to the International Arbitration Act (Cap 143A, 2002 Rev Ed), ordered the suspension for a period of proceedings to set aside an arbitration award made in Singapore dated 21 August 2020 ("the Award") so as to enable the arbitral tribunal ("the Tribunal") to eliminate the grounds for setting aside certain parts of the Award. The grounds referred to are that the Tribunal had in its Award failed to determine and take into account an outstanding debt (described as "the Principal Debt") relating to taxes, levies and freight claimed by the respondent ("CKG") as owed by the appellant ("CKH"), and interest thereon.

2 The background is complex, and there is a very substantial history of litigation and arbitration on matters including the scope of the Tribunal's jurisdiction, but for present purposes this is very largely irrelevant. CKH sold its timber concession interests in Indonesia to CKG in exchange for US$8 million and a three-year supply of round logs for use in CKH's plywood factory in Sumatra. On 18 September 2009, the parties concluded a Master Agreement to this effect,[1] to which were annexed various further agreements. One such agreement was a Round Logs Supply Memorandum of Agreement ("RLMOA") also dated 18 September 2009 providing for the supply of specified quantities of round logs "FOB" alongside jetties in Sumatra, with CKH being responsible for bearing all freight and local, national or other taxes initially payable by CKG at the point of logging or export.[2]

3 The Master Agreement, the RLMOA and any other presently relevant agreements provided for any dispute arising out of or in connection with it to be referred to Singapore arbitration in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("the SIAC Rules") for the time being in force. There was also a later Merchantability Wood Agreement ("MWA") dated 10 December 2009 made between CKH and a company which we refer to as "the Company".[3] In material put before the court by CKH, the Company was described as an affiliate of CKG entrusted by CKG with the timber log deliveries due under the RLMOA.[4] The MWA was subject to Indonesian law and contained an Indonesian National Board of Arbitration ("BANI") clause. However, the present Tribunal determined in a jurisdictional

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1 Record of Appeal ("RA") Vol 5 Part 6, Tab 34 at pp 155–160.

2 RA Vol 5 Part 6, Tab 34 at pp 183–191.

3 Affidavit dated 22 November 2021 ("Affidavit") at para 7.

4 Affidavit at para 6.

ruling that the MWA did not supersede the RLMOA. We introduce the MWA at this stage only as a prelude to [32] below. The present appeal was conducted on the basis that there was a single arbitration and Award addressing all the issues raised on either side. The single issue before the court was whether the Tribunal should, in the light of its other conclusions, have gone on to take into account the existence and amount of the Principal Debt and interest on it.

4 By April 2011 CKH had accumulated a substantial outstanding debt, and the parties reached the following agreement recorded in signed meeting minutes dated 8 April 2011 ("the April 2011 Minutes"), which stated as follows:[5]

> Both parties agree as follows:-
>
> 1. [CKH] undertake to pay [the Company] the sum of IDR 75 Billion for of its outstanding debt (PSDH/DR, Freight) and future shipment's PSDH/DR and freight: in the following manner:-

30 April 2011	30 May 2011	30 June 2011	30 July 2011	30 Aug 2011
IDR 10 Billion	IDR 10 Billion	IDR 15 billion	IDR 20 billion	IDR 20 billion

> 2. Payments will be closely monitored for the next five months. If the payments fall below the stipulated due sum for each respective month above, [the Company] will charge 2% net per month late penalty of shortfalls at the end of each month and the charges shall be cumulative until all amounts due is fully paid. Any unpaid shortfall will be imposed the interest charges at 2% net per month.
>
> 3. Starting 01 September 2011, [CKH] is fully committed to pay on time and without any delay to settle all outstanding debt arises. Any shortfall will be also imposed the interest charges at 2% net per month.
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> 4. By 15 November 2011, if there is still outstanding payment from [CKH] arises from the delivery of Round Logs, [CKG]/[the Company] and/or its affiliates reserve the right to initiate the following action(s):

[5] RA Vol 5 Part 6, Tab 35 at p 196.

> - To cease round logs shipment; [CKH] and its affiliates will fully indemnify [CKG] … [the Company], … and its affiliates for not delivering any outstanding Round logs as stated in the Master Agreement and [RLMOA] dated 18 September 2009 and Reconciliation and Settlement Deed in December 2009.
> - To reduce round logs volume commitments by all [CKH's] outstanding debts. The roundlog volume reduction will be derived from dividing the outstanding debt by IDR320,000/m3 ["the debt-to-log conversion"].
> - Both parties will attempt to settle all or any outstanding matters in an amicable manner.

5 Over the ensuing months, CKH failed to make payments as agreed and CKG made reduced deliveries of timber logs. Each side attributed its own failure to the other's. On 20 December 2011 CKG wrote to CKH claiming to treat CKH's outstanding indebtedness as a basis, under clause 4 of the April 2011 Minutes, for eliminating both any shortfall in log deliveries up to that date and any future obligation to deliver logs after that date (see the Judgment at [15]).

6 On 6 April 2015 CKH commenced the Singapore arbitration, claiming, *inter alia*, substantial damages for CKG's failure to supply it with timber logs under the RLMOA.[6] In its Statement of Defence and Counterclaim dated 30 October 2018, CKG maintained its claim to treat CKH's outstanding indebtedness as discharging it from all past and future liability to deliver logs.[7] CKH then took issue with this in its Reply to Statement of Defence and Defence to Counterclaims dated 22 February 2019 ("RSDDC"), maintaining that CKG's obligation to deliver quantities of logs operated independently of any payments

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6 RA Vol 5 Part 1, Tab 2 at pp 35–76.

7 RA Vol 5 Part 1, Tab 3 at pp 122–124 (at paras 79–84).

it might or might not make in the period up to 15 November 2011, and that, even thereafter, it was incumbent on CKG to have attempted (as it did not) to settle any outstanding claim in an amicable manner under the third point in clause 4 of the April 2011 Minutes, before ceasing or reducing any round log supply.[8]

7 The Tribunal in its Award accepted CKH's submissions on the point mentioned in this last sentence. It held CKG liable accordingly for damages for failure to supply the logs in appropriate quantities.[9] However, it did not give CKG credit for or make any award in relation to the Principal Debt on which CKG had relied when invoking clause 4 and which no one suggested could or would disappear if clause 4 did not apply to justify a complete cessation of or a reduction in log deliveries by CKG. On this basis, on 24 September 2020, CKG applied to the Tribunal for an "additional award" in its favour in respect of the Principal Debt under rule 29.3 of the 2013 SIAC Rules, which governed the arbitration.[10]

8 The Tribunal in a letter of decision dated 5 November 2020 refused to make an additional award. It considered that CKG had made no "claim" in the arbitration for the Principal Debt as required by rule 29.3. Its reasoning was this:[11]

> … Although [CKG] did raise the issue of its entitlement to the Principal Debt for pre-December 2011 taxes and freight as a defence to [CKH's] claim for failure of log supply obligations, and sought a set off against any damages awarded in substitution of log supply to [CKH], [CKG] did not plead a

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8 RA Vol 5 Part 2, Tab 5 at pp 9–91.

9 RA Vol 5 Part 5, Tab 23 at pp 125 and 128 (at paras 352 and 361).

10 RA Vol 5 Part 5, Tab 26 at p 247 (at paras 3.1 and 3.2).

11 RA Vol 5 Part 6, Tab 28 at p 22.

> counterclaim for the Principal Debt. This contrasts with [CKG's] pleaded counterclaim for post-2011 taxes and freight. In this respect, the Request is more in the nature of an appeal of the Tribunal's merits decisions than an application for an additional award on a claim not dealt with in the Award. …

9 What constitutes a "claim" which might justify an additional award under rule 29.3 of the SIAC Rules is, as the Judge correctly said (at [36] of the Judgment), presently irrelevant. The appeal before the court raised a different question, namely, whether the Tribunal omitted to address a matter before it for adjudication; and whether or not the omission could have been corrected to any extent under rule 29.3 was unimportant.

10 The Tribunal went on to add that, even if CKG had made a "claim" within rule 29.3, "the record contains no evidence that [CKG] made the necessary underlying payments, subject to reimbursement from [CKH]", and drew attention to its separate finding that there was a lack of such evidence in respect of post-2011 taxes.[12] It was not, and could not in any event be, suggested that this comment had any binding force, and it was, as the Judge noted (at [58] of the Judgment), also inaccurate, in the light of the April 2011 Minutes themselves, the evidence and submissions before the Tribunal and the Tribunal's own findings in its Award (see in particular [247], [348], [353] and [378] of the Award).[13] The position in and after April 2011 was not the same as that post-2011.

11 Section 24(*b*) of the International Arbitration Act provides that, notwithstanding Article 34(1) of the Model Law, an arbitral award may be set aside if "a breach of the rules of natural justice occurred in connection with the

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12 RA Vol 5 Part 6, Tab 28 at p 22.

13 RA Vol 5 Part 5, Tab 23 at pp 86–87 (para 247), pp 123–124 (para 348), p 125 (para 353) and p 133 (para 378).

making of the award by which the rights of any party have been prejudiced". As the authorities cited in the next paragraph of this judgment confirm, failure by an arbitral tribunal to address an issue submitted to it for adjudication may constitute a breach of the rules of natural justice within the meaning of s 24(*b*). Article 34(2)(*a*)(iii) of the Model Law empowers the court to set aside an award upon proof that "the award deals with a dispute 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". Dealing with matters beyond the scope of a submission and failing to deal with matters within the scope of a submission are in a sense opposite sides of a coin. Where a court concludes that an award is liable to be set aside on either basis, Article 34(4) of the Model Law enables it "where appropriate and so requested by a party" to "suspend the setting aside proceedings … in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside". That was the course which the Judge took in the present case.

12 That a failure by an arbitral tribunal to address an issue submitted to it for decision can constitute a breach of natural justice justifying intervention by the court is well-established: see *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 and *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN v ALC*"), where the circumstances in which this may occur were considered.

13 The position was summarised by the Court of Appeal in *AKN v ALC* (at [46]) as follows:

> To fail to consider an important issue that has been pleaded in an arbitration is a breach of natural justice because in such a case, the arbitrator would not have brought his mind to bear on an important aspect of the dispute before him. Consideration of

> the pleaded issues is an essential feature of the rule of natural justice that is encapsulated in the Latin adage, *audi alteram partem* (see also *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [43], citing *Gas & Fuel Corporation of Victoria v Wood Hall Ltd & Leonard Pipeline Contractors Ltd* [1978] VR 385 at 386). *Front Row* is useful in so far as it demonstrates what must be shown to make out a breach of natural justice on the basis that the arbitrator failed to consider an important pleaded issue. It will usually be a matter of inference rather than of explicit indication that the arbitrator wholly missed one or more important pleaded issues. However, the inference – that the arbitrator indeed failed to consider an important pleaded issue – if it is to be drawn at all, must be shown to be clear and virtually inescapable. If the facts are also consistent with the arbitrator simply having misunderstood the aggrieved party's case, or having been mistaken as to the law, or having chosen not to deal with a point pleaded by the aggrieved party because he thought it unnecessary (notwithstanding that this view may have been formed based on a misunderstanding of the aggrieved party's case), then the inference that the arbitrator did not apply his mind at all to the dispute before him (or to an important aspect of that dispute) and so acted in breach of natural justice should *not* be drawn.
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> [emphasis in original]

14 The Court of Appeal went on to underline the important distinction between making a decision on an issue (which may be right or wrong) and failing to consider an issue at all. It is only the latter which may lead to court intervention (*AKN v ALC* at [47]). The Court of Appeal also identified two further hurdles to relief in the case of a breach of natural justice consisting of failure to consider an issue – that is, there must be shown to be a causal nexus between the breach and the award, and the breach must have prejudiced the aggrieved party's rights (*AKN v ALC* at [48]). These two hurdles were not contentious on the present appeal. If the scope of the arbitration extended to considering and bringing into account any amount owed by way of the Principal Debt and interest on it, in the event that the Tribunal held (as it did) that clause 4 did not justify either cessation of log deliveries or any form of debt-to-log conversion, then the failure to consider and adjudicate upon the Principal Debt

and interest on it was likely to have affected the content and outcome of the Award very significantly to the prejudice of CKG's rights. The critical issue in the present case was whether the Principal Debt and any interest on it were matters within the scope of the arbitration if clause 4 did not apply.

15 The starting point in this context is that there was no pleading in the arbitration addressing the position regarding the Principal Debt in the event that the Tribunal rejected (as it did) CKG's case that the Principal Debt justified it in either withholding or reducing timber log deliveries under the first or second point in clause 4 of the April 2011 Minutes.

16 The pleadings are the first place in which to look for the issues submitted to arbitral decision. But matters can arise which are or become within the scope of the issues submitted for arbitral decision, even though they are not pleaded. Whether a matter falls or has become within the scope of the agreed reference depends ultimately upon what the parties, viewing the whole position and the course of events objectively and fairly, may be taken to have accepted between themselves and before the Tribunal. CKH cited to the court the familiar case of *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 ("*Kempinski*") for the passages in it emphasising both that pleadings "provide a convenient way for the parties to define the jurisdiction of the arbitrator" and that, where jurisdiction to adjudicate upon a dispute is in question, "it is necessary to refer to the pleaded case of each party to the arbitration and the issues of law or fact that are raised in the pleadings to see whether they encompass that dispute" (*Kempinski* at [33] and [34]). Both statements are true, but the decision in *Kempinski* itself shows that they are not the end of the matter. Other considerations may show a different picture. As the Court of Appeal observed in *CDM and another v CDP* [2021] 2 SLR 235 at [18], the question of what matters are within the scope of the parties' submission

to arbitration is answerable by reference to five sources: the parties' pleadings, the agreed list of issues, opening statements, evidence adduced, and closing submissions at the arbitration.

17 Arbitration is consensual and parties and changing circumstances can lead implicitly as well as expressly to a widening of the scope of an arbitration. In *Kempinski* that occurred when it came to light, during ongoing proceedings (commenced in 2002) to enforce a hotel management contract, that Kempinski had entered into a new management contract with a different operator on 28 April 2006, which potentially affected its right to insist on specific performance of the original management contract; and when disclosure applications and orders, written submissions and expert opinions followed regarding the effect of this new contract, without any amendment of the pleadings (*Kempinski* at [17]–[19]), Kempinski was held to have "ample notice of Prima's case on this particular point" and "did not suffer any prejudice in any way since it was given ample opportunity to address this issue of law" (*Kempinski* at [51]). It was a case where, in the words of this court in *CBX and another v CBZ and others* [2021] SGCA(I) 3 at [48], "[t]he conduct of parties to litigation before an arbitrator or judge may and does on occasion widen the scope of the issues falling for determination in a way which deprives a pleading objection of any force".

18 In the present case, the Judge considered that the absence of any pleaded counterclaim or even set-off was understandable (Judgment at [45]). It was only in the RSDDC that CKH first put forward its arguments that there could be no debt-to-log conversion under clause 4, as it had not been properly invoked.[14] CKH also asserted positively in the RSDDC that, pursuant to the RLMOA, it

[14] RA Vol 5 Part 2, Tab 5 at pp 45–46 (at paras 132–133).

was to bear the taxes, levies and freight on, but only on, logs actually delivered to it under the RLMOA; that the total of IDR75 billion covered by the April 2011 Minutes included an allowance for future deliveries; and that, based on the invoices issued to it and subject to proof of the taxes claimed, the total incurred up to 31 March 2011 was approximately IDR65.67 billion, of which CKH had paid approximately IDR14.76 billion.[15] In other words, CKH disputed the quantum but not the existence of the Principal Debt. Further, the service of the RSDDC was followed very swiftly by the exchange of expert reports in February and early April 2019 in which both sides treated the Principal Debt as an element, the precise amount of which fell to be established and included in a statement of items due in each direction in order to draw a net balance, if CKG was unable to rely upon it under clause 4 of the April 2011 Minutes as extinguishing or reducing its obligations to deliver logs.

19 Taking the relevant documents at their face value, and depending, it appears, on whether or not CKH succeeded in its claim for delivery of defective logs, CKH's expert and CKG's expert arrived in their joint statement dated 30 April 2019 ("the Joint Statement") at almost identical figures in their Table 2.1 headed "The Experts' assessments of the Claimant's claims, if the Respondent is not entitled to invoke the debt-to-log ratio". In this table the figure given for the "Claimant's [*ie*, CKH's] position" was US$4.2 million, whereas the figures given for the "Respondent's [*ie*, CKG's] position" were US$4.4 million or US$4.5 million.[16] Table 2.2, later in the Joint Statement, addressed "The Experts' assessments of the Claimant's claims, if the Respondent is entitled to invoke the debt-to-log ratio".[17] The distinction is clear,

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15 RA Vol 5 Part 2, Tab 5 at pp 43–44 (at paras 118–122).

16 RA Vol 5 Part 3, Tab 11 at p 176.

17 RA Vol 5 Part 3, Tab 11 at p 179.

and the court is unable to accept that Table 2.1 was concerned with the question whether clause 4 of the April 2011 Minutes applied. It was, on the contrary, addressing the position on the assumption that clause 4 was not applicable.

20 Prior to the merits hearing, which took place over five days from 6 to 10 May 2019, the parties agreed a list of issues.[18] Among these, under the general heading "Respondent's [*ie*, CKG's] Counterclaims" at items 15 and 16, were said to be issues as to whether, if taxes or levies were "not yet set off under the [April 2011 Minutes], what is the quantum that remains owed by [CKH] to [CKG]" and as to "How much unpaid Freight Charges, if not yet set off under the [April 2011 Minutes], remain [*sic*] owed by [CKH] to [CKG]". The only pleaded counterclaims for taxes, levies and freight related to the period after December 2011, which it was, as the Judge said, hard to think could have been envisaged as capable of set-off under clause 4 of the April 2011 Minutes. There seems a considerable possibility that these paragraphs were an express echo of the experts' reports identifying the Principal Debt (which related to taxes, levies and freight due up to November 2011) as an item requiring attention if CKG's invocation of a clause 4 set-off against or conversion into notional log deliveries failed.

21 The position is even more striking in relation to the presentations of the parties' cases made to the Tribunal in the course of the merits hearing. The experts were heard on the penultimate day of the hearing, and CKH's expert, put in two very significant slides. These would, as counsel for CKH acknowledged during the course of the appeal, have been prepared for presentation in conjunction with those acting for CKH. Slide 22, to which the Judge referred (at [46] of the Judgment), was headed "If the Respondent is <u>not</u>

[18] RA Vol 5 Part 3, Tab 10 at pp 167–170.

entitled to invoke the debt-to-log conversion" [the underlining is in the original] and it showed the Principal Debt of US$4.2 million as an outstanding debt reducing CKH's much larger claims, which were principally for US$47.1 million for failure to supply logs under the RLMOA, so as to arrive at a net total.[19] Slide 20, not referred to by the Judge, was even more striking, since it was headed "Respondent's Counterclaim (Without debt-to-log conversion)" and listed the detailed make-up and the totals in relation to, respectively, the "Claimant's Position" (US$4,238,938.95 and the "Respondent's Position" (US$4,423,156.50).[20] CKG's expert put in a similar presentation, with slides summarising the "Claimant's Claims" on the alternative bases of "no debt to log conversion" and "with debt to log conversion", and a credit in the former summary for an "outstanding debt" of US$4.2 million on CKH's case or US$4.4 million to US$4.5 million on CKG's case.[21]

22 CKG's opening and closing presentation and submissions were in the same vein. Slides 4 and 47 of CKG's opening presentation slides noted that, on CKH's case that clause 4 of the April 2011 Minutes did not apply and that there was "[n]o conversion", CKH "would still owe [CKG] IDR 66.4b debt + 2% compounded interest" (the rate agreed in the April 2011 Minutes).[22] CKG's written opening statement stated that:[23]

> [CKH] does not dispute that a debt is owed to [CKG]. The respective experts also agree on the quantum of debt accrued by December 2011 (within a small margin), save that [CKH] still resists the amounts owed to [CKG] for PNT taxes, and has

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19 RA Vol 5 Part 4, Tab 17 at p 136.

20 RA Vol 5 Part 4, Tab 17 at p 134.

21 RA Vol 5 Part 4, Tab 18 at pp 145–146.

22 RA Vol 5 Part 4, Tab 14 at pp 46 and 89.

23 RA Vol 5 Part 4, Tab 13 at p 17 (at para 13).

> discounted the value of their purported claims for defects and excess freight.

Counsel for CKG also pointed out orally that the provision for 2% *per* month compounded interest would mean that, if there was no debt-to-log conversion under clause 4, "[CKH] are in a worse position" than if there had been conversion.[24]

23 At no point did counsel for CKH take issue with the way CKH's claims were summarised by both experts or with the way in which CKG's position was put in its presentations and orally. As to quantum, she simply pointed in her opening statement to CKH's expert's calculation of "the amount of taxes and freight that is owed at 8 April 2011" as being about IDR50 billion, not the IDR75 billion referred to in the April 2011 Minutes – the difference being that the further IDR25 billion was (a) an estimate of future taxes and freight (b) assuming the full quantities of log deliveries after 8 April 2011.[25] In closing, in answer to a question from the Tribunal about the actual position, she added that, based on the expert's calculations, the debt in mid-November 2011 was IDR53 billion[26] (the rate of exchange at the relevant times being in the region of IDR9.20 billion to US$1 million). In CKH's written closing submissions, CKH submitted that the third point in clause 4 of the April 2011 Minutes was there to provide for an amicable settlement to be discussed, where it would have been possible for the parties to agree to set off the amounts owing by CKG against the outstanding taxes and freight owing by CKH.[27]

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24 RA Vol 5 Part 4, Tab 15 at p 105.

25 RA Vol 5 Part 4, Tab 15 at p 101.

26 RA Vol 5 Part 4, Tab 20 at p 178.

27 RA Vol 5 Part 4, Tab 22 at p 239 (at para 55).

24 The court fully accepts that the primary focus of CKG's case was on justifying its invocation of clause 4 of the April 2011 Minutes to withhold entirely or to *pro rata* further deliveries of timber logs, by establishing and relying on the Principal Debt in that connection. This was unsurprising in view of the very large financial significance which CKH attributed to that failure (US$47.1 million as stated), although in the event the Tribunal only awarded CKH US$6,772,978.88 under this head in respect of such failure during and after 2011. Accepting that this was the primary focus, the court cannot accept that it excluded consideration of the Principal Debt and the net financial position taking that into account, if reliance on clause 4 failed.

25 Viewing the position and course of events objectively, the natural expectation on both sides, manifested with particular clarity in the documents identified above emanating from CKH's side as well as from CKG's, must have been, or be taken to have been, that, if reliance on clause 4 failed, CKG's claim to the outstanding Principal Debt would then be brought into account in full as a contra item to any claim by CKH.

26 Putting the matter the other way round, the court does not consider it remotely possible that, if the Tribunal had adjudicated upon the Principal Debt and brought it into the picture, after rejecting CKG's case based on clause 4, CKH would then have had grounds to apply to set aside the Award on the ground that the Tribunal had strayed outside the scope of the matters submitted to it for determination. Yet the position is a binary one. Either the matter was within or it was outside the Tribunal's jurisdiction. It was not a situation where it was open to the Tribunal to pick and choose as to the scope of its jurisdiction.

27 The Tribunal's own view, expressed in its decision refusing to make an additional award (see [8] above), is also of interest, coming from those who

experienced directly the way this complex case was put and developed. How a tribunal understands the parties' conduct before it and submissions to it is part of the material from which the court may discern an objective understanding of the submissions and issues before it: see *CIM v CIN* [2021] 4 SLR 1176 at [69]. That may, with caution, even be so where that aid derives from a decision not part of its Award. In its decision, the Tribunal recognised, correctly, that CKG not only raised the issue of its entitlement to the Principal Debt for pre-December 2011 taxes and freight as a defence to CKH's claim for failure of log supply obligations, but also "sought a set off against any damages awarded in substitution of log supply to [CKH]".[28]

28 Counsel for CKH suggested at one point that there could be no legal basis for a set-off, since there was insufficient unity of or connection between the relevant claims. Apart from the fact that that was a point for the Tribunal, not a point going to its jurisdiction, there is in our view nothing in it. The Judge rightly thought nothing of it (see [52] of the Judgment). The claims were for, respectively, non-payment of taxes, levies and freight due under the RLMOA and April 2011 Minutes and for damages for non-delivery of logs due under the RLMOA. It was, as the Judge indicated, hard to imagine a closer connection (not least, one might add, because each side blamed the other for its failure).

29 It follows that the Tribunal's Award is vulnerable to being set aside, if not corrected, since, having rejected CKG's reliance on the debt-to-log conversion in clause 4 of the April 2011 Minutes, the Award failed to consider or adjudicate upon the appropriate set-off. However, the matter goes further, in our view, than set-off. In the light of the course of events, presentations and statements which we have set out, we consider that it was incumbent on the

[28] RA Vol 5 Part 6, Tab 28 at p 22.

Tribunal to treat CKG as having in reality advanced the Principal Debt with 2% interest *per* month not merely as a set-off, but as an item to be given full weight, whichever way the balance of account might as a result shift. It was, as CKH's own expert himself recognised (see [21] above), in substance a "[c]ounterclaim" which was being introduced as an element in an overall statement of account, made up of items due one way or the other and the overall balance of which would, moreover, be expected to be of substantial relevance when it came to matters such as costs.

30 For these reasons, we consider that the Judge came to a decision which was – on all central aspects – correct, and that the appeal should be dismissed. We therefore uphold his order at [77] of the Judgment for the setting aside of the Award to be suspended for a period to enable the Tribunal to correct its Award by considering and taking into account CKG's claim to the Principal Debt and interest thereon.

31 The only variation that we would make to the Judge's order relates to [76] of the Judgment, where the Judge made a prospective order to the effect that, if the Tribunal was unable to eliminate the grounds for setting aside the Award, then paras 519–524 and the entire dispositive section of the Award should be set aside. We consider that the right order in this context should not be anticipated, but should be left over for consideration once the Tribunal has responded to the order contained in [77] of the Judgment, which we have now affirmed.

32 Finally, with regard to CKH's application for leave to adduce further evidence in Summons No 91 of 2021, on the day of the appeal, CKH produced an affidavit sworn on 22 November 2021 attesting to the existence of a parallel BANI arbitration commenced on or around 25 January 2021 by the Company

under the MWA (see [2] above) to recover from CKH the very same taxes, levies and freight as were said to constitute the Principal Debt. An award is said to have been issued in the Company's favour on 11 November 2021 for a total of IDR118,094,879,077 covering such taxes, levies and freight. The affidavit asserts that, in the light of these facts, CKG can no longer be entitled to make against CKH any claim to the Principal Debt, as an award of the Principal Debt "would invariably result in double recovery against [CKH]".[29] That fear is most unlikely to have any reality. While the precise relationships between the parties and agreements involved are currently obscure, tribunals and courts have at the enforcement stage powers which should avoid any such risk of injustice. In any event, however, no legal basis or mechanism has been suggested by virtue of which the present court can or should refrain from addressing the issues actually before it in the ordinary course, as set out in the previous two paragraphs.

[29] Affidavit at paras 5, 10 and 16–17.

33 With regard to costs, counsel for CKG submitted, but only faintly, that indemnity costs of the appeal would be appropriate, but asked in the alternative for $50,000 (in addition to the costs already ordered by the Judge).[30] CKH did not resist this alternative. We see no basis for indemnity costs, and order that CKH pay CKG $50,000 for the costs of the appeal, inclusive of disbursements (in addition to the costs ordered by the Judge at first instance). We also make the usual consequential order for payment out of the security for the costs of the appeal.

Sundaresh Menon
Chief Justice

Judith Prakash
Justice of the Court of Appeal

Jonathan Hugh Mance
International Judge

Hee Theng Fong, Toh Wei Yi, Poon Pui Yee, Leong Shan Wei Jaclyn and Cherrilynn Chia (Harry Elias Partnership LLP) for the appellant;
Tan Beng Hwee Paul and Victor Yao Lida (Cavenagh Law LLP) for the respondent.

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[30] Respondent's Case at para 75; Respondent's Skeletal Submissions at para 34.