IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 54

Civil Appeal No 153 of 2020

Between

(1) CEF
(2) CEG

… *Appellants*

And

CEH

… *Respondent*

Originating Summons No 241 of 2020

Between

(1) CEF
(2) CEG

… *Plaintiffs*

And

CEH

… *Defendants*

JUDGMENT

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

CEF and another
v
CEH

[2022] SGCA 54

Court of Appeal — Civil Appeal No 153 of 2020
Sundaresh Menon CJ, Judith Prakash JCA and Steven Chong JCA
26 January 2022

18 July 2022 Judgment reserved.

Judith Prakash JCA (delivering the judgment of the court):

Introduction

1 The parties to this appeal were once eagerly engaged in the enterprise of constructing and operating a steel-making plant. Unfortunately, disputes over the construction and production capabilities of the plant arose and the respondent terminated the construction contract. An arbitration proceeding ensued in which the respondent was largely successful. The appellants now raise before us, as they did in the court below, issues of breach of natural justice and, further, challenge the workability and enforceability of the award issued by the tribunal.

2 Apart from the first appellant, which is incorporated in Narnia, all the parties are companies incorporated in Ruritania. The first appellant is a multinational company which designs, builds, and sells plants for the iron and

steel industry. It is the parent of the second appellant. In 2011, the appellants were contracted to design and build a steel-making plant for the respondent.

3 The respondent manufactures hot-rolled steelcoils and carries on business on the premises of its parent, a major steelmaker in Ruritania (the "Parent").

4 The relationship between the parties broke down in 2016 and each started action against the other. This led to a consolidated arbitration (the "Arbitration") in October 2016. An award was issued in 2019 (the "Award") and various orders made in favour of the respondent.

5 The appellants were dissatisfied with the Award and therefore applied to the Singapore High Court to set it aside. They asserted breach of natural justice under s 24(*b*) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (the "IAA") and also invoked various grounds under Art 34(2) of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"). The High Court judge (the "Judge") dismissed the appellants' application for the reasons given in *CEF and another v CEH* [2021] SGHC 114 (the "GD").

Facts

Background

6 In June 2011, the first appellant entered into a contract (the "Contract") with the Parent. Under the Contract, the first appellant was to provide engineering equipment and services to design and build a steel-making plant (the "Plant") on a site in Ruritania (the "Site") owned by the Parent for a contract

price of F$92.7m ("F$" being a pseudonym for the currency used in the contract documents). The material terms of the Contract were as follows:

(a) The Plant, once commissioned and fully operational, would be capable of producing approximately 600,000 tonnes of hot-rolled steelcoils per year. This was set out in a document dated 7 May 2011 containing specifications and attached to the Contract ("Technical Specifications").

(b) The first appellant's scope of supply under the Contract comprised: (i) supplying the engineering for the Plant; (ii) supplying the equipment for the Plant; (iii) supervising the erection of the Plant; (iv) supervising the commissioning of the Plant; and (v) training workers to operate the Plant.

(c) The Parent would, *inter alia*: (i) install the foundations of the Plant; (ii) manufacture and erect the steel building of the Plant; (iii) erect the equipment of the Plant; and (iv) install, start up, operate and maintain the Plant in conformity with, *inter alia*, the Technical Specifications.

7 In September 2011, the Parent assigned its rights, title, interest and liabilities under the Contract to the respondent. However, the Parent continued to retain ownership of the Site.

8 In March 2014, the first appellant supplied the respondent with additional equipment worth F$49,000 and additional services worth approximately F$31,000. This equipment was subsequently used in or incorporated into the Plant. The appellants received no compensation from the respondent for providing these additional services and equipment.

9 About two months later, in May 2014, the appellants and the respondent entered into a service agreement ("Service Agreement") whereunder the first appellant assigned to the second appellant the first appellant's obligation under the Contact to provide supervision and training services to the respondent.

The parties' dispute and the Arbitration

10 Unfortunately, there were delays in the construction of the Plant and the completed Plant never achieved its production target. The respondent purported to terminate the Contract. So, in August 2016, the appellants commenced an arbitration against the respondent. Some three weeks later, the respondent commenced its own arbitration against the appellants. In October 2016, the two arbitrations were consolidated into the Arbitration by consent. The claimants and respondent in the Arbitration were the appellants and the respondent, respectively. By November 2016, the Tribunal was constituted comprising Dr Michael Moser (President of the Tribunal), Prof Mauro Bussani and Mr Alan J Thambiayah.

11 The Arbitration was commenced under both the Contract and the Service Agreement. Art 26.1 of the Contract provided that it was governed by Singapore law, while Art 26.2 of the Contract provided that any dispute arising from or in connection with the Contract was to be arbitrated in Singapore under the Rules of Arbitration of the International Chamber of Commerce ("ICC Rules"). Article 6.2 of the Service Agreement incorporated Art 26 of the Contract.

12 On 3 January 2017, in accordance with Art 23 of the ICC Rules, the parties and the Tribunal signed the terms of reference ("Terms of Reference") setting out the parties' claims in the Arbitration.

13 Based on the Terms of Reference, the reliefs sought by the appellants in the Arbitration included the following:

> …
>
> c) [a declaration] that the Contract and the Service Agreement were unlawfully terminated by [the respondent] and such unlawful terminations [amounted] to repudiation of both contracts;
>
> …
>
> f) [a declaration] that [the] Respondent breached the Contract and the Service Agreement and [an] order [for the] Respondent to pay to [the appellants] all losses, damages (including reputational damages), extra-costs and expenses, with interest, resulting from [the] Respondent's breaches and repudiation of the Contract and the Service Agreement, respectively, whose amount [was] to be quantified at the proper stage of [the] proceedings;
>
> …

14 The respondent, for its part, stated in the Terms of Reference that it was seeking the following reliefs:

> (a) Rescission of the Contract and the Service Agreement;
>
> (b) Repayment of all sums paid by [the Parent] and/or [the respondent] to [the appellants] under the Contract and the Service Agreement;
>
> (c) Damages for misrepresentation under section 2(1) of the Misrepresentation Act (Cap. 390), to be assessed;
>
> (d) In the alternative to (a) to (c) above:
>
> > (i) Damages for [the first appellant's] breaches of the Contract and the Service Agreement, to be assessed; and
> >
> > (ii) Damages for [the second appellant's] breaches of the Service Agreement, to be assessed;
>
> (e) Pre-award interest;
>
> (f) Post-award interest;

> (g) the full Costs of [the] arbitration (as defined under Article 37(1) of the ICC Rules); and
>
> (h) Any other determination(s)/order(s)/relief(s) that the arbitral tribunal [deemed] fit in the circumstances.

The Award

15 On 28 November 2019, the Tribunal issued the Award. The majority of the Tribunal found that the respondent had been induced to enter into the Contract by the appellants' misrepresentations, and that the respondent was therefore entitled to rescission of both the Contract and the Service Agreement. The Tribunal made various orders including the following:

(a) The appellants were to pay the respondent the contract price of F$92.7m, less F$15m (to account for two loans which the first appellant had previously extended to the respondent) and F$54.5m (to account for the respondent's use of the Plant after it had been completed and the diminution in value of the Plant) (the "Repayment Order").

(b) The respondent was to "transfer the title to the Plant, including the additional equipment installed" to the appellants in return for payment under the Repayment Order (the "Transfer Order"). In this connection, the Tribunal noted that "[w]hile [the appellants] did not request the transfer of title to the Plant in their request for relief, such transfer of the title is the natural (i.e. legal) consequence of the rescission of the Contract, as specifically acknowledged by [the respondent] and not challenged by [the appellants]".

(c) The appellants were to pay the respondent sums denominated in Ruritanian currency totalling R$176,245,250 as damages under the Misrepresentation Act (Cap 390, 1994 Rev Ed) (the "Misrepresentation

> Act") to compensate the respondent for five heads of loss and/or expenses which it would not have incurred but for the first appellant's misrepresentations (the "Damages Order"). The Tribunal only permitted the respondent to recover 25% of the damages it had sought under each of the five heads as it found the respondent's evidence of the quantum of the loss it had suffered under each head to be deficient.

It should be noted that the Co-Arbitrator Prof Mauro Bussani disagreed with and dissented from certain findings and conclusions of the majority of the Tribunal on the respective liability of the parties as well as the quantum of relief awarded by the majority.

Arguments and the decision below

16 On 25 February 2020, the appellants applied to the High Court to set aside the Award.

Transfer Order

17 The bulk of the appellants' submissions before the Judge was directed at setting aside the Transfer Order. They submitted that:

> (a) First, the Transfer Order should be set aside under Art 34(2)(*a*)(iv) of the Model Law, on the basis that it was "uncertain, ambiguous and/or not enforceable", and therefore in breach of the parties' arbitration agreement, the arbitral rules, and/or the Model Law.
>
> (b) Second, the Transfer Order should be set aside under Art 34(2)(*a*)(iii) of the Model Law, on the basis that the transfer of title

to the Plant from the respondent to the appellants was a decision on a matter beyond the scope of the submission to arbitration.

(c) Third, the Transfer Order should be set aside under s 24(*b*) of the IAA and/or Art 34(2)(*a*)(ii) of the Model Law, on the basis that it had been issued in breach of natural justice and/or the fair hearing rule. A transfer of title to the Plant from the respondent to the appellants as a consequence of rescission had not been a live issue in the Arbitration, and the appellants had not been afforded an opportunity to present their case on the same.

18 The respondent responded that the Transfer Order was not in breach of the ICC Rules or the parties' arbitration agreement and that, further or in any event, the appellants had waived and/or were precluded from alleging any breach of Arts 23 and 41 of the ICC Rules. Second, the Transfer Order was clearly within the Tribunal's jurisdiction as it was a natural consequence of the rescission of the Contract, which was a form of relief that the respondent had explicitly sought during the arbitration proceedings. Third, the appellants had had every opportunity to make submissions and adduce evidence in relation to the Transfer Order, but had deliberately chosen not to do so. Accordingly, the grant of the Transfer Order could not constitute a breach of natural justice.

19 The Judge rejected the appellants' argument that the Transfer Order could be set aside under Art 34(2)(*a*)(iv) of the Model Law. The Judge considered that the appellants' reliance on this provision failed for two reasons. First, Art 34(2)(*a*)(iv) could only apply to a breach of arbitral *procedure*, and the appellants' complaints about the Transfer Order were in effect complaints about the *substance* of the Transfer Order (GD at [37]–[39]). Second, the

appellants had waived their right to rely on Art 34(2)(*a*)(iv) to challenge the Transfer Order (GD at [41]–[42]).

20 The Judge further took the view that, even if these two preliminary points were incorrect, the appellants' challenge under Art 34(2)(*a*)(iv) would still fail as:

(a) There was no authority, and nothing in the Model Law or ICC Rules, which supported the proposition that an arbitral award could be set aside merely on the basis that it was unenforceable or unworkable (GD at [51], [55], [56] and [60]).

(b) In any event, the Award was not unworkable (GD at [62]–[80]).

21 Turning to the issue of whether the Transfer Order was beyond the scope of the parties' submission to arbitration under Art 34(2)(*a*)(iii) of the Model Law, the Judge rejected the appellants' contention that Art 23 of the ICC Rules required the Terms of Reference to state in detail every single head of claim that was advanced in the arbitration (GD at [89]). However, even if Art 23 imposed such a requirement on the parties, paragraph 78 of the Terms of Reference was broad enough to bring counter-restitution of the Plant *in specie* within the scope of the submission to arbitration (GD at [91]). The appellants had also waived their rights to rely on Art 34(2)(*a*)(iii) of the Model Law to challenge the Transfer Order (GD at [96]).

22 Finally, the Judge declined to set aside the Transfer Order on the basis that it was tainted by a breach of natural justice. The issue of counter-restitution *in specie* had been live throughout the arbitration (GD at [102]–[103]). Having failed to present their case on counter-restitution *in specie* during the arbitration,

the appellants could not now argue that the Tribunal had acted in breach of the fair hearing rule (GD at [136]).

Repayment Order

23 In relation to the Repayment Order, the appellants submitted that the Tribunal had, in breach of the "no evidence rule", determined that the diminution in value of the Plant amounted to F$54.5m without any evidence from the parties on the current value of the Plant. The Tribunal had also failed to give the parties a reasonable opportunity to present their case on that issue. The respondent, however, argued that there was no breach of natural justice, as the appellants had had ample opportunity to address the Tribunal on the diminution in the Plant's value. The "no evidence rule" did not assist the appellants as it was inapplicable to the present context and, in any event, should not be accepted as a part of Singapore law.

24 In relation to the Repayment Order, the Judge held that:

(a) The Tribunal did not breach the fair hearing rule in making the Repayment Order. The diminution in value of the Plant had been a live issue in the Arbitration from the very outset and the appellants could well have presented their case on the same if they had so desired (GD at [143] and [150]).

(b) The "no evidence rule" should not be accepted as part of Singapore law. Even if it were to be accepted as a free-standing rule of natural justice, it could not apply to a situation where, as in the present case, the Tribunal had no evidence before it on a material issue of fact

simply because the party who bore the burden of proof on that issue had failed to adduce such evidence (GD at [152] and [154]).

Damages Order

25 Lastly, in respect of the Damages Order, the appellants submitted that the Tribunal had found that the loss/expense incurred by the respondent amounted to 25% of the sums claimed by the respondent under each of the five claimed heads of loss, without giving the appellants a reasonable opportunity to present their case or evidence on the same. The respondent argued that the Damages Order had not been issued in breach of natural justice, as the appellants had had ample opportunity to address the Tribunal on the evidence supporting the respondent's reliance loss. The "no evidence rule" did not assist the appellants as it was inapplicable in the present context and, in any event, should not be accepted as a part of Singapore law.

26 The Judge held that the fair hearing rule had not been breached as the appellants could have advanced an alternative case on the quantum of the respondent's reliance loss, but had refused to do so (GD at [175]). The appellants' reliance on the "no evidence rule" to challenge the Damages Order was without merit – even if the "no evidence rule" were accepted as a free-standing rule of natural justice, the Tribunal did have evidence before it to justify the Damages Order (GD at [176]–[180]).

Inadequate reasons

27 Finally, the appellants argued that the contents of the Award taken as a whole did not contain adequate reasons for the Tribunal's decision, and that the

Award therefore ought to be set aside under s 24(*b*) of the IAA and/or Art 34(2)(*a*)(ii) of the Model Law and/or Art 34(2)(*a*)(iv) of the Model Law.

28 The Judge rejected the appellants' contention that the Award and its contents were inadequately reasoned. As far as the Transfer Order was concerned, it was clear that the Transfer Order was enforceable and workable, and no further explanation was required on the Tribunal's part. Taken as a whole, the Award did provide sufficient reasons to inform the parties of the bases on which the Tribunal had reached its decision on the essential issues (GD at [187]–[188]).

The parties' cases on appeal

29 On appeal, the appellants rehash the arguments they made below in relation to the three orders in the Award and the Tribunal's alleged failure to furnish sufficient reasons on material issues in the Award. Aside from individually challenging the Transfer Order, the Repayment Order and the Damages Order on the bases set out at [17], [23] and [2525] above, the appellants also aver that "[a]s the Transfer Order and Repayment Order *are reciprocal, interdependent and necessarily contingent on each other, if either order is liable to be set aside, this will necessarily mean that at the least, the other order will also have to be set aside as a consequence*" [emphasis added]. The respondent generally supports the decision of the Judge and relies on its submissions below as well.

30 We mention here that on 9 September 2021, the respondent applied for leave to adduce further evidence in this appeal by CA/SUM 73/2021 ("SUM 73"). The application was allowed by this court on 18 October 2021; we permitted both the respondent and the appellants to adduce further evidence.

Issues before this court

31 Consequently, the following issues arise for our determination:

(a) Should the Transfer Order be set aside:

(i) under Art 34(2)(*a*)(iv) of the Model Law, on the basis that it is uncertain, ambiguous, impossible and/or unenforceable and therefore not in accordance with the parties' agreement, the ICC Rules and/or the Model Law?

(ii) under Art 34(2)(*a*)(iii) of the Model Law, on the basis that it contains decisions on matters beyond the scope of the submission to the Arbitration?

(iii) under Art 34(2)(*a*)(ii) of the Model Law and/or s 24(*b*) of the IAA on the basis that it was obtained in breach of natural justice and/or without giving the appellants an opportunity to present their case on the same?

(b) Should the Repayment Order be set aside under Art 34(2)(*a*)(ii) of the Model Law and/or s 24(*b*) of the IAA on the basis that it was issued in breach of the fair hearing rule and/or the "no evidence rule", and is therefore contrary to natural justice?

(c) In the event that either the Transfer Order or Repayment Order is set aside, should the other Order also be set aside on the basis that the two Orders are "reciprocal, interdependent and necessarily contingent on each other"?

(d) Should the Damages Order be set aside under Art 34(2)(*a*)(ii) of the Model Law and/or s 24(*b*) of the IAA on the basis that it was issued

in breach of the fair hearing rule and/or the "no evidence rule", and is therefore contrary to natural justice?

(e) Should the Award (or part thereof) be set aside on the basis that the Tribunal breached its duty to provide sufficient reasons on material issues in the Award?

Issue 1: Should the Transfer Order be set aside?

Whether the Transfer Order is uncertain, ambiguous, impossible and/or unenforceable

32 The appellants' first complaint in relation to the Transfer Order is that the Transfer Order is "uncertain, ambiguous and/or unenforceable", and "factually impossible or unworkable". Therefore, it is in breach of the parties' arbitration agreement, arbitral rules and/or the Model Law, and it ought to be set aside under Art 34(2)(*a*)(iv) of the Model Law, which states:

> (2) An arbitral award may be set aside by the court specified in Article 6 only if:
>
> > (*a*) the party making the application furnishes proof that:
> >
> > …
> >
> > > (iv) the composition of the arbitral tribunal or the *arbitral procedure was not in accordance with the agreement of the parties*, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law…
>
> [emphasis added]

Unenforceability

33 The appellants argue that the Transfer Order is unenforceable and therefore in breach of the parties' arbitration agreement in two respects:

> (a) First, the Transfer Order is contrary to Art 41 of the ICC Rules (being the procedural rules by which the parties agreed to conduct the Arbitration), which oblige the Tribunal to, *inter alia*, "make every effort to make sure that the award is enforceable at law".
>
> (b) Second, the Transfer Order is in breach of "an implied term … [in the parties'] arbitration agreement that the resulting award shall be in a form which is capable of being enforced in the same manner as a judgment".

34 We do not accept the appellants' arguments.

35 First, as the Judge (GD at [82]) and the respondent have pointed out, it does not make sense to suggest that an arbitral award can be set aside on the basis that it is "unenforceable". The grounds on which an arbitral award can be refused enforcement under s 31(2) of the IAA and Art 36 of the Model Law essentially mirror the grounds on which an arbitral award can be set aside under Art 34 of the Model Law, but s 31(2)(*f*) of the IAA and Art 36(1)(*a*)(v) of the Model Law additionally provide that *an award can be refused enforcement if it has been set aside*. Thus, an arbitral award becomes unenforceable *because* it is set aside – an arbitral award is not set aside because it is unenforceable. The appellants' assertion that the Transfer Order is unenforceable does not answer the question of whether the Transfer Order may be *set aside* under one of the grounds set out under s 24 of the IAA or Art 34 of the Model Law.

36 Second, there is no legal basis for the appellants' claim to set aside the Transfer Order in the present case on the basis that it is "unenforceable". The first ground which the appellants rely upon in support of this claim is Art 41 of the ICC Rules, which states as follows:

> In all matters not expressly provided for in the [ICC] Rules, the Court and the arbitral tribunal shall act in the spirit of the [ICC] Rules and shall make every effort to make sure that the award is enforceable at law.

37 The Judge opined, citing Nigel Blackaby, Constantine Partasides, *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) ("*Redfern*") at para 9.14 that Art 41 did not assist the appellants because it "impose[d] a duty on the tribunal to perform rather than to achieve a defined result": GD at [54]. The appellants submit that the statement in *Redfern* which the Judge had relied upon ought to be interpreted for the limited proposition that "no arbitral tribunal can be expected to guarantee that its award will be enforceable in *whatever country* the winner chooses to enforce it" [emphasis added]. Where the tribunal does have reason to believe, based on the arbitration record, that an award is intended to be enforced in a *particular jurisdiction*, the tribunal is *expected* to ensure that the award is enforceable therein.

38 We do not agree with the appellants' interpretation of *Redfern.* The relevant passages of *Redfern* provide:

> 9.14 No arbitral tribunal can be expected to *guarantee* that its award will be enforceable in whatever country the winner chooses to enforce it. However, every arbitral tribunal must do its best. As Article 41 of the ICC Rules provides: 'In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of these Rules and shall make every effort to make sure that the award is enforceable at law.' Phrases such as 'make every effort' imply an 'obligation to

> perform', rather than an 'obligation to achieve a defined result'. Nonetheless, the message is clear: in principle, the eventual outcome of every arbitration is intended to be a final, enforceable, award—as opposed to the outcome of a mediation, which is intended to be an agreement between the parties.
>
> 9.15 For an arbitral tribunal to achieve the standard of performance required to make an internationally enforceable award, it must first ensure that it has jurisdiction to decide all of the issues before it. The arbitral tribunal must also comply with any procedural rules governing the arbitration. Such rules commonly include, for example, allocation of the costs of the arbitration, identifying the seat of the arbitration, and having the award formally approved by an arbitral institution (as with an ICC award). The arbitral tribunal must also sign and date the award, and arrange for it to be delivered to the parties in the manner laid down in the relevant law or by the rules that apply to the arbitration. If the arbitral tribunal has carried out its work adequately, it should not be called upon to 'correct', or 'interpret, its award, although this does sometimes happen.
>
> 9.16 Moreover, Article V(2)(b) of the New York Convention provides that, even when these conditions have been met, an award need not be enforced if it violates the public policy of the place of enforcement … This provision gives discretion to the judicial authority at the recognition and enforcement stage, highlighting the impossibility of ensuring international enforceability at the time of issuing the award.
>
> [emphasis in original]

39 These paragraphs suggest that a tribunal's primary duty under Art 41 is to ensure that the *procedural* requirements for enforcement are satisfied, which was also the Judge's view (GD at [55]). These include, for example, ensuring that the procedural rules governing the arbitration are satisfied, signing and dating the arbitral award, and arranging for it to be delivered to the parties in the manner laid down by the relevant rules to the arbitration. In so far as the *substantive* (*eg*, public policy) requirements for enforcement are concerned, the tribunal will be found to have discharged its duty under Art 41 as long as it demonstrates that it has used "every effort" to ensure the enforceability of the award in the jurisdictions wherein the award can reasonably be expected to be

enforced. After all, as the authors of *Redfern* highlight, enforceability is sometimes subject to the discretion of the relevant judicial authority. It would be unreasonable to impose on the tribunal a duty to accurately predict or guarantee the outcome of such a discretionary exercise.

40 We turn next to the appellants' contention that it is "an implied term in every arbitration agreement that the resulting award shall be in a form which is capable of being enforced in the same manner as a judgment". The appellants argue that support for the existence of such an implied term may be derived from the UK case of *Margulies Brothers Ltd v Dafnis Thomaides & Co (UK) Ltd* [1958] 1 WLR 398 ("*Margulies*").

41 The Judge opined (GD at [48]) that *Margulies* does not support the appellants' case. We agree. The only *ratio* which can be extracted from *Margulies* is that an award *for the payment of money* has to be in a form which is capable of being enforced in the same manner as a judgment. Diplock J (as he then was) who delivered that decision did not say that this applied generally to *all* arbitration agreements, or to a case like the present, which involves an award for the transfer of title in property. Indeed, various local commentators (see, *eg*, Chan Leng Sun, *Singapore Law on Arbitral Awards* (Academy Publishing, 2011) at para 3.78; Sundaresh Menon CJ, *Arbitration in Singapore, A Practical Guide* (Sweet & Maxwell, 2nd Ed, 2018) ("*Arbitration in Singapore*") at para 13.092) have also cited *Margulies* for the same narrow proposition.

42 Second, *Margulies* involved an application for an award to be *remitted* based on common law principles as set out in the case of *Montgomery Jones & Co v Liebenthal & Co* (1898) 78 LT 406 ("*Montgomery Jones*"). It was not an application for the award to be *set aside* under the Model Law as in the present

case. The appellants argue, citing *AKN and another v ALC and others and other appeals* [2016] 1 SLR 966 ("*AKN v ALC*") at [25] (which refers to Art 34(4) of the Model Law) that this is irrelevant since remission is only ordered where there is a valid ground for setting aside the award. This argument is unpersuasive for two reasons:

(a) First, it is not clear that Art 34(4) of the Model Law and *AKN v ALC* stand for such a proposition. Article 34(4) of the Model Law allows the court to remit the award to the arbitral tribunal "when [the court is] *asked* to set aside the award" [emphasis added]. However, just because the court is asked to remit an award does not mean that there is a valid ground to set aside the award. Although *AKN v ALC* does state (at [33]) that the power to remit was conceived as an *alternative* to setting aside, the case does not go so far as to say that "remission is only ordered where there is a valid ground for setting aside the award", as the appellants claim.

(b) Second, the grounds for remitting an award under *Montgomery Jones* were: (i) that the award was bad on the face of it; (ii) that there had been misconduct on the part of the arbitrator; (iii) that there had been an admitted mistake and the arbitrator had asked that the matter be remitted; and (iv) that additional evidence had been discovered after the making of the award. Those grounds are different from the grounds for setting aside an award under s 24 of the IAA or Art 34 of the Model Law.

(c) Third, the appellants argue that the principles in *Margulies* continue to apply today even under the regime of the Arbitration Act 1996 (c 23) (UK). However, even if the principles in *Margulies* do

continue to apply in the UK, this does not answer the question of what the law is in Singapore which is governed by a different regime.

Uncertainty/ambiguity

43 We now turn to the appellants' submission that the Tribunal has a duty to render an award that is certain, unambiguous, precise and possible, and that the Transfer Order is uncertain, ambiguous and capable of multiple interpretations. In our view, however, uncertainty or ambiguity is not a basis to set aside an award under Art 34(2)(*a*)(iv) of the Model Law.

44 In support of their argument, the appellants cite *Official Assignee v Chartered Industries of Singapore Ltd* [1977–1978] SLR(R) 435 ("*Official Assignee*") and *BYL and another v BYN* [2020] 4 SLR 1 ("*BYL v BYN*").

(a) The appellants argue that in *Official Assignee*, the High Court set aside an award because it was ambiguous in that it was capable of two interpretations, uncertain as to how it decided the matters referred, and was therefore invalid. We do not think *Official Assignee* supports the appellants' argument. *Official Assignee* was decided *before* the IAA/Model Law was adopted in Singapore, on the basis of the old common law concept of arbitrator misconduct (*Official Assignee* at [14]–[16]). As the Judge noted, that has no relevance to the regime for setting aside an award under the Model Law (GD at [51]).

(b) The appellants next argue that the court in *BYL v BYN* (at [30]–[46]) did not dispute that an award could be set aside under Arts 34(2)(*a*)(ii), 34(2)(*a*)(iii) and/or 34(2)(b)(ii) of the Model Law and/or s 24(b) IAA on the basis that it was incomplete or unworkable.

In *BYL v BYN*, the plaintiffs argued that the award should be set aside as, first, it was neither final nor complete in that it entirely failed to resolve the parties' dispute, and second, that the tribunal had improperly conferred upon itself the power to change the award if part of it was later found to be unenforceable by a court. The plaintiffs in *BYL v BYN* also contended that the award was "unworkable" (at [32]). However, we do not think that this case stands for the proposition that an award can be set aside under those provisions of the Model Law on the basis that it is "unworkable" (or uncertain/ambiguous). The court there ultimately found that there was nothing incomplete or lacking in finality about the award (at [37]) and decided that the award was not unworkable (at [40]). The court did not go further to say that "unworkability", in and of itself, could justify setting aside.

45 Next, the appellants submit that the Transfer Order is capable of multiple interpretations, as it is unclear. They say it is not clear whether:

(a) the Transfer Order obliges the respondent or the Parent to transfer the title to the Plant to the appellants;

(b) the Transfer Order requires a transfer of title to the land to which the Plant is affixed;

(c) the Transfer Order requires physical disassembly and detachment of the Plant from the land, physical removal of the Plant from the land or physical transportation of the Plant from the respondent to the appellants;

(d) and, if so, whether it is the appellants or respondent who must undertake and pay the costs of any disassembly, detachment,

> removal and transportation of the Plant, and what the deadline for such disassembly, detachment, removal and transportation to be effected is.

46 This ambiguity renders the Award defective and liable to be set aside, whether under Arts 34(2)(*a*)(ii), 34(2)(*a*)(iii), 34(2)(*a*)(iv) and/or 34(2)(*b*)(ii) of the Model Law, or s 24(*b*) of the IAA.

47 We do not accept the appellants' submissions. First, we do not understand the appellants' reliance on Arts 34(2)(*a*)(ii) to (iv) of the Model Law. Article 34(2)(*a*)(ii) of the Model Law states that an award may be set aside where the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case – this does not have anything to do with the purported uncertainty or ambiguity of the award. Article 34(2)(*a*)(iii) refers to setting aside an award where the award deals with a dispute not contemplated by or not falling within the terms or the submission to arbitration, while Art 34(2)(*a*)(iv) refers to the composition of the arbitral tribunal or the arbitral procedure not being in accordance with the agreement of the parties – again, neither of these sub-paras has anything to do with the uncertainty or ambiguity of the award. We also see no basis for the appellants' reliance on Art 34(2)(*b*)(ii) of the Model Law, which concerns setting aside where the award is in conflict with the public policy of this State, *ie* Singapore – the appellants have not explained why uncertainty or ambiguity, even if proven, is in conflict with the public policy of Singapore. Lastly, s 24(*b*) of the IAA refers to the setting aside of an award where there is "a breach of the rules of natural justice" in connection with the making of the award by which the rights of any party have been prejudiced. The appellants have not explained or cited authority for why the purported

uncertainty or ambiguity of the Transfer Order amounts to a breach of the rules of natural justice under s 24(*b*) of the IAA, such that the Transfer Order should be set aside.

48 Second, in any event, we do not think the Transfer Order is uncertain or ambiguous.

(a) First, the appellants argue that it is unclear whether the Transfer Order obliges the respondent (which does not hold the title to the plant) or the Parent (which holds the title to the Plant but was not a party to the Arbitration) to transfer the title to the Plant to the appellants. We first note that the appellants' assertion that the Parent holds the title to the Plant is not based on a finding of fact made by the Judge; the Judge had only *assumed*, in the appellants' favour, that the appellants were correct that title to the Plant had vested in the Parent together with the title to the Site, such that there was no longer any separate title to the Plant which the respondent could transfer to the appellants under the Transfer Order (GD at [63]). Second, even if the appellants are correct that the Parent holds the title to the Plant, the Transfer Order clearly states that: "[T]he Respondent shall transfer the title to the Plant, including the additional equipment installed, to [the appellants]." Thus, the Transfer Order is clear that the respondent is obliged to transfer the title to the Plant to the appellants. In our view, the appellants' argument here is really about impossibility/workability – *ie*, whether it is possible or workable for the respondent to transfer the appellants the title to the Plant when (according to the appellants) title to the Plant is vested in the Parent. We return to this below.

(b) Second, the appellants submit that it is unclear whether the Transfer Order requires a transfer of title to the land on which the Plant is affixed. The appellants also submit that it is unclear whether the Transfer Order requires physical disassembly and detachment of the Plant from the land; physical removal of the Plant from the land or physical transportation of the Plant from the respondent to the appellant; and, if so, whether the appellants or the respondent are to undertake and pay the costs of any disassembly, detachment, removal and transportation of the Plant. Again, we think these points are really about impossibility or unworkability, which we address below.

Impossibility/unworkability

49 We now turn to the appellants' submission that the Transfer Order is impossible or unworkable.

50 The appellants submit that the Plant is a fixture that forms part of the land to which it is affixed (the Site), and therefore there is no separate title to the Plant that can be transferred. The appellants submit that the Judge erred in holding that the Transfer Order is still workable because the Parent can consent to the appellants arranging to disassemble the Plant and sever it from the land so as to restore the resulting components to their original status as chattels, which can then be transferred by the Parent to the appellants. According to the appellants, the Transfer Order is still "unenforceable as worded", since, practically, enforcement depends on a certain position being taken and maintained by the Parent, a non-party to the Arbitration, who can change its position at any time and against whom the respondent cannot enforce the Transfer Order. Further, the scenario contemplated by the Judge assumes that

the Plant can be severed and disassembled into its original components, but it is factually impossible to disassemble the Plant without destroying or rendering worthless the Plant or its components.

51 The appellants' submissions do not provide any basis on which to upset the decision of the Judge.

52 First, the appellants have not cited any authority for their argument that impossibility or unworkability is a basis to justify setting aside an award, much less under Art 34(2)(*a*)(iv) of the Model Law (GD at [60]).

53 In any event, the Transfer Order is not impossible or unworkable. First, as the Judge noted, the Parent can and has consented to the removal of the Plant from the Site, and is prepared to transfer title to the components resulting from the Plant's disassembly to the appellants and allow the appellants to take possession of those components (GD at [64]–[66]). The fact that these matters were not ordered by the Tribunal and are contingent on a certain position being taken and maintained by the Parent is, in our view, beside the point – based on the situation now (and when the matter was before the Judge), the Transfer Order *is* indeed workable. Further, as pointed out by the respondent, if the Parent does indeed change its mind and the respondent is unable to comply with its obligation to transfer the Plant and additional equipment to the appellants, the respondent will be in breach of the Award and the appellants will be at liberty to take whatever steps they deem fit against the respondent.

54 Second, the appellants did not adduce any evidence in support of their contention that it is impossible to disassemble the Plant without destroying or rendering it or its components worthless. The appellants did not previously

suggest, either *before* the Award was made or *thereafter*, that it would be unworkable to disassemble and retake possession of the Plant's components or that disassembly would render the Plant worthless. The Judge therefore rejected this claim "as an afterthought and a contrivance". In this regard, we refer to the Judge's comprehensive analysis (GD at [70]–[79]), with which we agree. We only add that some of the further evidence adduced by both parties in SUM 73 *supports* the Judge's conclusion that the appellants' argument about the impossibility and unworkability of the Transfer Order is an afterthought and a contrivance. We summarise this relevant further evidence as follows:

(a) The respondent adduced an application by the appellants before the court of Narnia dated 18 January 2021 for, *inter alia*, an order that the respondent allow the appellants to inspect the Plant to verify its current condition (the "Narnian Inspection Application"). As mentioned earlier, the first appellant is incorporated in Narnia. The Narnian Inspection Application states, *inter alia*, that the appellants asked the Narnian court to allow their inspection of the Plant in Ruritania as the inspection is "essential to acquire the elements necessary to decide on [the appellants'] opposition (that is, the information regarding the current conditions of [t]he Plant and the additional installed equipment that the Award has ordered to be transferred back to [the appellants])". The appellants went on to say that in their correspondence with the respondent following the Award, the appellants had repeatedly asked the respondent to allow them access to the Site in order to inspect it and verify "the material possibility to *disassemble and remove [the Plant] from the land on which it is located*" [emphasis added]. This is precisely how the Judge characterised the appellants' position in the post-Award correspondence in coming to his finding that the appellants' argument

about unworkability was an afterthought (GD at [76], [79]). Even on their *own* characterisation of their correspondence with the respondent, therefore, the appellants implicitly accept that they had contemplated the possibility of disassembling and removing the Plant from the Site.

(b) Next, the appellants adduced an affidavit dated 9 October 2020 by the Project Director of the first appellant, which was filed in support of an application by the appellants to inspect the Plant in Ruritania (the "Ruritanian Inspection Application"). Paragraph 15 of this affidavit states that in response to a letter dated 24 January 2020 from the respondent's solicitors, the appellants had explained that they needed to inspect the Plant so that the appellants could determine the "nature and extent of *the removal activities*", as well as the "measures that [would] have to be implemented *during the removal activities* for the protection of [the appellants'] rights, including [their] intellectual property rights on the Plant and related technology" [emphasis added]. The appellants' own characterisation of their reply to the respondent shows that the appellants *had* contemplated that removal/disassembly of the Plant was a viable option, and supports the Judge's finding that their argument of the unworkability of the Transfer Order is an afterthought. In fact, two paragraphs later, the same affidavit states that the Award required the respondent to transfer title to the Plant (and additional equipment) to the appellants, and this relief "may only be given effect to if the Plant and the Additional Equipment … remain with [the respondent] *and are in a state that permits all the physical components that comprise the Plant and the Additional Equipment to be redelivered to [the appellants]*" [emphasis added]. Thus, the appellants did not take the position here that the Transfer Order was unworkable on the basis that it was *not possible*

to separate the Plant from the land without destroying the Plant or rendering it practically worthless; rather, their position *assumed* that the Transfer Order was workable, subject to the condition of the Plant and the additional equipment. Finally, paragraph 46 of the same affidavit states that:

> The removal process will require input from both [the appellants] and [the respondent]. Hence, it is important for [the appellants] to conduct an inspection and assess the present state of the Plant *to ascertain steps to be taken on the dismantling of the structures, equipment, machines, devices and other parts* and returning them to [the appellants] without damaging the same.
>
> [emphasis added]

Clearly, the appellants contemplated that removal and disassembly of the Plant was possible – contrary to their position in OS 241 and in this appeal.

55 To sum up, our view is that some of the further evidence adduced by the parties supports the Judge's finding that the appellants' argument of unworkability is an afterthought.

56 Lastly, the appellants submit that the Transfer Order did not specify who was to pay to disassemble the Plant. In their view, the Transfer Order cannot encompass an order for the appellants to pay the costs of disassembly, detachment, removal and return, because such costs would constitute damages that the respondent did not claim in the Arbitration – and in so far as it *did* encompass such an order, the Transfer Order would contain a decision beyond the scope of submission to arbitration. We agree with the Judge that the appellants ought to have raised this issue with the Tribunal under Art 33(1)(*b*) or Art 33(3) of the Model Law and asked the Tribunal to make an additional award to cover these points. While a party is not *obliged* to invoke Art 33(3),

that party takes the risk that the court would not, in a setting-aside application, exercise its discretion to set aside any part of the award (*Arbitration in Singapore* at para 13.050).

The two preliminary points raised by the Judge

57 The Judge raised two preliminary points on the applicability of Art 34(2)(*a*)(iv) of the Model Law (GD at [37]–[43]). It is convenient to address them at this juncture.

(1) Agreement as to arbitral procedure

58 The appellants submit that the Judge erred in holding that the challenge to the Transfer Order failed because Art 34(2)(*a*)(iv) of the Model Law only concerns challenges to the "arbitral procedure" which the Tribunal adopted, and not the "substance" of the Award. According to the appellants, the Transfer Order violates the parties' agreement that the Award be certain, unambiguous, possible and enforceable, and the ambit of Art 34(2)(*a*)(iv) of the Model Law clearly extends to requirements on what the Judge termed as the "substance" of the Award or its contents. The appellants cite two US cases and one UK case as authority for this proposition:

(a) *Western Employers Ins Co v Jefferies & Co* 958 F 2d 58 (9th Cir, 1992): The court vacated the award because the tribunal failed to comply with the requirement in the arbitration agreement to provide findings of fact and conclusions of law in the award.

(b) *Weiner v Commerce Ins Co* 78 Mass App Ct 563 (Mass App Ct, 2011): The court set aside the award because the arbitrator failed to

determine the issue of damages in the award, as required under the arbitration agreement.

(c) *Pacol Ltd v Joint Stock Company Rossakhar* [2000] CLC 315: The parties had only referred issues relating to quantum to the tribunal, but the tribunal dealt with/reopened the issue of liability in the award. This constituted a serious irregularity warranting the setting aside of the award.

59 We do not think the Judge erred in finding that the appellants' complaint was really about the *substance* of the Award and not about the arbitral procedure adopted by the Tribunal (GD at [39]). The appellants have not shown that the Transfer Order violates the parties' *agreement as to the arbitral procedure* for the Award, which is what constitutes a ground for setting aside under Art 34(2)(*a*)(iv) of the Model Law. As for the US and UK cases relied on by the appellants, these cases do not address the question of how ambiguity, unenforceability, *etc* can constitute a basis for setting aside the Transfer Order under the Model Law.

(2) Waiver

60 The appellants also submit that the Judge erred in holding that the challenge to the Transfer Order must fail because the appellants had failed to raise the ground for the challenge in the Arbitration (GD at [42]). The appellants argue that they could not have been aware of the uncertainty, ambiguity, impossibility or unenforceability of the Transfer Order until the Award was issued, and so could not have raised this to the Tribunal during the Arbitration.

61 We agree with the Judge that the appellants have waived their right to rely on this ground of complaint. As we elaborate on below, an order for the respondent to make counter-restitution to the appellants *in specie* by transferring title to the Plant back to the appellants was a live issue throughout the Arbitration – if the appellants believed that an order for the respondent to transfer title to the Plant to the appellants was contrary to the agreed arbitral procedure or would be unenforceable, they should have raised this point to the Tribunal.

62 To sum up, the appellants have provided no basis on which we can reverse the Judge's decision that the appellants' challenge to the Transfer Order under Art 34(2)(*a*)(iv) of the Model Law should be dismissed.

Whether the Transfer Order contains decisions on matters beyond the scope of the submission to the Arbitration

63 The appellants also seek to challenge the Transfer Order under Art 34(2)(*a*)(iii) of the Model Law, on the basis that it contains decisions on matters beyond the scope of submission to the Arbitration. We summarise the appellants' arguments on this issue as follows.

(a) First, the appellants submit that in the Terms of Reference, the respondent only sought a monetary order as the consequence if the Contract and Service Agreement were to be rescinded and did not seek a transfer of title to the Plant from the respondent to the appellants. The appellants also did not seek counter-restitution *in specie*, as set out in the Terms of Reference.

(b) Second, in its pleadings, the respondent sought pecuniary rescission instead of counter-restitution *in specie*. The appellants likewise did not seek counter-restitution *in specie* in their pleadings.

Hence, according to the appellants, the issue of counter-restitution *in specie* and a transfer of title to the Plant was not within the scope of the parties' submission to arbitration, and the fact that the Tribunal made such an order warrants it being set aside under Art 34(2)(*a*)(iii) of the Model Law. Further, prior to the Award, the Tribunal did not inform the parties it intended to order a transfer of title to the Plant or hear the parties on the issue – this was in breach of Art 23(4) of the ICC Rules and warrants setting the Award aside under Art 34(2)(*a*)(iv) of the Model Law.

64 Article 34(2)(*a*)(iii) of the Model Law provides that an award may be set aside if it "deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration", or if it "contains decisions on matters beyond the scope of the submission to arbitration". Article 23(4) of the ICC Rules states:

> After the Terms of Reference have been signed or approved by the Court, no party shall make new claims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances.

Article 23(4) of the ICC Rules and Terms of Reference

65 It is correct that the Tribunal did not expressly include counter-restitution of the Plant *in specie* as one of the issues in the Terms of Reference, nor did it exercise its power under Art 23(4) of the ICC Rules to authorise either party to seek an order for counter-restitution of the Plant *in specie*.

66 As the Judge noted, however, this *does not mean* that the Transfer Order was outside the scope of the parties' submission to arbitration. First, Art 23(1)(c) of the ICC Rules only requires the Terms of Reference to include "*a summary* of the parties' respective claims and of the relief sought by each party…" [emphasis added]. Thus, "[j]ust because a particular head of relief does not appear in the Terms of Reference does not mean it is outside the scope of the submission to arbitration within the meaning of Art 34(2)(*a*)(iii) [of the Model Law]" (GD at [89]).

67 Second, with respect to the appellants' argument about the Tribunal omitting to inform the parties that it intended to order a transfer of title to the Plant, we do not think this was in breach of Art 23(4) of the ICC Rules. This argument is based on the premise that counter-restitution of the Plant *in specie* was a "new claim" within the meaning of Art 23(4) of the ICC Rules. In our view, however, this relief was not a "new claim" outside the Terms of Reference. Paragraph 78 of the Terms of Reference is widely enough worded to bring counter-restitution of the Plant *in specie* within the scope of the parties' submission to arbitration. It states:

> Subject to Article 23(4) of the ICC Rules, the issues to be determined by the Arbitral Tribunal shall be those factual or legal issues resulting from the Parties' submissions, including forthcoming submissions, which are relevant to the adjudication of the relief respectively sought by the Parties, in particular of the claims and defenses raised and including any further questions of fact or law which the Arbitral Tribunal, in its discretion, may deem necessary or appropriate to decide upon, after hearing the Parties, for the purpose of resolving the present dispute.

68 An issue which surfaces in the course of an arbitration and which is known to all the parties is within the scope of the submission to arbitration even if it is not part of any memorandum of issues or pleading (GD at [92];

TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd [2013] 4 SLR 972 ("*TMM Division*") at [52]). In our view, the Judge did not err in his holding that counter-restitution of the Plant *in specie* was one of the "factual or legal issues resulting from the Parties' submissions" (GD at [94]). This was the natural legal consequence of the respondent's counterclaim for rescission, as set out both in the Terms of Reference and in the respondent's pleadings – rescission restores the parties to their pre-contractual positions (*Straits Colonies Pte Ltd v SMRT Alpha Pte Ltd* [2018] 2 SLR 441 at [33]).

69 In this regard, the decision of the Singapore High Court in *CAI v CAJ and another* [2021] SGHC 21 at [216]–[218] ("*CAI v CAJ*") does not assist the appellants. The appellants cite this case as authority for the proposition that if a "new claim" falling outside the limits of the Terms of Reference is to be advanced after the signing of the Terms of Reference, the Tribunal must first authorise it. *CAI v CAJ*, however, is not relevant here as no new "claim" or "defence" was introduced by the respondent at all as we have explained above.

Waiver

70 The appellants submit that the Judge also erred in finding that they had waived their right to rely on Art 34(2)(*a*)(iii) of the Model Law to challenge the Transfer Order because they could have raised the argument during the Arbitration that counter-restitution *in specie* was outside the scope of the submission to arbitration. The appellants assert that they did not communicate any clear or unequivocal waiver in this case and counter-restitution *in specie* was not a live issue in the Arbitration. As stated earlier, however, we agree with the Judge's reasoning on this point.

Whether the Transfer Order was obtained in breach of natural justice and/or without giving the appellants an opportunity to present their case

71 The appellants argue that they were unable to present their case on the Transfer Order as the respondent had only sought pecuniary rescission. Transfer of title to the Plant was not a live issue in the Arbitration, based on the Terms of Reference, the respondent's defence and counterclaim, the respondent's prayer for relief, the respondent's opening submissions, the Tribunal's List of Issues, the statements in oral closing submissions and the appellants' reply post-hearing submissions. Thus, the Transfer Order should be set aside under Art 34(2)(*a*)(ii) of the Model Law and/or s 24(*b*) of the IAA as there was a breach of the fair hearing rule.

72 As the Judge explained (GD at [102]–[132]), however, the transfer of title to the Plant to effect counter-restitution *in specie* was a live issue throughout the arbitration. In our view, it was indeed a live issue.

Terms of Reference

73 The appellants submit that the respondent had only sought pecuniary rescission and not counter-restitution *in specie* in the Terms of Reference. We have addressed this point already.

The respondent's defence and counterclaim

74 Second, the appellants submit that the paragraphs in the respondent's defence and counterclaim referred to by the Judge (*ie*, paragraphs 379, 384, 388 and 393) have to be read in context – properly construed, the respondent's reference to a "transfer" in these paragraphs was only as a legal defence to the appellants' claims for certain specific costs incurred in the Project in relation to

certain specific parts of the Plant, with the respondent arguing that it was not liable to pay these costs because these parts of the Plant would revert to the appellants in the event of counter-restitution, whether *in specie* or *via* a monetary order. It was also necessary for the respondent to first identify the specific parts of the Plant that, according to the respondent, would have been liable to be transferred to the appellants in the event of counter-restitution *in specie*, because the monetary compensation sought by the respondent in pecuniary rescission can only be calculated by first determining which parts of the Plant were liable to be transferred, and by determining the appropriate quantum of compensation with reference to the same. We reproduce these paragraphs as follows:

> 379. By reason of [the appellants'] misrepresentations, *the Contract should be set aside* and title to the tundish temperature measurement system should revert to [the appellants], and [the respondent] is not obliged to pay for the costs of the said repairs. …
>
> …
>
> 384. Further, by reason of [the appellants'] misrepresentations, *the Contract should be set aside* and title to the replacement equipment should revert to [the appellants]
>
> …
>
> 388. … in any event, by reason of [the appellants'] misrepresentations, *the Contract should be set aside* and title to the spare parts, which have not been used, should revert to [the appellants], and [the respondent] is not obliged to pay for the costs for the spare parts.
>
> …
>
> 393. In any event, by reason of [the appellants'] misrepresentations, *the Contract should be set aside* and title to the wear parts, which have not been used, should revert to [the appellants], and [the respondent] is not obliged to pay for the costs for the wear parts. In the alternative, in the event that the Tribunal orders

> damages, the damages awarded must also include the cost of the said repairs.
>
> [emphasis added]

75 The Judge found that it was meaningless to raise rescission and its consequences by way of defence, and that these four paragraphs must not be read as part of a defence to the appellants' claim, but as part of the respondent's *counterclaim*. Further, these paragraphs sufficed to put the appellants on reasonable notice that counter-restitution *in specie* upon rescission, as one of the natural legal consequences of rescission, was a live issue in the Arbitration (GD at [110]–[111]).

76 We take the same view as the Judge. Given the repeated references in these paragraphs to the respondent's position that the "Contract should be set aside" and that "title" to various components should "revert to [the appellants]", it was apparent that counter-restitution *in specie* upon rescission was a live issue in the Arbitration.

The respondent's prayer for relief

77 Third, the appellants submit that the Judge erred in finding that paragraph 424(b) of the respondent's defence and counterclaim did not amount to a prayer for pecuniary rescission. We set out an extract from paragraph 424 as follows:

> 424 In light of the matters set out above, [the respondent] respectfully submits that the Tribunal grant [the respondent] its sought reliefs, namely:
>
> (a) Rescission of the Contract and the Service Agreement;
>
> (b) Repayment of all sums paid by [the Parent] and/or [the respondent] to [the appellants] under the Contract and the Service Agreement;

…

78 The Judge held that paragraph 424(b) of the defence and counterclaim did not amount to a prayer for pecuniary rescission – in fact, the respondent's prayer was for *full restitution* of the contract price from the appellants, without any deduction to account for counter-restitution to the appellants. The implicit premise of this prayer was that the original value of the Plant was nil – this was the respondent's best case on the consequences of rescission, and the respondent was perfectly entitled to advance its best case in this way. The respondent's approach cast a "tactical forensic burden" on the appellants to take a position on counter-restitution as a natural consequence of rescission, *ie*, the appellants could either have claimed counter-restitution as a benefit or rejected counter-restitution as a burden, but did neither (GD at [115]). The appellants instead resisted rescission on the sole basis that the remedy was entirely unavailable to the respondent, leaving it exposed in the event that the Tribunal found that rescission was not barred and the respondent was not estopped from seeking it (GD at [116]).

79 On appeal, the appellants submit that viewed in context, the respondent had sought the monetary order in paragraph 424(b) as the *only* consequence to the rescission sought in paragraph 424(a), *ie*, the respondent had only sought pecuniary rescission, and not rescission through restitution and counter-restitution *in specie*.

80 We agree with the Judge that it is inaccurate to characterise paragraph 424(b) as a prayer for "pecuniary rescission" which would "take into account the value [the respondent] had received and the value [the respondent] had transferred". What the respondent was saying in paragraph 424(b) was that it wanted the appellants to pay back the contract price to the respondent in *full*,

while the respondent did not need to pay the appellants anything, *ie*, this meant the respondent was taking the position that it had received no benefit under the Contract and did not owe the appellants anything. The respondent was entitled to take such a position.

81 Second, as pointed out by the respondent, the appellants' argument on appeal avoids the second aspect of the Judge's reasoning. The Judge said that there was a tactical burden on the appellants to take a position on counter-restitution as a natural consequence of rescission (GD at [115]). Instead, the appellants adopted an "all or nothing" defence to rescission (GD at [116]), meaning that they flatly denied that the respondent was entitled to this relief in the first place and offered no alternative position in the event that the Tribunal found that rescission *was* an available relief. In our view, the appellants were well aware that counter-restitution *in specie* was a live issue in the Arbitration and simply chose to conduct their case without addressing the possibility that this relief would be ordered.

The respondent's opening submissions

82 Fourth, the appellants submit that paragraph 201 of the respondent's opening submissions must be read in its proper context – they submit that this statement is consistent with the respondent's pleaded legal defence to the appellants' claims for specific costs incurred in the Project, and the statement did not have any reference to the possible transfer of title in the Plant. We do not accept this argument. On the contrary, it is clear from that paragraph that the respondent regarded a transfer of title to the Plant to be a necessary consequence of rescission. The paragraph states:

> If the Tribunal agrees that by reason of [the appellants'] misrepresentations, the Contract should be rescinded, *then title*

> *to the Plant, including the additional equipment installed, transfers to [the appellants].* [The respondent] would not be obliged to pay for the "additional sums" set out at [198] above. In the alternative, in the event that the Tribunal orders damages, the damages awarded must also include the cost of said additional sums.
>
> [emphasis added]

The List of Issues

83 Fifth, the appellants submit that the Tribunal did not include the issue of whether title to the Plant could or should be transferred from the respondent to the appellants in its List of Issues, indicating the reality that a transfer of title to the Plant was not a live issue in the Arbitration.

84 The Judge held that the failure to refer to counter-restitution *in specie* in the List of Issues did not withdraw it as a live issue in the arbitration.

85 The appellant has not provided any basis for a reversal of the Judge's holding on the point. First, as noted by the respondent, Issue 2 concerned the issue of rescission, and restitution/counter-restitution *in specie* are the natural legal consequences of rescission. Second, the appellants have not addressed the Judge's observation that a list of issues is not intended to set out every possible issue in the arbitration or to prevail over the scope of the parties' arbitration agreement, the notice of arbitration, the Terms of Reference or the pleadings (GD at [127]).

Oral closing submissions

86 Sixth, the appellants submit that the statements in oral closing submissions referred to by the Judge have to be read in their proper context – these statements were not made in the context of whether the Tribunal should

order counter-restitution *in specie* in the event that rescission is available. We reproduce the statements referred to by the Judge as follows:

> Statement by the appellants' counsel
>
> In the present condition you would restore – imagine that your awards [*sic*] said "yes, they are entitled to rescind for misrepresentation". What about the plant? How can the parties now go back to their former situation considering that in this case the plant was erected by respondent, operated by respondent for years? Respondent even had the time to benefit. It sold. It sold for a long time the products of the plant. It was commissioned by it and then it would be what, physically restituted [*sic*] to [the appellants] or what? If [the appellants] should pay 400 millions it would have something in exchange. The plant? What plant? That have been abandoned by purchaser, today respondent, because it has lost complete interest on that. So restoration, the restoration principle … would absolutely remain inapplicable. …
>
> Statement by the respondent's counsel
>
> I will now deal with the … point about restoration to its former position and he asks: how can that happen? That's like saying that even if this tribunal finds that there was a fundamental breach of the contract that they would have to repay the price, that the tribunal cannot then direct that they take the process back.
>
> Remember it is not just – it is not the plant. It is the process, the design and the layout, that is at issue here. To suggest that regardless of whether they were right or wrong we are stuck with the process and have to pay for it is, with respect, remarkable. *If they gave us a dud, why do we keep it? Contract provides, the law of contract, and this is basic law, provides that if there is misrepresentation it is rescinded, you take it back.*
>
> The only reason it is sitting there since 2016 is that they refuse to take it back. So in the event you find that I am right on the fundamental flaws in the plant, *then I would have been entitled in 2016 to ask them to take it back*. If it has deteriorated since, it is not my fault. It is because they refused to take it back.
>
> Indeed, there is nothing here that prevents restitution from taking place because there is no evidence that they can't come dismantle and take it back. Whether they have any value for it is by the by and the point that they make which is "Oh, you have used the plant to sell some coils", there are two answers to it.

> The first is that the coils were all but useless. The second is we have already given credit for the amounts we received for those coils in our damages claims. So they are not double hit. They would just take back what they gave us.
>
> [emphasis added]

87 We agree with the Judge that those statements of the appellants' counsel showed that the appellants were arguing that rescission was barred as the Plant had been abandoned since 2016, and restoring the appellants to the *status quo ante* was no longer possible (GD at [121]). The very fact that the appellants' counsel was making such an argument indicated that they accepted that counter-restitution *in specie was* available in principle as a relief – just that, according to the appellants, this was no longer possible *in the circumstances*. Further, the statements of the respondent's counsel made it clear that the Tribunal's decision to rescind the Contract would oblige the respondent to return the Plant to the appellants, and would oblige the appellants to accept the return of the Plant.

Reply post-hearing submissions

88 Lastly, the appellants submit that paragraph 67 of their reply post-hearing submissions was incorrectly interpreted by the Judge. Paragraph 67 states:

> In the event that the Tribunal finds that the defects complained of are of such a fundamental nature as to warrant a rescission of the Contract, then any sum awarded in favour of [the respondent] in respect of the return of the Contract price must take into account the following;
>
> (i) the loan of [F$15] million together with interest accrued;
>
> (ii) the diminution in value of the Plant by reason of the same lying idle for three years after the termination; and

> (iii) the sum of about **[R$270] million received** by [the respondent] in selling 149,530.297 tonnes of coils up to July 2016.
>
> [emphasis in original]

89 The Judge found that the appellants understood perfectly well that the issue of counter-restitution *in specie* was a live issue. The appellants' position in paragraph 67(ii) would have been quite different if they genuinely believed that the respondent's counterclaim was confined to pecuniary rescission. If the appellants really believed that, paragraph 67 would have been premised on the respondent (or the Parent) retaining title to the Plant, and the appellants would have argued in paragraph 67(ii) that the respondent must give the appellants credit against restitution of the Contract price for the *full* original value of the Plant, not merely for the *diminution* in its value. By submitting that the appellants' restitution of the Contract price should be reduced only by the *diminution* in value of the Plant, and not by the full original value of the Plant, the appellants showed that they anticipated reacquiring title to the Plant upon counter-restitution *in specie* (GD at [130]).

90 The appellants, however, submit that in paragraph 67, they had simply made the point that the diminution in value of the Plant should be counted against the respondent in a monetary order awarded to the respondent, due to the respondent's culpability in choosing to let the Plant lie idle.

91 We understand the Judge's reasoning to be as follows. Suppose the Plant's value in 2016 (before it was "moth-balled": GD at [17]) was F$80,000, and it is now worth F$50,000 after lying idle for about three years after the termination of the Contract, *ie*, the diminution in value is F$30,000. If the appellants had *really* thought that the respondent would keep the Plant, then the

appellants should have instead argued that the respondent would retain the Plant and that the Plant was worth its *full* original value of F$80,000. The appellants would then have asked in their reply post-hearing submissions for this full value of F$80,000 to be taken into account in the amount the appellants would have to pay the respondent, *ie*, if the appellants have to pay back the full contract price to the respondent, this should be reduced by the F$80,000 worth of Plant that the respondent retains. However, if the appellants contemplated that they would in fact get back the Plant as a consequence of the Award, then the appellants would receive the value of F$50,000 (the current value of the Plant, which the appellants say has diminished in value due to the fault of the respondent), and the respondent would have to compensate the appellants for the *diminution* in the value of the Plant in order to put both parties back in their pre-contractual positions, *ie*, the respondent would have to pay the appellants F$30,000, which should be set off against the amount the appellants have to pay to the respondent. The latter is exactly what the appellants asked for in paragraph 67(ii) of their reply post-hearing submissions. We agree with the Judge that this shows the appellants knew counter-restitution of the Plant *in specie* remained a live issue at the close of submissions in the Arbitration (GD at [131]).

92 We therefore reject the appellants' submission that they were denied a reasonable opportunity to submit on the issue of a transfer of title to the Plant as a consequence of rescission, including whether such transfer was possible/enforceable and how it was to be effected. Since the appellants knew throughout the Arbitration that counter-restitution *in specie* was a live issue, they only have themselves to blame for failing to make submissions on this point. The appellants also submit that they have suffered significant prejudice due to the fact that any separation of the Plant from the land would result in the

Plant being destroyed or render the Plant worthless. However, as we have explained earlier, the appellants have not adduced any evidence in support of this contention, and we agree with the Judge that this argument is an afterthought and a contrivance (GD at [79]).

Conclusion on Issue 1

93 In conclusion, the appellants have provided no basis to disturb the Judge's decision concerning the Transfer Order.

Issue 2: Should the Repayment Order be set aside?

94 We now turn to the Repayment Order. Under the Repayment Order, the appellants were to pay the respondent the Contract Price of F$92.7m, less F$15m (to account for two loans which the appellants had previously extended to the respondent) and F$54.5m (to account for the respondent's use of the Plant and the diminution in value of the Plant). This F$54.5m is the equivalent of R$270m. The Tribunal stated (see the Award at [398]–[403]):

> 398. In relation to the diminution in value of the Plant, the Tribunal does not have any evidence before it in relation to the current value of the Plant. Moreover, the Parties devoted only a very minimal part of their pleadings to this matter. *This lack of evidence cannot be attributed to the Respondent as it was the* [*appellants'*] *burden to prove the diminution in value.* …
>
> 399. The Tribunal also notes that the Respondent sought rescission already in its Request for Arbitration dated 29 August 2016. Therefore, as rightfully (*sic*) argued by the Respondent, the Plant has been left idle because the [appellants] disputed the Respondent's right to rescind the Contract.
>
> 400. However, *there is no doubt that some diminution in value of the Plant must have occurred and therefore the Tribunal accepts that this should be considered in the Contract Price.*

> 401. It is also beyond dispute that the Respondent sold 149,530.297 tonnes of coil up to July 2016. *This, according to the* [*appellants*]*, translates into a total sale price of about* [*R$270*] *million. …*
>
> 402. The Tribunal notes that [R$270] million is the gross revenue figure. The Tribunal also notes that the Respondent did not dispute or address the [appellants'] calculation of [R$270] million in its response to the [appellants'] last post-hearing submission. …
>
> 403. Accordingly, taking into account both the Respondent's use of the Plant and plausible diminution in value of the Plant and the losses suffered by the Respondent … the Tribunal decides that the [appellants] are entitled to a deduction of [R$270] million from the Contract Price that they will pay back to the Respondent. The Tribunal believes that the subtraction of [R$270] million, although it is the gross revenue figure, is just considering the Respondent's use of the Plant and the whole circumstances of the present dispute.
>
> [emphasis added]

95 The appellants submit that the Tribunal made the Repayment Order without any evidence of the current value of the Plant or the diminution in value of the Plant – in this regard, the appellants urge this court to consider the adoption of the "no evidence rule" as part of Singapore law. The appellants also submit that they were unable to present their case on the burden of proof and the condition/value of the Plant during the Arbitration – if the Tribunal wished to arrive at its conclusion on an issue where direct and relevant evidence was sorely lacking, the parties ought to have been given a chance to comment and provide submissions on the Tribunal's thinking or proposed line of reasoning. Thus, the Repayment Order was issued in breach of the fair hearing rule.

96 We first deal with the appellants' argument concerning the alleged breach of the fair hearing rule.

The fair hearing rule

97 The appellants say that they were unable to present their case on the burden of proof and the condition/value of the Plant (including on the diminution in value of the Plant). In our view, however, the Judge did not err in finding that the diminution in the value of the Plant was a live issue in the Arbitration from the very outset (GD at [143]).

98 In its statement of defence and counterclaim, the respondent had pleaded that rescission was not barred on the ground that the Plant had been used, because it could be accompanied by a monetary award of sufficient value to restore the appellants to the *status quo ante* (GD at [143]):

> 299. The fact that the Plant has been used is not a bar to rescission. The Tribunal can assess a suitable sum to compensate [the appellants] for any use of the property by [the respondent]. *Any deterioration in the property as a result of such use alone will not bar rescission where monetary compensation can be made*. The Tribunal has a power to award such monetary compensation.
>
> [emphasis added]

In its reply and defence to the counterclaim, the appellants had pleaded that the respondent was not entitled to rescind the Contract as, *inter alia*, the respondent had used and benefited from the Plant.

99 Thus, the pleadings showed that two issues were live in the Arbitration: whether the Plant had diminished in value since 2016, and the quantum of the diminution in the value of the Plant. Further, the Tribunal had held that the appellants bore the burden of proving the quantum of the diminution in value of the Plant (GD at [145]). Having failed to adduce any evidence in this respect, the appellants cannot now argue that they have been denied a fair hearing. It is

also trite that *even if* the Tribunal had made an error of law in finding that the appellants bore the burden of proof, this is not a ground for setting aside an award under the IAA or the Model Law (*Prometheus Marine Pte Ltd v King, Ann Rita and another appeal* [2018] 1 SLR 1 at [57]).

100 In fact, as we observed at the hearing, any error in this regard was *to the appellants' advantage*. The Tribunal found that the burden of proof was on the appellants to prove diminution in value of the Plant. The Tribunal could therefore have said that, since the appellants had *not* given any evidence of the diminution in value of the Plant, the Tribunal would not deduct *anything* from the sum to be repaid by the appellants to the respondent, with the result that the appellants would have to pay back *more* to the respondent. In our view, therefore, even if there had been any breach of the fair hearing rule, there was no prejudice caused to the appellants by this decision.

The "no evidence rule"

101 Next, the appellants argue that this court should consider adopting the "no evidence rule", a rule which has sometimes been applied in Australia and New Zealand. Application of this "rule" would mean that an award which contains findings of fact made with no evidential basis at all is liable to be set aside for breach of natural justice. In support of their contention, the appellants refer to two Australian cases, *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666 ("*Pochi*") and *R v Deputy Industrial Injuries Commissioner ex parte Moore* [1965] 1 QB 456 ("*Moore*"), and two Singapore cases, *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") and *CAI v CAJ*. The appellants submit that the Judge erred in finding that the "no evidence rule" has no application to a

situation in which a tribunal has no evidence before it on a material issue of fact simply because the party who bears the burden of proof on that issue has failed to adduce any such evidence – the appellants contend that there is no such limitation on the "no evidence rule". Rather, the respondent, being the party that sought pecuniary rescission, bore the burden of "proving every element in the formula necessary to calculate the monetary award which would achieve the same net economic effect as restitution and counter-restitution *in specie*, including the condition/value of the Plant"; and that the appellants were deprived of the opportunity to seek any evidence on the condition/value of the Plant during the Arbitration.

102 In our judgment, the "no evidence rule" should not be adopted as part of Singapore law, as to do so would run contrary to the policy of minimal curial intervention in arbitral proceedings (*AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 at [37]–[38]). Further, it would not add anything to the existing grounds for setting aside an award but would instead be (as the Judge stated) "an impermissible invitation to the courts to reconsider the merits [of] a tribunal's findings of fact as though a setting-aside application were an appeal" (GD at [152]).

103 In this regard, we do not think the cases cited by the appellants assist their argument.

(a) Simply citing the Australian cases of *Pochi* and *Moore* does not answer the question of why Singapore should adopt the "no evidence rule".

(b) The appellants have referred to [65(a)] and [65(d)] of *Soh Beng Tee*. But these paragraphs do not explain why Singapore should adopt

the "no evidence rule". In respect of [65(a)], this explains that "[a]n arbitrator should not base his decision(s) on matters not submitted or argued before him" and that "[a]rbitrators who exercise unreasonable initiative without the parties' involvement may attract serious and sustainable challenges". Read in context, this is a reference to the established principle of ensuring that parties are *given a fair hearing* and have "reasonable opportunities to present their cases as well as how to respond". The same goes for [65(d)], which addresses the issue of the parties' "right to be heard", and highlights that "there must be a real basis for alleging that the arbitrator has conducted the arbitral process either irrationally or capriciously".

(c) The appellants have also referred to *CAI v CAJ* at [166]–[176]. These paragraphs concern the High Court's finding that the tribunal in that case did not rely on any of the evidence adduced by the defendants, and instead had substantially relied on its "professed experience" to grant a 25-day extension of time to the defendants (at [168]). But, as the respondent submits, the High Court in that case did not rely on the "no evidence rule" in reaching its decision – rather, the High Court found that one of the parties (CAI) was denied a reasonable opportunity to be heard as it was not given a chance to comment and provide submissions on the tribunal's professed "experience in these matters" (*CAI v CAJ* at [168], [169], [171], [176]). This case therefore does not explain why Singapore should adopt the "no evidence rule". It is also different from the present case, where the issue of the diminution in value of the Plant was a live issue throughout the arbitration and the appellants simply failed to address it.

104 Second, *even if* the "no evidence rule" were to be applied in the present case, it cannot apply to a situation where the tribunal has no evidence before it on a material issue of fact because the party who bears the burden of proof on that issue has failed to adduce any such evidence. In this regard, the appellants have two contentions:

(a) The appellants submit that there is no such limitation on the "no evidence rule" – a tribunal faced with a situation where there is no evidence, *whether or not due to the fault of the party bearing the burden of proof*, cannot simply make an arbitrary decision based on mere speculation. However, as the respondent submits, where a party with the burden of proof on a particular point does not adduce evidence on that point, *it has simply failed to discharge its burden of proof on that point*, and the tribunal would thus be entitled to accept the other party's best case.

(b) Next, the appellants submit that, in the present case, it was the respondent who bore the burden of proving the diminution in value of the Plant, since the respondent "had sought pecuniary rescission". As we have explained, however, it was not the case that the respondent prayed for pecuniary rescission – as the Judge said, the respondent had pleaded its best case on rescission. We agree with the Judge that the appellants simply chose not to present their case on the diminution in value of the Plant in response (GD at [150]).

105 Third, in respect of the appellants' argument that they were deprived of the opportunity to seek evidence on the condition/value of the Plant both by the respondent and by the Tribunal's unexpected decision on the diminution in value of the Plant, and that the Tribunal should have requested the parties to

tender evidence and submissions, the appellants have not addressed the Judge's finding that the burden was on the appellants to deploy the appropriate procedural machinery at the appropriate procedural stage of the Arbitration to secure the necessary evidence to discharge their burden of proof (GD at [156], [158]). As for the appellants being allegedly taken by surprise by the Tribunal's unexpected decision on the diminution in value of the Plant, we do not think this submission is meritorious given that this was a live issue during the Arbitration. In this regard, the appellants have not addressed the Judge's finding that they failed to state a case on the diminution in the value of the Plant at any point during the Arbitration (GD at [159]).

Conclusion on Issue 2

106 In conclusion, the appellants' submission that the Repayment Order should be set aside on the basis that it was issued in breach of the "no evidence rule" or in breach of the fair hearing rule must be rejected.

107 Since neither the Transfer Order nor the Repayment Order is to be set aside, the question of whether both orders should be set aside as a result does not arise.

Issue 3: Should the Damages Order be set aside?

108 The Damages Order stated that the appellants were to pay the respondent a total of R$176,245,250 as damages under the Misrepresentation Act to compensate the respondent for five heads of losses and/or expenses which it would not have incurred but for the appellants' misrepresentations. The Tribunal had only permitted the respondent to recover 25% of the damages it had sought under each of the five heads as it had found the respondent's

evidence of the quantum of the reliance losses it had suffered under each head to be deficient.

109 In respect of the Damages Order, the Judge held that the fair hearing rule had not been breached as the appellants could have advanced an alternative case on the quantum of the respondent's reliance loss, but had refused to do so: GD at [175]. The Judge also held that the appellants' reliance on the "no evidence rule" to challenge the Damages Order was without merit: GD at [176]–[180].

The fair hearing rule

110 On appeal, the appellants submit that the Damages Order was issued in breach of natural justice and/or that the appellants were unable to present their case. The Tribunal had rejected and/or found the respondent's evidence in support of its five heads of reliance loss to be deficient. Despite this, it inexplicably proceeded to adopt a "flexible approach" and to award the respondent 25% of each head of reliance loss, without first telling the parties it would be doing so or giving them the opportunity to address the Tribunal on the same. Had the Tribunal indicated beforehand that it would apply this flexible approach, the appellants would have had the opportunity to decide whether to ask the respondent to produce the source documents, or to take a forensic risk by resting their defence only on the burden of proof.

The law

111 In the recent decision of this court in *BZW and another v BZV* [2022] SGCA 1 ("*BZW*"), this court stated that a breach of the fair hearing rule could arise from the chain of reasoning which the tribunal adopts in its award (at [60(b)]):

> … a breach of the fair hearing rule can also arise from the *chain of reasoning* which the tribunal adopts in its award. To comply with the fair hearing rule, the tribunal's chain of reasoning must be (i) one which the parties had reasonable notice that the tribunal could adopt; and (ii) one which has a sufficient nexus to the parties' arguments (*JVL Agro Industries* at [149]). A party has reasonable notice of a particular chain of reasoning (and of the issues forming the links in that chain) if: (i) it arose from the parties' pleadings; (ii) it arose by reasonable implication from their pleadings; (iii) it is unpleaded but arose in some other way in the arbitration and was reasonably brought to the party's actual notice; or (iv) it flows reasonably from the arguments actually advanced by either party or is related to those arguments (*JVL Agro Industries* at [150], [152], [154] and [156]). To set aside an award on the basis of a defect in the chain of reasoning, a party must establish that the tribunal conducted itself either irrationally or capriciously such that "a reasonable litigant in his shoes could not have foreseen the possibility of reasoning of the type revealed in the award" (*Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [65(d)]).
>
> [emphasis in original]

112 In *BZW*, the respondent had entered into a contract with the appellants for the latter to construct and deliver a vessel to the respondent. While the vessel was still under construction, the respondent held discussions with a third party (the "Buyer") to on-sell the vessel. After the appellants delivered the vessel to the respondent and the respondent delivered the vessel to the Buyer, the respondent commenced an arbitration against the appellants claiming damages for the installation of contractually inadequate generators (the "Rating Claim"). The tribunal dismissed this claim. The respondent successfully applied to the High Court to set aside the award on the basis that there was a breach of natural justice under s 24(*b*) of the IAA. That decision was upheld by this court on appeal. In their defence to the Rating Claim, the appellants had argued that they were not in breach of contract because the contract had not specified a particular rating for the generators and the "SA2 Minutes of Negotiations" signed by the parties permitted the appellants to deliver the vessel with IP23-rated generators.

113 In relation to the claim for breach of contract, the majority of the tribunal found that the Buyer had required the generators to be rated IP44 and that negotiations had resulted in an agreement for the respondent to pay the appellants a modification fee – the upgrade of the generators from IP23 to IP44 was a reasonable explanation for this fee. The tribunal also found that the pleadings and evidence pointed to the conclusion that the parties understood that the vessel's generators had to be upgraded from IP23 to IP44. As the High Court held, this could only mean that the tribunal was rejecting the appellants' defence that delivering the vessel with IP23-rated generators was not a breach of the contract. However, the tribunal then stated *that there was no breach by the appellants* in supplying IP23-rated generators because the respondent itself had confirmed that IP23 was fit for purpose. But it was never the appellants' case in the arbitration that they were not in breach of contract because the respondent had confirmed that IP23 was fit for purpose. Finally, this court observed that even if the generators were fit for purpose, this finding would simply have no nexus whatsoever to the issue before the tribunal as to whether the installation of IP23-rated generators was in breach of a *contractual obligation* to deliver IP44-rated generators (at [61(b)]). This court thus agreed with the High Court that there had been a breach of the fair hearing rule in relation to the Rating Claim as the tribunal had adopted a chain of reasoning that had no nexus with the parties' submissions.

Applying the law to the facts

114 In the Award, the Tribunal noted that there were deficiencies in the respondent's evidence as regards proof of its reliance loss, but nonetheless proceeded to award the respondent 25% of each claimed head of reliance loss. We reproduce the relevant excerpts of the Award as follows:

Ancillary capital expenditure

…

443. The Tribunal notes that the Respondent could have produced various source documents to show its expenditures (e.g., purchase orders and invoices for purchase of equipment). Such production would have been reasonable in light of the [appellants'] objection to the figures stated by the Respondent and would have assisted the Tribunal in ascertaining whether the numerous figures stated in the audited reports are directly relevant to the claim. However, the Respondent failed to submit the relevant source documents.

444. Nevertheless, the Tribunal believes that the Respondent had suffered loss by spending significant ancillary capital in relation to the Plant. Accordingly, bearing in mind the deficiencies in the Respondent's evidence, the Tribunal decides to award the Respondent 25% of the ancillary capital expenditure claimed amounting to [R$57,825,000].

Direct attributable costs

…

447. … the Respondent failed to explain in more sufficient detail the costs incurred in "testing the Plant". The Respondent also failed to support its claim with documentary evidence which could show, *inter alia*, what the costs exactly comprised of and whether they were reasonably incurred.

448. Nevertheless, the Tribunal cannot ignore the Respondent's evidence which supports the conclusion that the Respondent incurred direct costs. Accordingly, the Tribunal decides to award the Respondent 25% of the direct attributable costs claimed amounting to [R$23,948,750].

Operating costs

…

452. … even the Respondent could not explain or substantiate in detail how the phrases interest income and retirement benefits were related to the Plant's performance. Instead, the Respondent settled for stating that Mr [C's] evidence on this matter was not challenged by the [appellants] at the Hearing.

453. Considering the scarce evidence provided by the Respondent, the Tribunal finds it hard to accept the Respondent's claim at face value due to the limited evidence that each of the items claimed was directly related to the Plant's

> performance. Nevertheless, the Tribunal cannot ignore the Respondent's evidence which indicates that the Respondent incurred direct operating costs. Accordingly, the Tribunal decides to award the Respondent 25% of the operating costs claimed amounting to [R$12,196,500].
>
> *Finance and interest charges incurred*
>
> …
>
> 459. … the Tribunal cannot understand why the Respondent did not provide simple evidence, such as bank statements, to prove this contested evidence.
>
> 460. Moreover, as highlighted by the [appellants], the figures that the Respondent refers to in the audited reports do not show how they are connected to the Respondent's claim. However, the Tribunal decides that it cannot ignore the Respondent's evidence concerning the costs incurred on external borrowings/financing. Therefore, the Tribunal decides to award the Respondent 25% of the finance and interest charges claimed amounting to [R$20,100,000].
>
> *Opportunity costs*
>
> …
>
> 466. … According to the [appellants'] expert, Mr [A], as the Tribunal does not have the relevant information regarding any alternative investment, "*one possible reference point for opportunity cost would be the fixed deposit rate*." However, Mr [A] did not provide the Tribunal with a number which could assist the Tribunal with quantum.
>
> 467. The Respondent's expert, Mr [B], while accepting Mr [C's] reliance on [the Parent's] return of equity as a reference point to compute the opportunity costs, conceded that he could not confirm that 10% is a reasonable figure because he did not have all the detailed information necessary. …
>
> 468. As the Respondent's expert could not confirm that the figure of 10% is reasonable and the Respondent has not advanced any other figure, the Tribunal decides to award the Respondent 25% of the opportunity costs claimed amounting to [R$ 62,175,000].
>
> [emphasis in original]

115 The Tribunal explained that it was applying a "flexible approach" to proof of damage as "it is impossible to lay down any definitive rule as to what

constitutes sufficient proof of damage". The Tribunal included a footnote reference to the decision of this court in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623 ("*Robertson Quay*") at [28]–[30]:

> 28 The law, however, does not demand that the plaintiff prove with complete certainty the exact amount of damage that he has suffered. …
>
> 29 In this regard, we find that the following observations by Fletcher Moulton LJ in the English Court of Appeal decision of *Chaplin v Hicks* [1911] 2 KB 786 ("*Chaplin*") (at 793–795) are also instructive:
>
> > Mr. McCardie [counsel for the defendant] does not deny that there is a contract, nor that its terms are as the plaintiff alleges them to be, nor that it is enforceable, but he contends that the plaintiff can only recover nominal damages, say one shilling. To start with, he puts it thus: where the expectation of the plaintiff depends on a contingency, only nominal damages are recoverable. Upon examination, this principle is obviously much too wide; everything that can happen in the future depends on a contingency, and such a principle would deprive a plaintiff of anything beyond nominal damages for a breach of contract where the damages could not be assessed with *mathematical accuracy*.
> >
> > …
> >
> > … I think that, where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case.
> >
> > [emphasis added]
>
> 30 Accordingly, a court has to adopt a flexible approach with regard to the proof of damage. Different occasions may call for different evidence with regard to certainty of proof, depending on the circumstances of the case and the nature of the damages claimed. There will be cases where absolute certainty is possible, for example, where the plaintiff's claim is for loss of earnings or expenses already incurred (ie, expenses incurred between the time of accrual of the cause of action and

> the time of trial), or for the difference between the contract price and a clearly established market price. On the other hand, there will be instances where such certainty is impossible, for example, where the loss suffered by the plaintiff is non-pecuniary in nature, or is prospective pecuniary loss such as loss of prospective earnings or loss of profits (see generally *McGregor on Damages* at paras 8-003–8-064). The correct approach that a court should adopt is perhaps best summarised by Devlin J in the English High Court decision of *Biggin & Co Ld v Permanite, Ld* [1951] 1 KB 422 ("*Biggin*"), where he held (at 438) that:
>
> > [W]here precise evidence is obtainable, the court naturally expects to have it. Where it is not, the court must do the best it can.
>
> This is in fact the approach that this court has adopted (see *Raffles Town Club Pte Ltd v Tan Chin Seng* [2005] 4 SLR(R) 351 at [17]–[19], where both *Chaplin* and *Biggin* were cited with approval and the above observation by Devlin J emphasised by this court).

116 In our view, the Tribunal's chain of reasoning in respect of the Damages Order was not one which the parties had reasonable notice that the Tribunal could adopt, nor did it have a sufficient nexus to the parties' arguments.

117 First, the Tribunal had expressly stated that there were deficiencies in the respondent's evidence due to the respondent's failure to produce the relevant supporting documents or to explain how the existing documents substantiated its claim. In our view, both parties would have expected that the Tribunal would only award the respondent loss that the respondent could prove. They would have expected that if the Tribunal disagreed with the appellants about the state of the evidence adduced by the respondent in support of its reliance loss, it would award the respondent its claim in its entirety, *ie*, it would then award 100% of the respondent's claim for reliance loss. Similarly, if the Tribunal were to award 25% of the claim for reliance loss, this would be because the respondent had only proved 25% of its claim for reliance loss (and failed to

prove the other 75%). In our view, a reasonable litigant in the appellants' shoes could not have foreseen the possibility of reasoning of the type revealed in the Award – *ie*, that the Tribunal, *having noted all the deficiencies in the respondent's evidence*, would then go on to adopt a figure of 25% of the amount claimed as being the loss incurred. Instead, the parties would have expected the Tribunal to dismiss the claim for reliance loss *in its entirety*.

118 Second, the Tribunal's chain of reasoning did not have a sufficient nexus to the parties' arguments. The Tribunal justified its reasoning with reference to the "flexible approach" in *Robertson Quay* at [28]–[30]. We note that the sole reference to *Robertson Quay* was in the respondent's reply post-hearing submissions, under a sub-heading concerning the respondent's claim for expectation loss:

> **C. [The appellants'] allegation that the quantum of [the respondent's] losses is not substantiated**
>
> (i) [The appellants'] allegation that there is no basis for [the respondent's] claim for expectation loss
>
> 158. [The appellants claim] … that [the respondent's] claim for expectation loss is premised on future losses, and that [the respondent] must prove that [the respondent] has a real or substantial instead of a speculative chance. [The appellants say] that [the respondent] has not met the "*minimum legal requirements*" for proof set out in the English case of *Amstrad plc v Seagate Technology Incorporated and Another (in members' voluntary liquidation)*, i.e. to (1) show evidence of existing customers who decline to continue to place further business, or (2) to show evidence of possible future customers who would have bought but were deterred by the relevant breach and (3) if no such evidence is forthcoming, to show that it had a substantial chance of obtaining such continuing or future business. [The appellants have] got it wrong. The case of *Amstrad* does not say that this is the only way to prove loss. It is impossible to lay down any definitive rule as to what constitutes sufficient proof of damage. [footnote reference to *Robertson Quay*] … the question is simply whether the Tribunal is satisfied that [the respondent's] evidence on the loss and quantification is more likely to be true than not, and in

> calculating [the respondent's] expectation loss, one has to assume that the Contract was properly performed as intended and that accordingly, the correct parameter to use was 600,000 MT.
>
> [emphasis in original]

119 Even in the respondent's own reply post-hearing submissions, the respondent did *not* cite *Robertson Quay* for the proposition that, if the Tribunal was not satisfied as to the state of the respondent's evidence concerning proof of its loss, the Tribunal could then rely on the "flexible approach" to justify awarding a certain percentage of the respondent's total claim (assuming the case could have been cited for that proposition which seems doubtful). In fact, the respondent had cited *Robertson Quay* in support of its argument that the question was simply "whether the Tribunal is satisfied that [the respondent's] evidence on the loss and quantification is *more likely to be true than not*" [emphasis added]. Thus, even the respondent acknowledged that, on the "flexible approach", the Tribunal had to *first* be satisfied that the respondent's evidence was "more likely to be true than not" in order to award any damages to the respondent. In our view, therefore, the Tribunal's reliance on the "flexible approach" in *Robertson Quay* had no connection to the issue before the Tribunal of what the appropriate award for the respondent's alleged reliance loss should be. Once the Tribunal found that the respondent had not proved its reliance loss, *the only appropriate percentage to award was 0%* – the "flexible approach" did not allow the Tribunal to randomly select a figure of 25%.

120 In this regard, we think the present case is similar to *BZW*. In *BZW*, in relation to the Rating Claim, the tribunal found that (a) the upgrade of the vessel's generators from IP23 to IP44 was a reasonable explanation why the appellants agreed to incorporate a modification fee in their agreement with the respondent and (b) the parties understood that the vessel's generators had to be

upgraded from IP23 to IP44. Making those two findings ("findings (a) and (b)"), could only mean that the appellants' defence that they were not in breach of contract when they delivered IP23-rated generators was being rejected by the tribunal. Yet, instead of finding that the appellants were in breach of contract, the tribunal found that there was no breach of contract by the appellants based on a reason that was not even part of the appellants' case, and that, even if true, had no relevance to the issue of whether the appellants had breached their contractual obligation. The parties could not have anticipated that a finding that there was no breach of contract by the appellants would follow from findings (a) and (b) above. Similarly, in this case, the Tribunal found that there were deficiencies in the respondent's claim for reliance loss (*eg*, it observed that the respondent failed to produce documentary evidence or explain how the existing documents substantiated its claim). This could only mean that the claim for reliance loss had to be rejected in its entirety. Yet, instead of rejecting the claim for reliance loss in its entirety, the Tribunal awarded the respondent 25% of a figure which the Tribunal found was unproven.

121 Third, we consider that this breach of natural justice was connected to the making of the Award (*BZW* at [62]), as the Tribunal awarded the respondent 25% of its claimed reliance loss based on the "flexible approach". In our view, this breach of natural justice prejudiced the appellants' rights. Had the Tribunal informed the parties of its intention to apply the "flexible approach" in this manner, the appellants would have had the opportunity to inform the Tribunal of its objections to such an approach, or the appellants would have had the opportunity to decide whether to ask the respondent to produce the source documents or to take a forensic risk by resting their defence only on the burden of proof. This compliance with the rules of natural justice could reasonably have made a difference to the outcome of the Arbitration (*BZW* at [63]).

122 Both before the Judge and this court, the respondent submitted that, in the event the court was troubled by the challenge mounted against the Damages Order, the court should remit the matter to the Tribunal to reconsider the assessment instead of setting aside the Damages Order. The appellants' submission in reply, relying on *BZW* at [67], was that in this case remission would not be appropriate because a reasonable person would not be confident in the ability of the Tribunal to objectively reconsider a decision that it had made arbitrarily.

123 The Judge did not need to consider this point as he held that the challenge against the Damages Order failed. We have come to a different conclusion on the merits of this challenge and therefore must consider if remittal to the Tribunal would be appropriate. Our conclusion is that this is not a proper case for remittal. We have explained at length above why the Tribunal was not entitled to do what it did – its flexible approach resulted in an arbitrary decision that could not have been anticipated by the parties.

124 We agree that resolving the question of whether to remit should, among other considerations, involve applying the objective test of whether a reasonable person would be confident that the Tribunal would be able to reconsider the issue remitted in a fair and balanced manner and would not, even sub-consciously, be influenced toward justifying or re-instituting its previous decision. In this case, we are satisfied that a reasonable person would not have that necessary confidence after having assessed how the impugned decision had been arrived at. Further, the Tribunal having dealt with each head of the reliance loss claim in detail from [435] to [468] of the Award, and having found that there was insufficient evidence on the record to support those heads, it would

be pointless to send the claim back to the Tribunal to repeat an exercise which, logically, should result in the same conclusion of lack of evidence.

Conclusion on Issue 3

125 We will allow the appeal in relation to the Damages Order on the basis that there has been a breach of the fair hearing rule. In the circumstances, there is no need for us to address the appellants' arguments concerning the "no evidence rule" in relation to the Damages Order.

Issue 4: Should the Award (or part thereof) be set aside on the basis that the Tribunal breached its duty to provide sufficient reasons on material issues in the Award?

126 Lastly, the appellants submit that the Award does not contain sufficient reasons for the Tribunal's decision on key issues, and the Award should therefore be set aside under s 24(*b*) of the IAA, Art 34(2)(*a*)(ii) and/or Art 34(2)(*a*)(iv) of the Model Law. These key issues are as follows:

(a) In respect of the Transfer Order, the Award does not inform the parties of whether the Tribunal decided that the Transfer Order was a "legally and factually possible/enforceable remedy", or the basis on which it made that decision.

(b) In respect of the Repayment Order, the Tribunal decided that the diminution in value of the Plant amounted to a proportion of R$270m. The Award, however, does not inform the parties of the precise proportion of R$270m which the Tribunal awarded for the diminution in value of the Plant or the basis upon which it decided that the diminution in value amounted to a proportion of R$270m.

(c) In respect of the Damages Order, the Tribunal did not inform parties of the basis or evidential route by which it decided to award 25% of the losses/expenses incurred by the respondent.

127 Both Art 31(2) of the Model Law and Art 31(2) of the ICC Rules provide that "[t]he award shall state the reasons upon which it is based". Whether a given decision is sufficiently reasoned is a matter of degree and must be considered in the circumstances of each case – even if *no* reasons were given in an arbitral award, this would not invariably cause the award to be set aside for breach of natural justice (*AUF v AUG and other matters* [2016] 1 SLR 859 at [77]–[79]). An allegation of inadequate reasons and explanations is generally not capable of sustaining a challenge against an award (*TMM Division* at [98]).

128 We have already dealt with the Damages Order. As for the Transfer Order and the Repayment Order, we agree with the Judge that, taken as a whole, the Award did provide sufficient reasons to inform the parties of the bases on which the Tribunal had reached its decision on the essential issues. The Tribunal had explained in detail why, in its view, rescission was not barred (see the Award at [351]–[406]), and ordered both the Repayment Order and Transfer Order to effect rescission. As for the appellants' argument concerning the diminution in value of the Plant, the Tribunal took a broad-brush approach to assessing the diminution in value of the Plant, but this was not a result of any breach of the IAA or the Model Law. In fact, as we have noted earlier, this was to the appellants' advantage.

Conclusion on Issue 4

129 In conclusion, we do not accept the appellants' submission that the Award should be set aside on the basis that it does not contain sufficient reasons for the Tribunal's decision.

Conclusion

130 For the reasons already provided, we allow the appeal in respect of the Damages Order and set the Damages Order aside. For the avoidance of doubt, we dismiss the appeal on the other issues and state that the rest of the Award is to stand.

131 The appellants challenged three orders made by the Tribunal and brought up many issues and arguments in support of those challenges. Although there were three issues it was not the case that equal time and effort was given to each issue – the most weighty challenge was in respect of the Transfer Order. The respondent has succeeded in defending this issue and the Repayment Order issue and therefore, on balance, is the successful party in the appeal. Bearing in mind however that it did not wholly succeed, we award the respondent the costs of the appeal (including the costs of SUM 73) in the sum of $55,000 inclusive of disbursements. There will be the usual consequential order for payment out of the security.

Sundaresh Menon
Chief Justice

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

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