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

**[2022] SGHC 126**

Originating Summons No 925 of 2021

Between

COD

… *Applicant*

And

COE

… *Respondent*

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# JUDGMENT

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

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# v
# COE

**[2022] SGHC 126**

General Division of the High Court — Originating Summons No 925 of 2021
Philip Jeyaretnam J
13–14 April 2022

25 May 2022 Judgment reserved.

**Philip Jeyaretnam J:**

## Introduction

1 Arbitration, like any process for dispute resolution, is dynamic. Parties make choices of what to emphasise and what to contest. The arbitrator must make sense of what may be complex submissions that interlock and interact. It is generally not wrong for an arbitrator to seek further submissions from parties when this might help his task to adjudicate fairly and justly. Indeed, doing so might well be considered part of doing justice in the round, rather than, as claimed by the applicant in these proceedings, a breach of agreed procedure and of natural justice.

## Facts

### *The parties*

2 This is an application under s 48 of the Arbitration Act (Cap 10, 2002 Rev Ed) (the "AA") to set aside a final award dated 21 June 2021. The applicant, COD, is a company incorporated in Singapore. It is a shipbuilder. The respondent, COE, is also a company incorporated in Singapore. It makes marine and offshore equipment.[1]

### *Background to the dispute*

3 COE contracted to make and deliver to COD two identical fibre rope cranes (the "Cranes").[2] There was one contract for each crane on the same terms ("the contracts"). Both contained an identical arbitration clause.[3]

4 While COD considered fibre rope cranes to be better than traditional steel wire rope cranes because of higher buoyancy and lighter weight, such cranes were also quite new to the market.[4] The Cranes were intended to be mounted on COD's vessels for use in offshore operations.[5]

5 After the contracted delivery dates for the Cranes had passed, COD terminated each of the contracts on the same ground, namely non-compliance

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1 1st Affidavit of COD's representative dated 10 September 2021 ("1COD1–17COD1") vol 1 at paras 8–9.

2 1COD1 at paras 10–11.

3 1COD1 at para 33.

4 1COD1 at para 11, Respondent's written submissions dated 6 April 2022 ("COE WS") at para 18.

5 1COD1 at para 12.

with contractual specifications and requirements.[6] COD did not take delivery.[7] COE commenced two arbitrations alleging breach of contract on the basis of wrongful refusal to take delivery of the Cranes. COE sought specific performance and payment of the balance contract price of the Cranes, with damages in the alternative. Pending the outcome of the proceedings, COE retained the Cranes, putting them into storage.[8]

6 A single arbitrator was appointed for both arbitrations. As the facts and legal issues overlapped, the arbitrations were consolidated.[9]

7 COE's primary claim for specific performance rested on the point that the Cranes were of a unique nature, given the novelty of using fibre rope instead of steel wire, and that it would be difficult to find an alternative buyer. Consequently, COE contended that damages would not be an adequate remedy.[10] Nonetheless, COE also claimed damages in the alternative to specific performance.

8 The relevant parts of the relief claimed in the notice of arbitration for the first crane dated 6 November 2015 were as follows:[11]

> …
>
> a. The Claimant claims for specific performance of the Contract. The Crane is only one of two Cranes to use fibre rope, and a unique piece of equipment. Because of its uniqueness, it is unlikely that the Claimant will be able to find other Buyers

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6 1COD1 at paras 22 and 26.

7 1COD1 at para 30.

8 1COD1 at paras 30 and 34.

9 1COD1 at para 38.

10 1COD1 at para 41.

11 1COD1 at p 301; COE's solicitors' letter dated 6 November 2015 at para 40.

> for the Crane. Further, the Claimant has no use for the Crane. As a result, an award of damages is unlikely to be an adequate remedy for the Claimant.
>
> …
>
> b. If specific performance is not awarded, in the alternative, the Claimant claims damages for the said breach of Contract, including damages for demobilisation, transportation, temporary storage, insurance for temporary storage, preservation material and labour, and preservation maintenance material and labour.

This language was carried through into the statement of claim for the first crane, which stated:[12]

> j) In the alternative, if specific performance is not awarded, damages for the said breach of Contract, including damages for demobilisation, transportation, temporary storage, insurance for temporary storage, preservation material and labour, and preservation maintenance material and labour.

The relevant parts of the notice of arbitration and statement of claim for the second crane were substantially the same.

9 Thus, damages were pleaded generally, with no measure of damages identified, but with specific items of expenditure primarily related to storage stated to be included.

10 In the witness statement of COE's consultant filed in the arbitration on 6 October 2017 (the "COE witness statement"), it was briefly explained that if specific performance was not granted, the quantum of damages claimed would still match the full price of the Cranes in addition to the other claimed costs such as storage costs. The reason given was that there was no second-hand market for the Cranes and therefore the purchase price would be a fair and reasonable

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12 1COD1 at p 503.

reflection of COE's loss and damage suffered as a result of COD's breach. At best, the Cranes had a certain scrap value (which was insignificant compared to the purchase price), said to be supported by some quotations for scrap steel that COE had obtained in respect of equipment other than the Cranes. These quotations had previously been disclosed and were exhibited to the COE witness statement.[13] I will refer to this paragraph as COE's witness statement quantification.

11 COE's consultant was cross-examined about ten days later, on 17 October 2017. While he was not specifically questioned about that quantification, he was cross-examined by COD's counsel[14] on his evidence a few paragraphs earlier[15] where he deposed that the first crane was unique and "one of a kind, having been made for [COD's] specific use" and that consequently COE "would be unable to find a buyer". COD's counsel asked him whether he had "tried to go out into the market and find a buyer", and COE's consultant responded that he had, explaining:

> Nobody wants to be a guinea pig in terms of soft rope, and the answer also, if you look at [COD's] information provided in the discovery, they have also gone out to many, many service providers in the marine industry, to the oil and gas companies and they also said, you know, "no".

COD's counsel's response was:

> Thank you. I just want to know what you have done at your end, that's all.

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13 3COD1 at pp 1202–1203; Witness statement of COE's consultant ("WS") at paras 275–276.

14 9COD1 at p 5075.

15 2COD1 at pp 1196–1197; WS at para 269.

12 COD's counsel did not follow up further. Nor did COD seek leave to supplement its witness statements when their witnesses came to give evidence some months later, starting on 5 February 2018. At the same time, COE's counsel did not put to any of COD's witnesses COE's witness statement quantification. COE's counsel explained at the oral hearing before me that he did not do so because, in his view, none of COD's witnesses were relevant to the questions of adequacy of damages, available market and scrap value.

13 The parties exchanged closing submissions on 16 September 2019 and reply submissions on 15 November 2019.[16] COE's witness statement quantification was not mentioned in COE's closing submissions as initially filed. However, in a footnote to the penultimate paragraph of its reply submissions, it corrected its closing submissions to include a reference to it.[17]

14 There had not been any bifurcation of the issues. Nonetheless, the arbitrator on 28 April 2020 issued an interim award.[18]

15 The arbitrator decided that while the Cranes did not comply with contractual specifications for weight, this non-compliance was not sufficiently material to justify COD's termination of the contracts. COD's termination was thus wrongful and in breach of the contracts. However, he did not consider specific performance as the appropriate remedy because in his view this would absolve COE from liability to pay damages flowing from the excess weight. He then decided that damages were the just and appropriate remedy, and invited

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16 1COD1 at paras 70 and 74.

17 17COD1 at p 9688.

18 1COD1 at para 81.

further submissions on the quantum of damages. It is worth setting out this part of his award in full (but omitting his footnotes):[19]

> 129. Therefore, I hold that damages to [COE] is the just and appropriate remedy in the circumstances. I am also satisfied that damages will serve as an adequate remedy, and will be sufficient to restore [COE] to the position it would have enjoyed had the Contracts not been wrongfully terminated.
>
> 130. As stated in *RDC Concrete* at [114], even if the innocent party is not entitled to terminate the contract, it will *always* be entitled, subject to any applicable legal conditions or constraints (such as the need to prove substantive damage, as well as the legal rules and principles relating to mitigation, remoteness of damages and limitation), to claim *damages as of right* for loss resulting from the breach (or breaches) of contract. Parties are thus hereby invited to make written submissions on the appropriate quantum of damages to be awarded to [COE] to take into account any plausible impact to the vessel arising from the excess weight of the cranes such as, *inter alia*, fuel consumption rate, cargo carrying capacity or modifications to vessel construction.
>
> [emphasis in original]

16 Following the interim award, there were requests for corrections and the Memorandum of Corrections was issued on 10 June 2020.[20]

17 Initially, COD's counsel had requested in an email dated 27 May 2020 that the filing of submissions on damages be deferred,[21] but when the arbitrator wrote to ask for the deferred date, COD's counsel wrote on 20 July 2020 to state that COD's position was that the arbitrator had no right or power to direct an assessment as there had been no agreement between the parties to bifurcation of the matter and both liability and damages should have been dealt with together.[22]

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19 17COD1 at p 9862; Interim Award dated 28 April 2020 ("IA") at paras 129–130.

20 1COD1 at para 81.

21 17COD1 at pp 9877–9878.

22 17COD1 at pp 9875–9876.

COD expressed its disagreement to any further submissions on damages (and costs). In addition, COD's counsel informed that COD would shortly be filing an application to set aside the interim award. No such application was filed.

18 The arbitrator responded on 21 July 2020 with three points:[23]

(a) Rules 17.6 and 28.1 of the Arbitration Rules of the Singapore International Arbitration Centre (5th Ed, 1 April 2013) ("SIAC Rules") empowered him to request further submissions.

(b) He was only seeking parties' further assistance on the question of damages via submissions and was neither asking for nor allowing additional evidence to be adduced.

(c) Rule 28.3 of the SIAC Rules empowered him to make separate awards on different issues at different times.

19 In addition, he fixed a timeline for submissions on damages and costs and gave notice that if either party did not comply, he would nonetheless proceed on the basis of the evidence and submissions received in accordance with his powers under rules 24.1(m) and 24.1(n) of the SIAC Rules.

20 Following a short extension of time, both COD and COE filed submissions on damages (and costs) on 28 August 2020.[24]

21 On 1 September 2020, COD's counsel wrote to object to COE's "claim for the purchase price less part-payments… less the alleged 'scrap value'" on

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23 17COD1 at p 9874.

24 1COD1 at para 92.

the basis that it was not pleaded.[25] COD asked that any claim for damages or losses not pleaded, or for which no evidence had been led by COE, be disregarded by the arbitrator.

22 With that objection in place, COD proceeded with the hearing for oral submissions which took place on 9 December 2020. A final round of post-hearing submissions followed on 15 February 2021.[26]

23 The arbitrator issued his final award on 21 June 2021 (the "final award"). He dealt with COD's objection in detail.[27] He considered that COE's plea of damages was not limited to the specific items identified, and a claim for the price of the Cranes was not excluded from it. He also referred to and relied on the Court of Appeal decision in *Lee Chee Wei v Tan Hor Peow Victor and others and another appeal* [2007] 3 SLR(R) 537 which was cited to him by COE. In that case, the plaintiff unsuccessfully sought specific performance, but had asked in submissions that if specific performance were not granted damages should be assessed. However, his plea omitted the words "to be assessed" and he had not put in evidence of damages during trial. The trial judge awarded only nominal damages. The Court of Appeal allowed the appeal and ordered an assessment of damages in lieu of specific performance.

24 In response to COD's objection that the arbitration had proceeded on the basis of one evidential hearing, the arbitrator noted that evidence of the damages sought had been adduced during that evidential hearing, and referred to COE's

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25 17COD1 at p 9941.

26 1COD1 at paras 110 and 112.

27 1COD1 at pp 94–100; Final Award dated 21 June 2021 ("FA") at paras 46–65.

witness statement quantification and the documents exhibited in support. The arbitrator concluded:[28]

> 63. I find that [COE] did in fact adduce evidence going to the scrap value of the Cranes. [COD] was free to adduce evidence to the contrary, or to test the veracity of the evidence adduced by [COE] during the substantive hearing. That the parties did not agree to a bifurcation of proceedings is another reason why [COD] should have ensured that it was able to meet both [COE's] primary and alternative case.
>
> 64. [COD] did not do so despite having ample opportunity.
> …

25 The arbitrator ultimately awarded damages to COD based on the purchase price of the Cranes together with variation orders that increased the price, less the scrap value as set out in COE's witness statement quantification.[29] The arbitrator rejected COE's attempt to reduce the scrap value, disallowing any further evidence on this point.[30] The arbitrator also ultimately rejected any deduction for loss in cargo carrying capacity and increase in fuel consumption due to excess weight,[31] which had been the issue on which he had indicated he wanted further submissions in [130] of his interim award reproduced at [15] above.

### *Procedural history*

26 On 10 September 2021, COD filed its application to set aside the whole of the final award. I would summarise the grounds set out in the supporting affidavit as follows:

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28 1COD1 at pp 99–100; FA at paras 62–64.

29 1COD1 at p 108; FA at para 84 and 1COD1 at p 125; FA at para 130.

30 1COD1 at p 114; FA at para 103.

31 1COD1 at p 129; FA at para 142.

(a) Sections 48(1)(*a*)(iii) and 48(1)(*a*)(vii) of the AA: COD had been unable to present its case and/or there was a breach of natural justice in connection with the making of the award because in relation to the question of damages in lieu of specific performance, the measure of damages adopted by the arbitrator had not been pleaded or otherwise properly introduced into the proceedings and/or COD was not given the opportunity to put in evidence in relation to it.

(b) Section 48(1)(*a*)(v) of the AA: The arbitrator had proceeded contrary to the arbitral procedure agreed by parties, namely to have only one tranche of hearing without bifurcation of liability and quantum.

27 The assistant registrar (the "AR") gave directions on 30 September 2021 extending time for COE to file its reply affidavit and giving leave for a further round of affidavits thereafter, first from COD and then finally from COE. Directions were also given by consent for confidentiality and redaction in the proceedings.

28 On 13 January 2022, the AR rejected COD's request to file a third affidavit which would reply to COE's second reply affidavit. On 12 March 2022, COD applied by SUM 991 of 2022 for leave to file that third affidavit, and this application was heard at the start of the hearing of the setting aside application. COD sought to adduce evidence in rebuttal of certain points made in COE's second reply affidavit, relating in particular to whether any breach of natural justice had prejudiced COD. However, COD decided to withdraw its application.

## The parties' cases

### *COD's submissions*

29 COD in its written submissions contends that there were two breaches of natural justice. The first is that the arbitrator allowed COE to advance its claim for damages in lieu of specific performance based on the formula of balance contract price less scrap value without giving COD a fair and reasonable opportunity to respond. The second is that the arbitrator failed to consider COD's arguments disputing COE's contention that there was no available market for the Cranes.

30 COD also contends that the final award should be set aside under s 48(1)(*a*)(v) of the AA on the ground that the arbitrator proceeded contrary to the arbitral procedure agreed by the parties, that is to have only one tranche of hearing without bifurcation into liability and quantum phases.

31 At the heart of COD's submissions is the proposition that COE first introduced its alternative claim for damages based on the formula of balance contract price less scrap value only after the interim award was issued, when it filed its written submissions on damages and costs on 28 August 2020.[32] COD contends that the arbitrator should not have permitted the claim to be introduced at that stage, or that he ought to have at least given COD the opportunity to put in evidence to respond to that claim.

32 This submission depends on establishing first that the claim for damages in lieu of specific performance in the notices of arbitration and statements of claim did not fairly warn COD of the intended measure of damages and

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[32] Applicant's written submissions dated 7 April 2022 ("COD WS") at para 74.

secondly that COE's witness statement quantification did not put that measure of damages into play. Otherwise, the evidentiary hearing would have been COD's opportunity to address it. COD responds to the fact of COE's witness statement quantification, which specifically set out this intended measure of damages prior to the evidentiary hearing, in the following ways. COD argues that COE's witness statement quantification was either itself insufficiently detailed, was buried beneath other material or could be safely ignored in the light of what was not pleaded. COD accordingly relies on several authorities on court pleadings in the context of damages, among them the following:

(a) The English case of *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd* [1951] 1 All ER 873 ("*Anglo-Cyprian*"), where Devlin J in deciding who had substantially succeeded in the case before him for the purpose of his considering and awarding costs, opined that where buyers claim goods sold to them are valueless by reason of some defect but wish to fall back to a claim that the goods sold are not entirely valueless they must plead that in the alternative with a method of calculation. He rejected, at 875D, the "impression that, when pleading special damage, one can plead a certain figure, arrived at in some way, and one can then set up any lower figure in court and seek to justify it".[33]

(b) The English Court of Appeal case of *Perestrello e Companhia Limitada v United Paint Co Ltd* [1969] 1 WLR 570 ("*Perestrello*"), where it was held that even for general damages "a mere statement that the plaintiff claims 'damages' is not sufficient to let in evidence of a

[33] COD WS at para 113(c).

particular kind of loss which is not a necessary consequence of the wrongful act and of which the defendant is entitled to fair warning".[34]

(c) The decision in *The "Shravan"* [1999] 2 SLR(R) 713 ("*The Shravan*"), where Chao J (as he then was) opined at [78] that the plaintiff should have pleaded the alternative method of calculating loss of revenue, but nonetheless held that it was sufficient that this point had been set out in the opening statement whereupon leave was given to the defendant to adduce additional evidence.

33 On the premise that the formula of balance contract price less scrap value was first introduced only after the interim award, COD relies on the Court of Appeal decision in *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN*") at [75]–[80]. There, the claim for damages was mounted on the basis of loss of profits until, on the last day of the evidentiary hearing, the tribunal raised the possibility of the claim being made instead on the basis of the loss of a chance or an opportunity to earn profits. The tribunal then awarded damages on this new basis without ever giving the opportunity for submissions to be made, let alone further evidence to be adduced, on this point. The Court of Appeal noted at [79] that, in that case, unlike the facts in its earlier decision in *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 where there was ample notice of the new point, the tribunal did not seek, nor was furnished with, submissions (or expert evidence) on damages for loss of chance to earn profits.

34 As for its contention that the agreed arbitral procedure was not followed when the arbitrator bifurcated the proceedings into liability and quantum phases,

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[34] COD WS at para 113(b).

COD cites the Court of Appeal decision in *Phoenixfin Pte Ltd and others v Convexity Ltd* [2022] SGCA 17, which at [72] approved the position in relation to international arbitration stated in *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd and another matter* [2018] 4 SLR 271 at [63], namely that the party seeking to set aside an arbitral award on this ground must show: (a) there was an agreement between the parties on a particular arbitral procedure; (b) the tribunal failed to adhere to that agreed procedure; and (c) the failure was causally related to the tribunal's decision in the sense that the decision could reasonably have been different if the tribunal had adhered to the parties' agreement on procedure; and (d) the party mounting the challenge is not barred from relying on this ground by virtue of its failure to raise an objection during the proceedings before the tribunal.[35] I accept that these legal principles while developed in the context of the International Arbitration Act 1994 have general application in the context of the AA. On the basis of these principles, COD contends that bifurcation was never agreed and that the Tribunal unilaterally bifurcated the proceedings to COD's prejudice.

***COE's submissions***

35 COE contends that there was never any new claim. Its claim for damages in lieu of specific performance was pleaded in general terms and the specific measure of damages was set out in COE's witness statement quantification. This gave COD sufficient notice of its intended measure of damages should specific performance not be granted. Further, COD never requested leave to adduce further evidence even though COE had stated in its post-hearing submissions

[35] COD WS at para 228.

that it had no objection to COD submitting evidence "if it is contesting the value of the Cranes".[36]

36 COE locates the source of COD's complaints in its tactical decision to run an all or nothing case, *ie*, that it was entitled to terminate the contracts for non-compliance with specifications, and thus COE was not entitled to any remedy, whether specific performance or damages.[37] As for the claim that the Tribunal unilaterally bifurcated proceedings, COE says the Tribunal did no such thing.

**Issues to be determined**

37 While more time was spent on arguing the natural justice challenge than the agreed arbitral procedure challenge, I will deal with the latter first. Accordingly, I frame the issues for determination as follows:

(a) Did the arbitrator proceed contrary to the arbitral procedure agreed by the parties, that is to have only one tranche of hearing without bifurcation into liability and quantum phases?

(b) Was COE's claim for damages in lieu of specific performance based on the formula of balance contract price less scrap value introduced only after the interim award?

(c) Did the arbitrator, in breach of natural justice, allow COE to advance that claim without giving COD a fair and reasonable opportunity to respond?

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36 17COD1 at pp 10482–10483; COE's further submissions on damages and costs dated 15 February 2021 at para 136.

37 COE WS at para 5.

(d) Did the arbitrator, in breach of natural justice, fail to consider COD's arguments disputing COE's contention that there was no available market for the Cranes?

**Issue 1: Did the arbitrator proceed contrary to the arbitral procedure agreed by the parties, that is to have only one tranche of hearing without bifurcation into liability and quantum phases?**

38 COD's contention is essentially that the arbitrator unilaterally bifurcated the arbitration into liability and quantum phases when the parties had proceeded on the basis of a single hearing. This contention fails for one simple reason. The arbitrator did not bifurcate the hearing. There was only one evidentiary hearing and the arbitrator did not ask for or allow any *evidence* to be adduced after that hearing. All that the arbitrator did was to seek further *submissions* on the question of damages, having determined that he would not grant specific performance.

39 So long as an arbitrator behaves in an even-handed fashion, there is generally no bar to an arbitrator asking for further submissions in the course of arbitration proceedings, including after post-hearing written or oral submissions and while deliberating prior to an award. In principle, an arbitrator is also entitled to determine those issues on which he has reached a decision in an interim award and invite further submissions on other points for a further award. This happens most often in relation to incidental matters like ancillary orders, interest and costs, but the principle is the same even for issues that fall within the core merits of a claim.

40 I would go further. Parties had agreed to an arbitral procedure where even after proceedings are declared closed (and they were not in this case until after the interim award) the tribunal is empowered on its own motion to reopen

proceedings. This power extended even to further evidence and not just submissions as was sought in this case. As the arbitrator himself noted[38] the applicable SIAC Rules chosen by parties provided by Rule 28.1:

> The Tribunal shall, after consulting with the parties, declare the proceedings closed if it is satisfied that the parties have no further relevant and material evidence to produce or submission to make. The Tribunal may, on its own motion or upon application of a party but before any award is made, reopen the proceedings.

41 It is not the case that arbitrators must be mere automatons, motionless unless activated by either party. That dissatisfaction with the outcome of an arbitration can only be expressed in terms of procedural complaints such as breach of natural justice or departure from agreed procedure must not be allowed to deprive arbitrators of their procedural discretion and control of proceedings. Arbitrators seek to do justice between the parties, and the objective of doing justice in a case is served both by procedure and the substantive law.

42 As for the power to make separate awards on different issues at different times, the arbitrator also rightly noted that the appliable SIAC Rules chosen by parties provided for this by Rule 28.3 (see [18(c)] above).[39]

43 In fact, as I read the paragraphs of the interim award set out at [15] above, the arbitrator's reason for inviting further submissions was for COD's benefit. COE had provided evidence of the balance contract price and of the scrap value and there was not much by way of submission required concerning that simple formula. COD had not contested this evidence in cross-examination of COE's witnesses, in its own witness statements or in written submissions.

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38 17COD1 at p 9948.

39 17COD1 at p 9948.

What the arbitrator wanted to hear more on was whether to deduct anything for the excess weight issue that was the subject of a counterclaim by COD. This is what he said explicitly:

> … Parties are thus hereby invited to make written submissions on the appropriate quantum of damages to be awarded to [COE] to take into account any plausible impact to the vessel arising from the excess weight of the cranes such as, *inter alia*, fuel consumption rate, cargo carrying capacity or modifications to vessel construction.

44 Thus, the arbitrator was not giving COE an opportunity to have a second bite of the cherry or otherwise to remedy any deficiency in its case on damages by adducing further evidence, as COD contends. Rather, he was in fact offering COD the opportunity to put forward a case that there should be a deduction for the excess weight of the Cranes when assessing damages and to explain how much such deduction should be. He chose to give COD this opportunity instead of assuming that no such deduction should be made given that COD had not raised this point prior to the interim award.

45 Ultimately, having given COD this further opportunity, the arbitrator did not make any such deduction. But it lies ill in the mouth of COD to complain about the arbitrator's having given it this opportunity.

46 In any case, COD's principal concern with the arbitrator's decision to issue an interim award is that it gave COE the opportunity to advance a new claim for damages. As will be seen in the next section, I find that this is not correct. Before I turn to that, I would observe that COD's criticisms could be said to be directed to the interim award when instead of proceeding to a decision on all issues the arbitrator invited further submissions on the question of damages in lieu of specific performance. No challenge to the interim award was ever filed, and parties are bound by it.

**Issue 2: Was COE's claim for damages in lieu of specific performance based on the formula of balance contract price less scrap value introduced only after the interim award?**

47 For the following reasons, I do not find that the claim for damages in lieu of specific performance based on the formula of balance contract price less scrap value was first introduced on 28 August 2020 in COE's submissions on costs and damages after the interim award. It was introduced before the evidentiary hearing.

48 First, the formula is perfectly clear in COE's witness statement quantification. During the hearing before me, COD's counsel vacillated between saying that counsel in the arbitration did not read it properly (for example, because it was "buried"[40]) and asserting that counsel in the arbitration was entitled to disregard it because the formula was not set out in the notices of arbitration or statements of claim. Neither of these points have merit.

49 I do not consider that the formula was buried. It is not surprising that COE's effort was mainly focused on its effort to obtain specific performance and that this took up the bulk of its evidence. But a claim for damages in lieu of specific performance had been pleaded, and it would only be reasonable for COD's counsel to read COE's witness statements in full and address those parts, however relatively short they might be, that concerned COE's alternative claim in damages. What matters is that COE's witness statement quantification was unambiguous. It would have been clear to anyone who had read COE's witness statement quantification that COE was relying on the formula of balance contract price less scrap value.

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40 1COD1 at para 60.

50 Nor do I consider that COD's counsel was entitled to disregard COE's witness statement quantification just because the formula had not been spelled out in the notices of arbitration or the statements of claim. Such a position could only begin to be justified if parties had adopted formal pleading rules that required the measure of damages for general damages claims to be spelled out in the pleadings. COD relies on Rule 17.2(c) of the SIAC Rules, which requires parties to set out in "full detail" the "relief claimed together with the amount of all quantifiable claims" in the statement of claim. However, this simply reflects the usual position that special damages must be specifically pleaded.

51 Moreover, even in court proceedings, it may happen that new or more detailed or alternative methods for calculating damages may be introduced otherwise than by formal amendment of pleadings, and the question is whether the other party had sufficient notice and opportunity to deal with it. In *The Shravan*, the plaintiff's claim for loss of revenue was pleaded, but the method of calculating this loss on which the plaintiff ultimately relied was not. However, the plaintiff did state that it would seek damages calculated using the alternative method in its opening statement. Leave was granted to the defendants to adduce evidence in response to this alternative method, but the defendants chose not to do so. At [79], Chao J (as he then was) held that "there [could have been] no doubt that the defendants had more than ample time to prepare their case on the alternative basis of computing loss of revenue" and that "[i]f it were necessary that this alternative basis for determining loss should be explicitly pleaded and if the loss had been proven, [he] would grant the necessary leave to amend." Similarly, while COE may not have specifically pleaded its method for calculating damages for non-acceptance of the Cranes, it was sufficiently set out prior to the commencement of the evidentiary hearing in COE's witness statement. As noted at [35] above, no leave was sought by

COD to adduce evidence to respond to COE's witness statement quantification. That, however, does not change the fact that they had ample time to prepare their case in response to COE's witness statement quantification. Thus, the absence of the formula of contract price less scrap value from the notices of arbitration or statements of claim did not entitle COD to ignore COE's witness statement quantification.

52 Second, I would in fact agree with the arbitrator that even from the plea in the statements of claim on their own, COD "would have been aware of the need to address the various issues relating to a claim for damages".[41] The statements of claim refer to "damages for the said breach of Contract, including…" (see [8] above). This is clearly a claim for general damages, not limited to the specific items listed in that paragraph. The obvious way of compensating for the loss that flows naturally and reasonably from a buyer's refusal to accept goods is to use the formula of contract price less value of those goods. As for how that value was to be determined, COE's contention that the Cranes were unique, that it had no use for them and that it would be difficult to find an alternative buyer was already part of its pleaded case for specific performance. Logically, if equipment has no resale value, then one falls back to scrap value. This approach, which I consider should have been obvious to experienced counsel in the context of a case involving allegedly unique goods, was in any event expressed clearly in COE's witness statement quantification. Thus, this is a case where the factual basis or building blocks for the decision including the uniqueness of the Cranes and the difficulty of finding an alternative buyer were fully in play throughout the proceedings.

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41 1COD1 at p 98; FA at para 57.

53 COD submits that it is not necessarily the case that if there is no market for goods, their value is their scrap value. They rely on a number of authorities for this proposition.[42] Thus, COE's submission that there was no market for the Cranes in the context of seeking specific performance was not sufficient to give COD fair notice that their case was that the value of the Cranes was scrap value. However, while this proposition of law may be true, it is beside the point. First, whether COE adduced sufficient evidence (as opposed to any evidence at all) to justify the arbitrator's finding that the value of the Cranes was scrap value is irrelevant. That goes to the merits of the final award. Second, even if it was not clear from the statements of claim how COE proposed to value the Cranes, it was clear that the value of the Cranes was a live issue. As I have said at [52] above, the obvious and natural loss flowing from non-acceptance of goods is the contract price minus the value of the goods. It is not the case that COD adduced evidence or made submissions addressed to a different valuation of the Cranes because it misapprehended COE's case in the statements of claim. COD simply chose not to address the issue of valuation.

54 Further, once COE's witness statement quantification was filed, COD had ample opportunity to consider whether it wanted to challenge the assertion that COE was not able to find buyers for the Cranes or to contend for a higher scrap value. COD did not seek leave to supplement its witness statements whether orally or in writing, nor did COD seek to put in any further evidence.

55 The other two authorities that COD relies on concerning pleadings do not assist its case, even if one were to import formal pleading rules into arbitration. In *Anglo-Cyprian*, the plaintiffs' original statement of claim set out in effect that the goods were of no value at all and that the plaintiffs were entitled

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42 COD WS at paras 117–118.

to recover the whole of their purchase price on the basis that they were valueless (at 875). Devlin J held that this pleading did not encompass the claim that the plaintiffs eventually succeeded on, which was that the goods were commercially sound except for a defect that could easily have been removed, which entitled them to receive the cost of removing the defect as damages. Thus, the amendment to the statement of claim that he had granted earlier in the proceedings had been a necessary amendment. The issues with which the court was concerned are plainly different from the present case. COE did not set out in its statements of claim a valuation for the Cranes which was different from that which it ultimately relied on. Rather, they did not specify any valuation for the Cranes in the statements of claim, but did so in COE's witness statement quantification.

56 The remarks from *Perestrello* which COD relies on were made in the context of a claim for loss of profits being advanced when the only pleaded relief was compensation for wasted expenditure. The court held that a general claim for "damages" in the statement of claim would not allow the plaintiff to advance a claim for loss of profits for two reasons. First, loss of profits was not a necessary consequence of the defendant's wrongful act. Second, the claim for loss of profits was inconsistent with the pleaded claim for wasted expenditure. Neither reason applies to this case. Here, loss amounting to contract price minus the value of goods is a necessary, and certainly obvious, consequence of non-acceptance of goods (see [52] above). Also, a claim for such damages is not inconsistent with COE's specific performance claim because it was sought in the alternative.

57 I find that COD did indeed adopt the litigation strategy of focusing on its substantive defence of non-compliance with specifications as justifying its termination of the contracts. Success in that strategy would have meant that

COE's claims both primary and alternative would have been dismissed. This meant that COD decided not to focus very much on the quantum of damages COE should obtain if COD failed to justify its termination and COE failed to obtain specific performance. COD may have been surprised that it lost on the question of termination, but that does not mean that it should have been surprised that, if it did lose, the arbitrator would turn to the question of damages for COE based on COE's witness statement quantification.

**Issue 3: Did the arbitrator, in breach of natural justice, allow COE to advance this claim without giving COD a fair and reasonable opportunity to respond?**

58 Because of my finding at [47] above, this issue is readily answered in the negative. Given that COE's claimed measure of damages as balance contract price less scrap value was introduced prior to the evidentiary hearing, there can be no question that COD was given a fair and reasonable opportunity to respond to it.

59 For this reason, the authorities that COD cites which involve claims introduced on the final day of the arbitral hearing (see *AKN* at [69]) or in written closing submissions (see *CAJ and another v CAI and another appeal* [2022] 1 SLR 505 at [8]) are of no assistance to it.

**Issue 4: Did the arbitrator, in breach of natural justice, fail to consider COD's arguments disputing COE's contention that there was no available market for the Cranes?**

60 COD also contends that the arbitrator failed to consider its arguments concerning the availability of a market for the Cranes. COD's arguments were essentially that if the Cranes had complied with the specifications, then they

would have found a ready market, either being delivered to COD or to a third party who would have taken advantage of the new technology.[43]

61 COD contends that the arbitrator was wrong to believe, as expressed in the final award, that COD did not dispute that there was no market for the Cranes, nor dispute that the fibre rope cranes were the first of their kind and developed specifically for COD. The relevant portion of the final award states:[44]

> 36. I note that the Claimant's argument that there was "no market" for the Cranes is not new, and the Claimant already made this point previously without referring to these new documents. Further, this argument did not appear to be disputed by the Respondent either. It is not disputed that the AHC fibre rope Cranes were the first of its kind, and developed specifically for the Respondent. …

62 The short answer is that the arbitrator was not mistaken. The question of whether there was no available market for the Cranes was something COE put in issue in relation to its primary claim for specific performance. If it was disputed by COD, its contentions to the contrary should have been canvassed in its submissions made prior to the interim award. It was not.

63 COD submits that the arbitrator's mistaken assumption that it was "undisputed" that there was no market for the Cranes relieved COE from its burden to establish this fact on the balance of probabilities.[45] I do not see this to be the case. It is hardly the inescapable inference from the paragraph of the final award cited above that the arbitrator dispensed with the need for COE to prove its case because he assumed that COD accepted COE's case. My reading of his final award, taken as a whole, is that he concluded from the evidence before

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43 COD's WS at para 197.

44 1COD1 at p 91; FA at para 36.

45 COD WS at para 204.

him, which was the uncontroverted evidence of COE's consultant, that COE had proven there was no available market for the Cranes on a balance of probabilities. COD may not agree with this conclusion, but it was a conclusion that the arbitrator was entitled to reach.

64 Indeed, I come back to the point that the arbitrator had in the interim award invited submissions focused on the question of whether there should be a deduction made for excess weight from any damages to be awarded. A fair reading of the interim award reveals that he was with COE on the point that the Cranes were unique and of no use to COE and that there were no other buyers, but declined to grant specific performance only because of COE's non-compliance with specifications.

**Conclusion**

65 I end with five observations:

(a) Awards are not meant to be read microscopically, but generously, as advised by the Court of Appeal in *Soh Beng Tee & Co Pte Ltd v Fairmont Development Pte Ltd* [2007] 3 SLR(R) 86 at [65(f)] ("*Soh Beng Tee*"). In my view, this entails reading the award as a whole, seeking to make coherent sense of it. Some of COD's submissions have not reflected the arbitrator's actual reasoning as expressed in the interim and final awards.

(b) Moreover, while "an arbitrator [is not] under any general obligation to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he finally commits himself" (*Soh Beng Tee*, at [55(h)]), he is generally entitled to invite further submissions from counsel, as he did here, before

making a final decision on an issue, and while so doing may decide other issues while reserving his decision concerning that issue for a further award.

(c) As emphasised by the Court of Appeal in *AKN* at [39], the court must "resist the temptation to engage with what is substantially an appeal on the legal merits of an arbitral award, but which, through the ingenuity of counsel, may be disguised and presented as a challenge to process failures during the arbitration".

(d) Formal court pleading rules are not necessarily applicable to arbitrations, even ones under the AA, except to the extent that parties expressly or impliedly adopt them by virtue of their agreement on arbitral procedure. The question for the court is ultimately one of fact: did the party challenging the award for breach of natural justice have sufficient notice of the case it had to meet?

(e) Ultimately, the cause of doing justice depends on the adjudicator having the flexibility to adapt procedure to the needs of the case, while bearing in mind the requirements of natural justice. It would be both ironic and wrong if arbitration, intended originally to have the advantages of relative informality and flexibility, were to become a minefield of procedural obstacles, necessitating arbitrators to armour up and adopt formulaic defensive practices at the expense of doing justice reasonably and efficiently.

66 I dismiss COD's application to set aside in its entirety. I will hear parties on costs.

Philip Jeyaretnam
Judge of the High Court

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