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

[2024] SGHC 211

Originating Application No 1280 of 2023

Between

Swire Shipping Pte Ltd

… *Applicant*

And

Ace Exim Pte Ltd

… *Respondent*

GROUNDS OF DECISION

[Arbitration — Award — Recourse against award — Setting aside — Arbitral tribunal making finding on unpleaded issue in the course of disposing of pleaded issue — Whether arbitral tribunal acted in excess of jurisdiction by making finding on unpleaded issue — Article 34(2)(*a*)(iii) UNCITRAL Model Law on International Commercial Arbitration]
[Arbitration — Award — Recourse against award — Setting aside — Arbitral tribunal making finding on unpleaded issue in the course of disposing of pleaded issue — Whether arbitral tribunal's finding made in breach of natural justice — Section 24(*b*) International Arbitration Act 1994 (2020 Rev Ed)]
[Arbitration — Award — Recourse against award — Setting aside — Party alleging arbitral tribunal's finding on evidence "manifestly incoherent" — When award may be set aside on basis that arbitral tribunal's finding is "manifestly incoherent" — Section 24(*b*) International Arbitration Act 1994 (2020 Rev Ed)]

TABLE OF CONTENTS

Swire Shipping Pte Ltd
v
Ace Exim Pte Ltd

[2024] SGHC 211

General Division of the High Court — Originating Application No 1280 of 2023
S Mohan J
19 March, 10 May 2024

16 August 2024

S Mohan J:

Introduction

1 There has, in recent times, been a proliferation of challenges against arbitral awards on the basis that the award is tainted by some fatal jurisdictional or procedural defect. However, it is well-known that many of these challenges tend to be nothing more than disguised attacks on the merits of the arbitral tribunal's findings. The cardinal principle of minimal curial intervention that guides the interaction between the courts and arbitral tribunals proscribes the courts from entertaining such sophistry (see the Court of Appeal decision of *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN v ALC*") at [37]–[39]).

2 Take, for example, an *infra petita* challenge – *ie*, that the tribunal has failed to consider a material issue within the scope of the parties' submission to

its jurisdiction. The vice that this challenge is properly targeted at is the tribunal's failure to apply its mind to the issue, such that inasmuch as that issue is concerned, the parties have been deprived of their right to be heard. However, in practice, the courts have often seen the *infra petita* ground recharacterised into arguments that the tribunal failed to consider a material issue *favourably to the challenger*, or that the tribunal did not think about the issue *enough*, as had it done so, it would have come around to the challenger's position. So too is the similar charge that the tribunal failed to give a disgruntled party a proper opportunity to make its case thereby breaching the rules of natural justice; arguments on breach of natural justice are often intertwined with an *infra petita* objection or arguments that the tribunal completely failed to understand or address its mind to the challenger's case. In reality, the true source of the disgruntlement is less a deprivation of the challenger's right to be heard than it is a perceived apparent right to have the challenger's position heard *and accepted*.

3 Likewise is the common refrain that the tribunal made a finding *ultra petita*, *ie*, that it had acted in excess of jurisdiction or outside the scope of the parties' submission. This ground of challenge is a natural incident of party autonomy, which sees the tribunal's jurisdiction defined and circumscribed by the scope of the parties' consent. Axiomatically, if a tribunal does something which the parties did not clothe it with authority to do, no party should be bound by it. But, in practice, *ultra petita* is interpreted with ingenuity such that the argument put before the court is really that the tribunal did not have jurisdiction to make a finding *adverse to the disgruntled party*. Again, much like the proverbial wolf in sheep's clothing, such objections are, once exposed, nothing more than a substantive appeal against the merits dressed up as a jurisdictional objection and/or due process violation.

4 The point of the matter is that minimal curial intervention has to cut both ways; there is no cakeism when parties (particularly commercial ones) have made a considered and informed choice in their contracts to limit the role of the courts when it comes to resolving their disputes. When parties subscribe to have their disputes resolved by arbitration, they are deemed to accept "the attendant risks of having only a very limited right of recourse to the courts" (see the Court of Appeal decisions of *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [65(c)] and *BLC and others v BLB and another* [2014] 4 SLR 79 ("*BLC v BLB*") at [51]). This acceptance is unconditional: a duly rendered arbitral award would bind the parties on a good day – where they like the outcome – as much as a bad day – where they do not.

5 These principles relating to minimal curial intervention were again brought into focus in the present application brought by the applicant, Swire Shipping Pte Ltd ("Swire"), to set aside a final award dated 23 September 2023 (the "Final Award") issued by a sole arbitrator (the "Arbitrator"), in an arbitration (the "Arbitration") administered by the Singapore Chamber of Maritime Arbitration ("SCMA").

6 Having considered the parties' submissions, I was satisfied that there was no merit in the grounds raised by Swire for setting aside the Final Award. I accordingly dismissed Swire's application on 10 May 2024, providing oral grounds for my decision. While there has been no appeal against my decision, I consider it useful in this case to release written grounds of decision containing a fuller exposition of my reasons, and to make some observations on the Final Award.

Background facts

The parties

7 The applicant, Swire, is a Singapore incorporated company carrying on business as, among other things, a shipowner. The respondent, Ace Exim Pte Ltd ("Ace Exim"), is also a Singapore incorporated company in the business of purchasing vessels for recycling.[1]

Circumstances giving rise to the parties' dispute

8 Pursuant to a BIMCO RECYCLEON contract dated 24 February 2020 (the "MOA"), Swire agreed to sell, and Ace Exim agreed to purchase, the vessel MV Melanesian Pride (the "Vessel") for scrap, for a purchase price of US$2,152,585.50. Ace Exim paid a 30% deposit of the purchase price – amounting to US$645,775.00 – pursuant to Box 14 read with cll 4 and 5 of the MOA. The balance of the purchase price was to be paid by Ace Exim no later than two banking days after tender of a notice of readiness ("NOR") by Swire under cl 5 of the MOA.[2]

9 The place of delivery of the Vessel was central to the parties' dispute. Under the MOA, a cascading system was put in place for determining the place of delivery:[3]

> (a) In the first instance, under cl 9(a) of the MOA, the Vessel was to be delivered at the "Place of Delivery". The Place of Delivery, pursuant

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1 Agreed Core Bundle of Documents Vol 1 ("1ACB") dated 12 March 2024 at p 13: 1st Affidavit of Cherilyn Wong Li Chuen dated 21 December 2023 ("CWLC-1") at paras 14–15.

2 1ACB at p 13: CWLC-1 at paras 16–17.

3 1ACB at p 532: Appendix 4 of the Final Award.

to Box 16, was stipulated to be "1 safe anchorage at the Port of Alang, West Coast of India".[4] Alang is of course well-known in the shipping industry as one of the leading locations in the world to which merchant vessels are sent to be broken up and recycled.

(b) In the event that the Place of Delivery in Box 16 was inaccessible, cl 9(b) of the MOA provided that the Place of Delivery would either be:

(i) "as near [to the Place of Delivery] as [the Vessel] may safely get at a safe and accessible berth or at a safe anchorage which shall be designated by [Ace Exim]"; or

(ii) failing Ace Exim's nomination of an alternative place, "the place at which it is customary for vessels to wait" (the "Customary Waiting Place").

10 From 11 March 2020 onwards, the Government of the Republic of India put in place measures to combat the spread of the COVID-19 pandemic. This included the suspension of existing visas and the issuance of visas to foreign nationals, thus rendering it impossible for foreign nationals to enter India.[5]

11 On 23 March 2020, Swire informed Ace Exim that the port of Alang was inaccessible due to the COVID-19 measures imposed by the Indian Government, and requested Ace Exim to designate an alternative place for delivery within 24 hours, in accordance with cl 9(b) of the MOA.[6]

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4 1ACB at p 527: Appendix 4 of the Final Award.

5 1ACB at p 14: CWLC-1 at para 18; Respondent's Written Submissions dated 13 March 2024 ("RWS") at para 9.

6 1ACB at p 14: CWLC-1 at paras 18–19.

12 However, on 24 March 2020, Ace Exim provided its response, in which it did not designate any alternative place for delivery. As a result, Swire ordered the Vessel to proceed in the direction of Alang. On 24 March 2020, the Vessel arrived at the mouth of the Gulf of Khambhat and Swire tendered its NOR.[7] Under cl 8 of the MOA, upon receipt of the NOR, Ace Exim was to take over the Vessel.[8]

13 On 25 March 2020, Ace Exim rejected the NOR on the basis that the Vessel was not at the Place of Delivery. Specifically, Ace Exim took the position, *inter alia*, that:

(a) the Vessel was not at the place of delivery as defined by Box 16 and cl 9(a) of the MOA,[9] *ie*, at "1 safe anchorage at the Port of Alang, West Coast of India";[10]

(b) the Vessel was on the high seas and not at the Customary Waiting Place in accordance with cl 9(b) of the MOA;[11] and

(c) the MOA was "null and void" under cl 19 of the MOA[12] as the COVID-19 measures instituted by the Indian Government had rendered delivery of the Vessel impossible.[13]

14 In consequence of the above, a dispute arose between the parties as to whether the NOR had been validly tendered in accordance with the terms of the

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7 1ACB at p 14: CWLC-1 at para 20.

8 1ACB at p 532: Appendix 4 of the Final Award.

9 1ACB at p 591: Statement of Case dated 11 January 2021 ("SOC") at para 14(a).

10 1ACB at p 527: Appendix 4 of the Final Award.

11 1ACB at p 591: SOC at para 14(b).

12 1ACB at p 536: Appendix 4 of the Final Award.

13 1ACB at p 591: SOC at para 14(d).

MOA, such that Ace Exim was bound to take delivery of the Vessel and complete the purchase. Ace Exim commenced the Arbitration seeking to recover the deposit it had paid, whereas Swire counterclaimed for the balance of the purchase price payable to it.[14]

The Arbitration

15 The Arbitration was seated in Singapore and conducted under the Rules of the Singapore Chamber of Maritime Arbitration (3rd Ed, 2015).[15] The substantive dispute was governed by English law as the governing law of the MOA.[16] On 10 December 2020, the SCMA appointed the Arbitrator as sole arbitrator to preside over the Arbitration.[17]

16 The central issue to be determined by the Arbitrator in the Arbitration was whether Swire had validly tendered a NOR in accordance with the terms of the MOA.[18] This required the Arbitrator to determine the following sub-issues, which were germane to the present setting aside application:[19]

(a) what were the places of delivery prescribed under the MOA;

(b) whether, at the time the NOR was tendered, the Vessel was at a place entitling Swire to tender the Vessel for delivery under the terms of the MOA;

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14 Applicant's Written Submissions dated 13 March 2024 ("AWS") at para 8.5.

15 1ACB at pp 102–103: Final Award at paras 15–17.

16 1ACB at p 102: Final Award at para 13.

17 1ACB at pp 99–100: Final Award at para 4.

18 1ACB at p 16: CWLC-1 at para 26.

19 AWS at para 8.6.

(c) whether the location of the Vessel at the time that Swire tendered the NOR – *viz*, five nautical miles South of Jafarabad (the "Jafarabad Waiting Place") – was the Customary Waiting Place, within the scope of cl 9(b) of the MOA; and

(d) whether the Arbitrator was bound to follow the English High Court decision of *NKD Maritime Ltd v Bart Maritime (No 2) Inc (The Shagang Giant)* [2022] EWHC 1615 (Comm) ("*The Shagang Giant*"), which Swire submitted was on all fours with the parties' dispute in the Arbitration.

Swire's case in the Arbitration

17 Swire's case in the Arbitration can be broadly summarised as follows.

18 It was common ground that the Vessel could not proceed to the Place of Delivery as specified in Box 16 and cl 9(a) of the MOA due to the Indian Government's COVID-19 measures, and Ace Exim had not designated an alternative Place of Delivery. Accordingly, Swire had to deliver the Vessel at "… the place at which it is customary for vessels to wait" in accordance with cl 9(b) of the MOA.[20]

19 The Gulf of Khambhat (also known as the Gulf of Cambay) was subject to an official vessel traffic service ("VTS Khambhat") which had the authority to direct when and where vessels were to anchor, proceed or beach at Alang. VTS Khambhat was entitled to, and did, give permission to vessels on when they were permitted to enter the area under VTS Khambhat's control. If a vessel

[20] 1ACB at pp 18–19: CWLC-1 at paras 29(a)–(b).

had not been permitted by VTS Khambhat to enter the VTS zone, the usual waiting place for a vessel was south of Jafarabad and Diu.[21]

20 Once a vessel destined for Alang had been given permission to enter the VTS area, the vessel would usually be given instructions to anchor off Bhavnagar. After the vessel had undergone the necessary inspections, the VTS would then permit the vessel to proceed to Alang Anchorage.[22]

21 In *The Shagang Giant*, the English High Court was asked to determine whether the eponymous vessel in that case had been at a place customary for vessels to wait at the time that it had tendered its NOR. *The Shagang Giant* was on all fours with the present case given that it also concerned a sale and recycle contract (like the MOA) that provided for the place of delivery at Alang, and the delivery date range was around the same time as that under the MOA. The English High Court in *The Shagang Giant* held that the Jafarabad Waiting Place was a place at which it was customary for vessels to wait.

22 Following *The Shagang Giant*, as the Vessel in the present case had been situated at the Jafarabad Waiting Place when the NOR was tendered, Swire had properly and validly delivered the Vessel at the Customary Waiting Place in accordance with cl 9(b) of the MOA.[23] Apart from the authority of *The Shagang Giant*, the conclusion that the Jafarabad Waiting Place was the Customary Waiting Place was reinforced by additional evidence put before the Arbitrator, including the *Guide to Port Entry: Albania to Kuwait Text* vol 1 (Shipping

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21 1ACB at p 19: CWLC-1 at para 29(c).

22 1ACB at p 19: CWLC-1 at para 29(d).

23 1ACB at p 20: CWLC-1 at paras 29(e)–(f).

Guides Ltd, 2015/2016 Ed) (the "*Port Guide*") relied on by both parties, as well as the opinions of the parties' expert witnesses.[24]

23 As the Jafarabad Waiting Place was the Customary Waiting Place and the NOR had been validly tendered, Ace Exim's refusal to pay the balance of the purchase price was a breach of the MOA.[25]

Ace Exim's case in the Arbitration

24 Ace Exim's case in the Arbitration can be broadly summarised as follows.

25 It was not disputed that, because the Place of Delivery under Box 16 and cl 9(a) of the MOA was inaccessible, and Ace Exim had not nominated an alternative, the Place of Delivery was to be the Customary Waiting Place, in accordance with cl 9(b) of the MOA.[26]

26 The Jafarabad Waiting Place was not the Customary Waiting Place. The Vessel thus did not arrive at an agreed Place of Delivery under the MOA at the time that the NOR was tendered. Consequentially, the NOR was invalid,[27] and Ace Exim was not bound to accept delivery of the Vessel and pay the balance of the purchase price.

27 The Vessel was situated in the open seas at the mouth of the Gulf of Khambhat. For vessels waiting to enter the port of Alang, Bhavnagar Anchorage

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24 1ACB at pp 21–23: CWLC-1 at para 29(i).

25 1ACB at p 23: CWLC-1 at para 29(j).

26 1ACB at p 24: CWLC-1 at para 31(a).

27 1ACB at p 24: CWLC-1 at para 31(b).

was the Customary Waiting Place.[28] This was confirmed by the port authority administering the ports of Alang and Bhavnagar, namely the Gujarat Marine Board ("GMB"), and VTS Khambhat (as the agency tasked with vessel traffic control in those waters).[29]

28 *The Shagang Giant* was accordingly of no assistance to Swire as it was distinguishable from the present case.[30]

29 Insofar as Swire relied on the *Port Guide* as supporting the Jafarabad Waiting Place as the Customary Waiting Place, the *Port Guide* did not bear the weight that Swire placed on it. Among other things, the *Port Guide* only referred to heavily laden vessels entering Bhavnagar Port for cargo operations. The Vessel (unladen and bound for Alang for recycling) was not such a vessel. In any event, the *Port Guide* could not supersede the Indian authorities' position on the designated waiting place (see [27] above).[31]

The Final Award

30 As a preliminary observation, I found it difficult not to agree with Swire's complaint that the Final Award was "very difficult to read and understand".[32] Indeed, even Ace Exim did not attempt – quite rightly – to contend otherwise. Perhaps as a result of due process paranoia (a point which I return to at [134]–[137] below) and the resultant attempt by the Arbitrator to cover every "blade of grass" in terms of the witness evidence, issues and

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28 1ACB at pp 25–26: CWLC-1 at paras 31(d), 31(f) and 31(h).

29 1ACB at pp 25–26: CWLC-1 at paras 31(e) and 31(g).

30 1ACB at pp 26–32: CWLC-1 at paras 31(j)–(l).

31 1ACB at p 33: CWLC-1 at para 31(m).

32 1ACB at p 34: CWLC-1 at para 33.

arguments raised, the Final Award (which ran to 386 pages) was a thoroughly unhappy, maze-like combination of innumerable internal cross-references coupled with the indiscriminate use of sub-paragraphs and sub-sub paragraphs – in one instance running from sub-paragraph (a) to sub-paragraph (aaa) within a *single* paragraph that spanned 18 pages.[33] The end product was a Final Award structured as a labyrinth for the reader to navigate through and conquer, requiring the utmost willpower and concentration just to try to understand the Arbitrator's reasoning. With due respect to the Arbitrator, a tribunal does itself, the parties, and the court little favour in terms of the cogency of its decision by presenting its reasons in such a convoluted and tortuous manner.

31 Be that as it may, the mere fact that it would not be unfair to describe an award as being borderline unintelligible is not *per se* a ground for setting it aside. It is axiomatic that the court should strive to read an award in a reasonable and commercial manner and supportively instead of destroying it. Ultimately, the grounds for setting aside an award are exhaustively set out in s 24 of the International Arbitration Act 1994 (2020 Rev Ed) ("IAA") and Art 34(2) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"). Unless the unintelligibility of the Final Award directly implicated one of these grounds, it was not a relevant consideration insofar as the present application was concerned. Nonetheless, my observations above should serve as a cautionary tale. While the Final Award sailed close to the wind, ultimately, I was of the view that it had not crossed the line so as to warrant curial intervention.

32 In sum, the Arbitrator found in Ace Exim's favour and held that the Vessel was not at a place entitling Swire to validly tender the NOR. The

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[33] 1ACB at pp 257–274: Final Award at para 189.

Arbitrator's crucial findings, insofar as they were relevant to the present application, were as follows:

(a) The Jafarabad Waiting Place was the customary waiting place only for "heavily laden vessels" bound for Bhavnagar Port.[34]

(b) On the other hand, the customary waiting place for vessels which, like the Vessel, were destined for recycling at Alang (and therefore would not be heavily laden), was an area other than the Jafarabad Waiting Place.[35]

(c) The Customary Waiting Place *per* cl 9(b) of the MOA was not the Jafarabad Waiting Place, but the area bounded by coordinates known as the "VTS Alang Anchorage Coordinates".[36] The VTS Alang Anchorage Coordinates were coordinates set out in an email from VTS Khambhat dated 25 March 2020 and timestamped 2.45pm.[37]

(d) Consequentially, the Vessel was not at the Customary Waiting Place under cl 9(b) of the MOA at the time that Swire had tendered the NOR.[38]

Swire's setting aside application

33 Swire's setting aside application was directed at two findings that the Arbitrator had made in the Final Award.

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34 1ACB at p 465: Final Award at para 398(aa).

35 1ACB at pp 465–466: Final Award at para 398(bb).

36 1ACB at pp 470 and 476: Final Award at paras 398(ll) and 398(yy).

37 1ACB at p 158: Final Award at para 131(b).

38 1ACB at p 476: Final Award at para 399.

34 First, Swire took issue with the Arbitrator's finding that the Jafarabad Waiting Place was limited to being a customary waiting place for heavily laden vessels (see [32(a)] above). I will refer to this below, where appropriate, as the "Jafarabad Finding" and the "Jafarabad Issue". Swire submitted that this finding occasioned a breach of natural justice that prejudiced Swire, as Swire had not had a reasonable opportunity to present its case on the Jafarabad Issue.[39] Alternatively, Swire argued that the Jafarabad Finding was also a finding made by the Arbitrator acting in excess of his jurisdiction.[40]

35 Second, Swire attacked the Arbitrator's finding that Swire's expert witness, Mr Shashank Agrawal ("Mr Agrawal"), had given evidence aligned with the Jafarabad Finding (*ie*, that the Jafarabad Waiting Place was the customary waiting place only for heavily laden vessels). I will refer to this as the "Agrawal Evidence Finding". Swire submitted that it had been deprived of a reasonable opportunity to present its case and arguments in respect of the Agrawal Evidence Finding.[41] Specifically, Swire contended that the Agrawal Evidence Finding entailed a dramatic departure by the Arbitrator from the parties' submission and evidence[42] and, because it was apparently wholly at odds with the evidence on record, indicated that the Arbitrator had failed to apply his mind to the evidence and submissions before him generally, so as to have come to the conclusion that he did.[43]

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39 AWS at para 11.

40 AWS at para 13.

41 AWS at para 14.

42 AWS at para 15.1.

43 AWS at para 15.2.

36 Ultimately, Swire contended that these alleged breaches of natural justice led to the Arbitrator making findings that Swire had no notice of.[44] In particular, the Arbitrator's dismissal of the Jafarabad Waiting Place as only applicable to heavily laden vessels was one which took Swire completely by surprise.[45] This finding was crucial to the Arbitrator's decision that he was not bound by the *The Shagang Giant* case that Swire had placed great reliance on during the Arbitration.

Decision: Swire's setting aside application was dismissed

37 For the reasons below, I considered that there was no merit in Swire's objections, and thus dismissed the application. I will first address Swire's challenge against the Jafarabad Finding, before turning to the challenge against the Agrawal Evidence Finding.

Ground 1: The Jafarabad Finding

Whether the Jafarabad Finding was made in excess of the Arbitrator's jurisdiction

(1) Applicable legal framework

38 Article 34(2)(*a*)(iii) of the Model Law provides that an award may be set aside by the court if:

> … the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside[.]

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44 AWS at para 5.

45 1ACB at p 10: CWLC-1 at para 8.

39 Article 34(2)(*a*)(iii) is reflective of party autonomy which is a cornerstone principle of international arbitration. Since an arbitral tribunal's jurisdiction is derived from the parties' consent, even when constituted by the parties' consent as encapsulated in a valid arbitration agreement, an arbitral tribunal would only have the authority to bind the parties to findings on issues that they have agreed to refer to it for determination (see the Court of Appeal decisions of *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2021] 2 SLR 1279 ("*Bloomberry*") at [68] and *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 ("*CRW Joint Operation*") at [31]).

40 Generally, the enquiry as to whether the arbitral tribunal had exceeded its jurisdiction under Art 34(2)(*a*)(iii) of the Model Law proceeds in two stages (see *CRW Joint Operation* at [30]; *Bloomberry* at [69]):

(a) First, the court must determine the matters that are within the scope of submission to the arbitral tribunal.

(b) Second, the court must determine whether the arbitral award involved such matters or whether it involved a new difference outside the scope of submission to arbitration and that was, accordingly, irrelevant to the issues requiring determination.

41 The court assesses the scope of the parties' submission to arbitration with reference to five sources: (a) the parties' pleadings; (b) the agreed list of issues; (c) the opening statements; (d) the evidence adduced; and (e) the closing submissions in the arbitration (see the Court of Appeal decision of *CDM and another v CDP* [2021] 2 SLR 235 at [18]). However, the issue is not to be approached mechanistically as a box-ticking exercise seeking to match an issue to one of these five sources. As the Court of Appeal clarified in its subsequent

decision of *CAJ and another v CAI and another appeal* [2022] 1 SLR 505 ("*CAJ v CAI*") (at [50]):

> … the five sources referred to at [18] of *CDM* are not *discrete or independent* sources. It would not suffice for the purposes of determining the tribunal's jurisdiction that the issue in question had been raised in *any one* of the five sources. Instead, the overriding consideration is to determine whether the relevant issues had been properly pleaded before the tribunal. [emphasis in original]

42 The upshot of the above is that the court would approach the matter holistically; as Kristy Tan JC observed in the recent High Court decision of *DGE v DGF* [2024] SGHC 107 ("*DGE v DGF*"), the court takes "a balanced approach towards assessing, in the round, what falls within the scope of the submission to arbitration" (at [110]). The same point was made by the Court of Appeal in *CKH v CKG and another matter* [2022] 2 SLR 1, where Jonathan Hugh Mance IJ stated that (at [16]):

> The pleadings are the first place in which to look for the issues submitted to arbitral decision. But matters can arise which are or become within the scope of the issues submitted for arbitral decision, even though they are not pleaded. *Whether a matter falls or has become within the scope of the agreed reference depends ultimately upon what the parties, viewing the whole position and the course of events objectively and fairly, may be taken to have accepted between themselves and before the Tribunal. …*
>
> [emphasis added]

43 If the court finds that a particular issue is within the scope of the parties' submission to arbitration, that is the end of the matter as far as any dispute as to jurisdiction is concerned (see *Bloomberry* at [72]). But if the court does find that the tribunal had exceeded its jurisdiction, the position as to whether there is a further requirement to demonstrate prejudice does not quite appear to be settled under Singapore law.

44 In *CRW Joint Operation*, the Court of Appeal held that a challenge under Art 34(2)(*a*)(iii) of the Model Law that the tribunal had failed to decide matters submitted to it did not render the arbitral award liable to be set aside unless there had been real or actual prejudice to either (or both) of the parties to the dispute (at [32]). Subsequently, in *AKN v ALC*, the Court of Appeal appeared to generalise the requirement of prejudice to *any* challenge under Art 34(2)(*a*)(iii), as it stated quite unequivocally that "[i]n order to set aside an arbitral award on the grounds of excess of jurisdiction, the court must further be satisfied that the aggrieved party has suffered actual or real prejudice" (at [72]).

45 However, in recent times, the courts appear to have retreated from this position. The High Court decision of *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd and another matter* [2018] 4 SLR 271 ("*GD Midea*") reinvigorated the drawing of a distinction between different types of challenges under Art 34(2)(*a*)(iii) of the Model Law, finding that where the charge was that the tribunal had exceeded its jurisdiction by addressing matters *beyond* the scope of submission, there was no further requirement for the applicant to show that it had suffered real or actual prejudice. Chua Lee Ming J considered that the Court of Appeal's observation in *CRW Joint Operation* should be confined to the particular context in that case of a tribunal failing to deal with matters properly put before it (at [60]). More recently, the Court of Appeal in *CBX and another v CBZ and others* [2022] 1 SLR 47 ("*CBX v CBZ*") cited the distinction drawn in *GD Midea* with approval (at [11]).

46 Given that Swire's challenge to the Jafarabad Finding was that it was an issue beyond the scope of submission, I approached the present case on the basis that *CBX v CBZ* was binding on me, such that, if I were to agree with Swire's attack on the Jafarabad Finding, there would have been no further requirement of prejudice for Swire to surmount.

(2) The Jafarabad Finding was not in excess of the Arbitrator's jurisdiction

47 Having regard to the applicable principles, I had little difficulty in concluding that the Jafarabad Finding was within the scope of the parties' submission to the Arbitrator's jurisdiction.

(A) THE JAFARABAD FINDING WAS INEXTRICABLY LINKED TO THE MAIN ISSUES IN DISPUTE

48 It is settled law that a decision on an issue that may not be specifically pleaded, but which can be subsumed into a more general issue that has been raised by the parties, is not one that is made in excess of the tribunal's jurisdiction (see Paul Tan, Nelson Goh & Jonathan Lim, *The Singapore International Arbitration Act: A Commentary* (Oxford University Press, 2023) at para 16.191). This principle can be illustrated by a few examples in the following paragraphs.

49 In *AKN v ALC*, an arbitral award was attacked on the ground, *inter alia*, that the tribunal had exceeded its jurisdiction by recharacterising, on its own motion, the claimants' claim which had been framed as a loss of actual profits into a claim for loss of an opportunity to earn profits, before proceeding to award damages to the claimants on that basis (at [69]). At first instance, the High Court found that the tribunal had acted in excess of its jurisdiction in doing so, and that this warranted setting aside the award in its entirety (at [70]). However, this finding was reversed by the Court of Appeal, which considered that the tribunal had not exceeded its jurisdiction as a general pleading by the claimants for damages to be awarded was broad enough to encompass the recharacterised claim (at [74]). In short, the tribunal's finding that the claimants had lost an opportunity to make profits was not in excess of its jurisdiction as it could be subsumed within the more general issue of the claimants' entitlement to

damages which had indisputably been submitted to the tribunal for determination.

50 To similar effect is the High Court decision of *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM Division*"). In that case, the tribunal had made a finding that a particular term of a contract that was alleged to have been breached was not a condition but a warranty, such that a breach of it did not amount to a repudiatory breach giving the innocent party a right to terminate the contract. Subsequently, the tribunal's characterisation of the relevant term as a warranty was challenged in setting aside proceedings as a finding in excess of the tribunal's jurisdiction.

51 The court gave the argument short shrift. Chan Seng Onn J (as he then was) observed that, since the parties had asked the tribunal to determine if there had been a repudiatory breach of the contract, it was open for the tribunal to take the view that it had to decide the characterisation of the relevant term as an anterior issue in order to determine the issue of repudiatory breach that had been submitted to it (see *TMM Division* at [57]).

52 A final example is the High Court decision of *Prometheus Marine Pte Ltd v King, Ann Rita and other matters* [2017] SGHC 36 ("*Prometheus Marine (HC)*"). The parties' dispute arose out of a contract for the sale of a yacht. After taking delivery of the yacht, the buyer was dissatisfied with the yacht's condition and commenced arbitration against the seller for breach of the sale contract. In the arbitration, the buyer argued *inter alia* that the seller had breached a term requiring the yacht to correspond to the description in the contract, which was implied by law by virtue of s 13 of the Sale of Goods Act (Cap 193, 1999 Rev Ed). In its award, however, the tribunal reclassified the buyer's claim into a breach of an *express* term requiring the yacht to conform

to the contractual specification. The disgruntled seller applied to set aside the award on the basis that this finding – based on an express term, rather than an implied term as the buyer had run its case – was in excess of the tribunal's jurisdiction.

53 Kannan Ramesh JC (as he then was) held that the tribunal had not exceeded its jurisdiction. Cautioning that "a formulaic and pedantic approach to construction of the issues should be eschewed in favour of a holistic assessment of the true issues before the [tribunal]", Ramesh JC noted that the substantive issue that had been submitted to the tribunal's determination was "whether the [seller] had indeed failed to deliver the Yacht in accordance with the contractual description and specifications". Given this, regardless of whether the tribunal had identified this failure as a breach of an express term or implied term, a finding that such failure had occurred on the seller's part was in no way in excess of the tribunal's jurisdiction (see *Prometheus Marine (HC)* at [60] and [66]).

54 On appeal, the Court of Appeal upheld Ramesh JC's decision in its entirety, including the finding that the tribunal had not exceeded its jurisdiction (see *Prometheus Marine Pte Ltd v King, Ann Rita and another appeal* [2018] 1 SLR 1 ("*Prometheus Marine (CA)*"). Pertinently, Sundaresh Menon CJ echoed that "a practical view ha[d] to be taken regarding the substance of the dispute being referred to arbitration", and observed that "the substance of the breach was the same regardless of whether it was labelled as a breach of [an express term] or a breach of [an implied term]" (see *Prometheus Marine (CA)* at [58]–[59]).

55 Drawing the threads together, the survey of the authorities above illustrates that the courts are wary of parties who seek to escape the binding

effect of a tribunal's decision through *ex post facto* sleight of hand in the framing of the issues submitted to the tribunal in a setting aside application (see *BLC v BLB* at [4]). Ultimately, the court would take a substance-over-form approach – thus, the mere fact that a tribunal does not answer an issue submitted to it letter-for-letter but answers it in a different way based on evidence that is before it does not mean that it has acted in excess of jurisdiction.

56 As for the requisite degree of connection between the tribunal's finding and the specific framing of the issues before it by the parties, I do not think it necessary or wise to attempt to lay down any specific test. The authorities I have considered above have all proceeded on the basis that the issue calls for an application of a healthy dose of common sense. Indeed, attempting to concretise a specific expression of the requisite connection may prove to be undesirable due to the inevitable concern that the chosen expression may be too broad or too narrow (see, *eg*, *GD Midea* at [59]). However, as a general reference, the language employed by Tan JC in *DGE v DGF* of the tribunal's decision having its "genesis" in, bearing a "close nexus" to, or being "intertwined with" the issues as framed by the parties before the tribunal, seems to me to accurately capture the essence of the point (at [115]).

57 In my judgment, the Jafarabad Finding was clearly within the Arbitrator's jurisdiction as it had its genesis in, and was intertwined with, the broader issues of: (a) whether the Jafarabad Waiting Place was the Customary Waiting Place; and (b) whether the Vessel was at the Customary Waiting Place at the time that it tendered the NOR.

58 More specifically, the Jafarabad Finding was one of the Arbitrator's reasons for concluding that the Jafarabad Waiting Place was not the Customary Waiting Place. The latter was indisputably a major issue, if not *the* crucial issue,

that the parties submitted to the Arbitrator to adjudicate upon. By seeking to characterise the Jafarabad Finding as lying outside of the Arbitrator's jurisdiction, Swire's submission was, in substance, that any finding by the Arbitrator other than one accepting Swire's position that the Jafarabad Waiting Place was the Customary Waiting Place would be *ultra petita*, since any attempt by the Arbitrator to comply with his duty to provide reasons for the opposite conclusion of distinguishing between these two locations would entail exceeding his jurisdiction.

59 With respect, this was a plainly absurd suggestion. This submission was a quintessential example of what I have described at [3] above as a disguised challenge on the merits of the tribunal's findings by characterising an adverse finding – and here, the reasons for an adverse finding – as a finding in excess of the tribunal's jurisdiction.

(B) THE JAFARABAD ISSUE WAS PUT INTO ISSUE BY THE PARTIES

60 Having reviewed the arbitral record, it was also clear to me that the Jafarabad Issue had been put into issue by the parties in the course of the Arbitration.

61 It is well-established that an issue that was not initially the subject of a specific pleading may nonetheless come within the scope of the parties' submission to arbitration if it was clearly raised and the parties had an adequate opportunity to address it (see *DGE v DGF* at [111]). As the Court of Appeal stated in *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 (at [47]):

> … any new fact or change in the law arising after a submission to arbitration which is ancillary to the dispute submitted for arbitration and which is known to all the parties to the

> arbitration is part of that dispute and need not be specifically pleaded. It may be raised in the arbitration …

The same proposition, as put in the converse by Mance IJ in *CBX v CBZ*, is that "[t]he conduct of parties to litigation before an arbitrator or judge may and does on occasion widen the scope of the issues falling for determination in a way which deprives a pleading objection of any force" (at [48]). Such flexibility is consonant with the dynamic nature of arbitration (see *Bloomberry* at [71]).

62 As I will demonstrate below, the Jafarabad Issue arose in the evidence adduced by the parties at trial and also featured in their written submissions. In these premises, the Jafarabad Issue was clearly a live issue before the Arbitrator and which the parties had adequate notice of, so as to fall squarely within the Arbitrator's jurisdiction.

63 As a starting point, I refer to the *Port Guide*, which both parties and the Arbitrator relied on extensively. The *Port Guide* was exhibited as an annex in an expert report of Captain Sudhir Chadha ("Captain Chadha"),[46] who gave evidence in the Arbitration as Ace Exim's expert witness. The *Port Guide* included an entry titled "SHIPMASTER'S REPORT: July 1992" ("*Shipmaster's Report*"), which purported to state certain details about Bhavnagar Port.[47] Of particular interest for present purposes was the following statement under the header of "Waiting Area":[48]

> **Waiting Area:** There is no anchorage area for awaiting pilot close to the port. Lighter vessels may anchor south of Piram island, where ships awaiting beaching for breaking are generally anchored. ***Heavily laden vessels are advised to***

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46 Agreed Core Bundle of Documents Vol 2 dated 12 March 2024 ("2ACB") at pp 751–763: Captain Chadha's Reply Expert Report, Annex A.

47 2ACB at p 763 Captain Chadha's Reply Expert Report, Annex A.

48 2ACB at p 763: Captain Chadha's Reply Expert Report, Annex A.

> ***anchor about 5 n.m. douth [sic] of Jafarabad Port*** (Lat. 20° 51.5' N, Long. 0 71° 23' E), about 80 mn.m. SW of Bhavnagar, and enter Gulf of Cambay at an appropriate time when called for Pilot.
>
> [emphasis added in bold italics]

The location of "5 n.m. douth of Jafarabad Port" – "douth" being, in all likelihood, a typographical error for "south" – was the Jafarabad Waiting Place. The fact that the *Port Guide* stated that the Jafarabad Waiting Place was the "Waiting Area" for "heavily laden vessels" meant that the position stated in the *Port Guide* was precisely the Jafarabad Finding that the Arbitrator came to make.

64 In the course of Swire's cross-examination of Ace Exim's witness, Mr Abhinav Kumar ("Mr Kumar"), Swire's counsel referred Mr Kumar to the *Shipmaster's Report*, and directed his attention specifically to what the *Shipmaster's Report* had to say on the "Waiting Area" for Bhavnagar Port. Mr Kumar repeatedly responded that the *Shipmaster's Report* was "totally out of context" relative to the parties' dispute, as the Vessel was not the type of vessel that the *Shipmaster's Report* was commenting upon:[49]

> Q If you then go on in the waiting area, he says:
>
> > "There is no anchorage area for awaiting pilots close to the port. Lighter vessels may anchor south of the Piram islands where ships awaiting beaching for breaking are generally anchored."
>
> Pausing there, I think he's saying you might be able to wait and what you've described as Alang inner roads. Then he goes on to say:
>
> > "Heavily laden vessels are advised to anchor about five nautical miles south of Jafarabad Port …"

[49] 2ACB at p 844: Transcript (27 March 2023) at p 83 ln 16–p 84 ln 17.

> And then goes on to give some coordinates, about 80 nautical miles south–west of Bhavnagar and enter the Gulf of Khambhat at an appropriate time when called for pilot. *So do you agree that he is there describing 5 nautical miles south of Jafarabad, more or less the same position that the "Melanesian Pride", "Kweilin" and the "Shagang Giant" were waiting in the third week of March 2020?*
>
> A *I think this is totally out of context. Our case is not for any vessel that is coming in with cargo.* Our coordinates specify that the vessel that is coming in is without cargo. The vessel that is coming in for cargo (indistinct). *This section of this is not at all applicable to any vessel coming in for recycling at Alang. This is totally out of context.*
>
> [emphasis added]

Indeed, when Swire's counsel attempted to brush aside the distinction that Mr Kumar was seeking to draw (based on whether a vessel was a heavily laden vessel or not) and repeated his question, Mr Kumar unequivocally maintained his position that the Jafarabad Waiting Place did not apply to the Vessel because it was not a "heavily laden vessel":[50]

> Q Well, I'm not sure, with respect, you really answered the question that I asked, so let me have a go because maybe I wasn't clear enough. Do you accept that when he says, "Heavily laden vessels are advised to anchor about 5 nautical miles south of Jafarabad", that is approximately where the "Melanesian Pride", the Kweilin, the "Shagang Giant" and other vessels were in the third or fourth week of March 2020?
>
> A It could be, but *I don't find it relevant.*
>
> Q Okay. So do you accept that there was a custom for *at least cargo vessels* to wait 5 nautical miles south of Jafarabad when there was congestion or some other reason for delay in Bhavnagar?
>
> A *I think this doesn't refer to congestion, first of all, it refers to heavily laden vessels, this is not relevant, as I repeat multiple times, in our business* (microphone distorted).
>
> [emphasis added]

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[50] 2ACB at pp 844–845: Transcript (27 March 2023) at p 84 ln 18–p 85 ln 10.

While the transcript was unfortunately cut off at an important point, it was reasonably clear that Mr Kumar's point was that the *Shipmaster's Report* was "not relevant" because "it refers to heavily laden vessels", which had nothing to do with Ace Exim's business of purchasing and recycling vessels.

65 It was also clear from the above line of questioning that Swire's counsel had, in fact, been alive to the distinction that Mr Kumar was seeking to draw in confining the Jafarabad Waiting Place's applicability to "heavily laden vessels". This was apparent in how, when faced with Mr Kumar's persistence on this point, Swire's counsel retreated slightly and sought Mr Kumar's agreement that "there was a custom for *at least cargo vessels* to wait [at the Jafarabad Waiting Place]" [emphasis added]. The qualification that Swire's counsel inserted – that his proposition related to "cargo vessels" specifically – was consistent with the distinction between "heavily laden vessels" (*ie*, laden with cargo) and vessels headed for recycling (which would be empty of cargo) that Mr Kumar had been at pains to draw (see [64] above). It was thus clear that the two parties were not speaking at cross-purposes but *ad idem* that the qualifier of "heavily laden vessels" lay at the heart of Mr Kumar's evidence.

66 Swire's cross-examination of Captain Chadha was similar in this respect. When Captain Chadha was taken to the *Shipmaster's Report*, and the same line of questioning was put to him *vis-à-vis* the reference in the *Shipmaster's Report* to the Jafarabad Waiting Place, Captain Chadha laid emphasis on the same point that the Jafarabad Waiting Place was only applicable to "heavily laden vessels":[51]

> Q Do you see there is some text there called "Waiting Area", and this is in relation to Bhavnagar port, yes?

[51] 2ACB at p 891: Transcript (28 March 2023) at p 117 lns 2–21.

A Yes.

Q And it says:

> "Heavily laden vessels are advised to anchor about 5 [nautical miles south] of Jafarabad port … and enter gulf of Cambay at an appropriate time when called for Pilot."

Do you see that?

A I see that.

Q This is a ship master's report back from 1992, that shows that vessels do wait south of Jafarabad before proceeding to Alang and Bhavnagar, doesn't it?

A *I think this pertains to laden vessels which are bound for Bhavnagar port for discharge, sir, heavily laden vessels are advised to anchor about 5 nautical miles. I think they pertains to vessels which are coming with commercial cargo and waiting to enter Bhavnagar port for discharge, sir.*

[emphasis added]

And, having been faced with the same type of resistance as Mr Kumar had put up, Swire's counsel once again retreated to extracting a confirmation from Captain Chadha that the Jafarabad Waiting Place was the waiting area for "commercial vessels":[52]

Q Do you accept that there is a history going back to at least 1992, and possibly before, of *commercial vessels* waiting south of Jafarabad prior to proceeding to Bhavnagar port?

A As per this report, but I do not have any first-hand knowledge of that, sir.

[emphasis added]

67 Coming to the parties' written submissions, when referring to the *Port Guide* and Captain Chadha's evidence, Swire glossed over the distinction that Captain Chadha (and Mr Kumar) had been at pains to draw. Thus, it submitted

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[52] 2ACB at p 891: Transcript (28 March 2023) at p 117 ln 22–p 118 ln 2.

at paragraph 61 of its closing submissions in the Arbitration that the *Port Guide* was "documentary evidence … prov[ing] that vessels ha[d] anchored south of Jafarabad whilst waiting to proceed to Bhavnagar since at least 1992 and probably before".[53] This, of course, was a generalisation, given that the *Port Guide* had not referred to "vessels" in the abstract, but "heavily laden vessels" specifically.

68 Indeed, Swire was cognisant that the qualifier of "heavily laden" in the *Port Guide*, as well as in Mr Kumar and Captain Chadha's evidence, posed a difficulty to its case that the Jafarabad Waiting Place applied to the Vessel. This was evidenced by the fact that, after quoting from Captain Chadha's evidence, Swire sought to downplay the distinction that Captain Chadha had emphasised at paragraph 63 of its closing submissions in the Arbitration:[54]

> Of course, *the fact that this report refers to commercial vessels laden with cargo, rather than commercial vessels voyaging in ballast for recycling, makes no difference at all to whether it was a "customary waiting place"*. The MOA does not require the customary waiting place to be somewhere that only one sort of vessel (or more accurately vessels on a particular sort of voyage) might wait.
>
> [original emphasis omitted; emphasis added in italics]

It is apparent on the face of this extract that Swire was responding *directly* to the Jafarabad Issue. Although Swire in its written submissions for the present application attempted to downplay this as "a short throwaway line",[55] I had little hesitation in rejecting this as an opportunistic attempt at resiling from its own submissions in the Arbitration.

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53 2ACB at p 1013: Swire's Closing Submissions in the Arbitration at para 61.

54 2ACB at p 1014: Swire's Closing Submissions in the Arbitration at para 63.

55 AWS at para 37.1.

69 Finally, in its reply closing submissions in the Arbitration, Ace Exim emphasised the distinction and made extensive submissions refuting Swire's reliance on the *Port Guide*, explaining why the Jafarabad Waiting Place did not apply to the Vessel as it was not a "heavily laden vessel":[56]

> 65 [Swire] would advance its assertion at [61] [of its closing submissions in the Arbitration] that it had adduced documentary evidence or the extract of *Guide to Port Entry* (2015/2016 Edition) which states that vessels may anchor south of Jafarabad.
>
> …
>
> 67 It is clear that this is a single shipmaster's report from July 1992 (which Mr Agrawal did not mention in his 2 expert reports). The shipmaster had only "advised" that "heavily laden vessels" that were going to Bhavnagar Port are to anchor "5 n.m. [s]outh of Jafarabad Port". Even if 5 n.m. south of Jafarabad is a waiting area, the Vessel was not at this location when the NOR was tendered. A simple plotting will show that 5 n.m. south of Jafarabad is within the VTS zone. The Vessel was at a distance of about 20 n.m. SSW of Jafarabad Port and outside the VTS zone. See the calculations annexed to this Reply.
>
> 68 There are also manifest differences observed. Firstly, *the report refers to heavily laden vessels (implied to be carrying cargo) that are entering Bhavnagar Port (Lat 21 45' N Lon 072 18.0' E) for cargo operations. The Vessel Melanesian Pride was not heavily laden (in fact, she was not even carrying any cargo), and her destination was not Bhavnagar Port. Her destination was Alang Port for demolition. Hence, the reference to "heavily laden vessels" in the shipmaster's report anchoring 5 n.m. south of Jafarabad Port would not apply to the Vessel Melanesian Pride.*
>
> …
>
> 72 *With respect, it is submitted that [Swire's] statement in [61] [of Swire's closing submissions in the Arbitration] stating that "[the extract of Guide to Port Entry (2015/2016 Edition)] proves that vessels have anchored south of Jafarabad whilst waiting to proceed to Bhavnagar since at least 1992" is hence misguided and irrelevant.* It is one shipmaster's report advising mariners to anchor south of Jafarabad (it is unclear if the master in question anchored there himself) when going to

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[56] 2ACB at pp 1123–1124: Ace Exim's Reply Closing Submissions in the Arbitration at paras 65–72.

> Bhavnagar Port. *In any event, "heavily laden" vessels "carrying cargo" going to Bhavnagar Port are entirely irrelevant to this present case. The Vessel Melanesian Pride was not laden, did not carry any cargo and was going to Alang for demolition. The situations are simply different.*
>
> [original emphasis omitted; emphasis added in italics]

70 Given the above, it was plainly unarguable that the Jafarabad Issue *was* raised by the parties in the course of the Arbitration. In the first place, the Jafarabad Issue arose out of the *Port Guide* relied on by both parties. In the second place, Swire would, at the latest, have been put on notice after hearing the evidence of Mr Kumar and Captain Chadha that the Jafarabad Issue was an important plank of Ace Exim's case as to why the Jafarabad Waiting Place was not the Customary Waiting Place. Indeed, the fact that Swire itself saw fit to respond in its written submissions to Mr Kumar and Captain Chadha's evidence by downplaying the distinction they drew indicated clearly beyond peradventure that *Swire itself* apprehended that the Jafarabad Issue *was* in play. Finally, the parties' engagement on the Jafarabad Issue was rounded off by Ace Exim's response to Swire's written submissions in its reply closing submissions. In the premises, Swire's complaints that the Jafarabad Issue had not been in the parties' contemplation, and had only been raised for the first time by Ace Exim in its reply closing submissions, were plainly contradicted by how the Arbitration had panned out on the record.

Whether the Jafarabad Finding was made in breach of natural justice

71 I come to Swire's second line of attack against the Jafarabad Finding, *ie*, that it was made by the Arbitrator in breach of natural justice.

72 As a preliminary point, there is, in principle, no contradiction in a tribunal's finding or decision on a particular issue being within its jurisdiction while being in breach of natural justice. Although the same factual matrix may

attract both *ultra petita* and natural justice challenges, the two grounds are conceptually distinct. As the Court of Appeal noted in *CJA v CIZ* [2022] 2 SLR 557 ("*CJA v CIZ*"), challenges to jurisdiction require the court to "[look] at the arbitration in the round to see whether or not an issue was live", whereas challenges based on natural justice raise "the question of whether an issue had been sufficiently raised by or to the parties" (at [1]). The potential overlap (but conceptual distinction) is well illustrated by the Court of Appeal's decision in *AKN v ALC*, the facts of which I have set out at [49] above. Although the court reversed the High Court's finding on the excess of jurisdiction ground, it upheld the finding that a breach of natural justice had been occasioned in the tribunal's *sua sponte* recharacterisation of the claimants' claim into a claim for loss of an opportunity to make profits when the case had been argued on the footing of an actual loss of profits. On the facts, the tribunal had raised the possibility of proceeding on a loss of chance basis only on the last day of a 20-day hearing, and made a finding on that basis despite no party having made submissions or leading any expert evidence on the quantum of the lost chance (at [69] and [76]).

73 At the level of principle, therefore, there is little difficulty in conceiving of a decision on a matter that is well within the tribunal's jurisdiction being nonetheless impugnable on the ground of breach of natural justice. The converse, however, is logically less likely to occur – if the tribunal has given the parties an adequate opportunity to address an issue (such that it crosses the requisite threshold of due process), it may be the case that, even if not formally within the scope of the parties' submission and/or pleadings, the parties may be found to have agreed to a widening of the scope of the arbitration (see the Singapore International Commercial Court decision of *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2022] 4 SLR 158 at [33]).

74 In light of the above, my finding that the Arbitrator did not exceed his jurisdiction in making the Jafarabad Finding did not *ipso jure* dispose of the natural justice challenge. I thus turn to address this challenge, beginning first with an overview of the applicable legal framework and principles.

(1) Applicable legal framework

75 Section 24(*b*) of the IAA provides that an award may be set aside if "a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced".

76 For completeness, although Art 34(2)(*a*)(ii) of the Model Law similarly provides that an award may be set aside if, *inter alia*, the applicant was "unable to present his case", Swire only invoked s 24(*b*) of the IAA for its present application. In any event, this was of little moment given that there is "no distinction between the right to be heard as an aspect of the rules of natural justice under s 24(*b*) of the IAA and as an aspect of being able to be heard within the meaning of Article 34(2)(*a*)(ii)" (see the High Court decision of *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 ("*Triulzi*") at [123], citing the High Court decision of *ADG and another v ADI and another matter* [2014] 3 SLR 481 at [118]).

77 It is settled law that an applicant seeking to set aside an award on the ground of breach of natural justice must establish: (a) which rule of natural justice was breached; (b) how it was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach did or could prejudice its rights (see the Court of Appeal decision of *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 ("*China Machine*") at [86]). It is also well-established that the courts take a serious view of challenges based on alleged breaches of natural justice, and

there is a high threshold for an applicant to succeed on this ground. Successful challenges would be "few and far between" and limited to cases where the error is "clear on the face of the record" (see the High Court decision of *Coal & Oil Co LLC v GHCL Ltd* [2015] 3 SLR 154 at [2], citing *TMM Division* at [125]).

78 The right to be heard is a fundamental rule of natural justice (see *China Machine* at [87]). This right finds expression in Art 18 of the Model Law, which contains the due process guarantee that "[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case", and is given teeth by Art 34(2)(*a*)(ii) of the Model Law and s 24(*b*) of the IAA. Although Art 18 speaks in terms of a "*full*" opportunity, what is contemplated is not an "expansive and uncurtailed right", but a right that is "limited by considerations of reasonableness and fairness" (see *China Machine* at [93]–[97]). As explained by the Court of Appeal in *China Machine* (at [98]):

> In our judgment, in determining whether a party had been denied his right to a fair hearing by the tribunal's conduct of the proceedings, *the proper approach a court should take is to ask itself if what the tribunal did (or decided not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done*. This inquiry will necessarily be a fact-sensitive one, and much will depend on the precise circumstances of each case …
>
> [emphasis added; internal citations omitted]

79 The practical content of the right to be heard was elucidated by Vinodh Coomaraswamy J in the High Court decision of *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 ("*JVL Agro Industries*") at [146]–[147]:

> 146 There are two aspects to a party's reasonable opportunity to present its case: a positive aspect and a responsive aspect. The positive aspect encompasses the opportunity to present the evidence and advance the propositions of law on which it positively relies to establish its claim or defence, as the case may be. The responsive aspect

> encompasses the opportunity to present the evidence and advance the propositions of law necessary to respond to the case made against it. …
>
> 147 The responsive aspect of presenting a party's case has itself two subsidiary aspects to it. The first is having notice of the case to which one is expected to respond. The other is being permitted actually to present the evidence and advance the propositions of law necessary to respond to it. A tribunal will therefore deny a party a reasonable opportunity to respond to the case against it if it either: (a) requires the party to respond to an element of the opposing party's case which has been advanced without reasonable prior notice; or (b) curtails unreasonably a party's attempt to present the evidence and advance the propositions of law which are reasonably necessary to respond to an element of the opposing party's case. But there is a third situation in which a tribunal will deny a party a reasonable opportunity to present its responsive case: when the tribunal adopts a chain of reasoning in its award which it has not given the complaining party a reasonable opportunity to address.

In the present case, the breach of natural justice alleged by Swire *vis-à-vis* the Jafarabad Finding was a failure of its right to a reasonable opportunity to respond to the Jafarabad Issue (*ie*, the "third situation" posited by Coomaraswamy J in the extract above). According to Swire, the "chain of reasoning" adopted by the Arbitrator in making the Jafarabad Finding caught it by surprise.

80 In determining whether there has been a breach of natural justice of the sort alleged by Swire, the question is whether there is a sufficient nexus between the chain of reasoning which the tribunal has adopted and the cases which the parties themselves advanced in the arbitration (see *JVL Agro Industries* at [149]). In this regard, there would be the requisite nexus if the tribunal's chain of reasoning: (a) arises from a party's express pleadings; (b) is raised by reasonable implication by a party's pleadings; (c) does not feature in a party's pleadings but is in some other way brought to the opposing party's actual notice; or (d) flows reasonably from the arguments actually advanced by either party or

is related to those arguments (see *JVL Agro Industries* at [159]). Put differently, there would be a sufficient nexus if a reasonable party to the arbitration could objectively have foreseen the tribunal's chain of reasoning (see *JVL Agro Industries* at [160]).

81 Finally, it also bears emphasising that the mere fact that a breach might have occurred is a necessary but insufficient condition to warrant the court setting aside the award. In order to prevent parties from taking advantage of arid procedural irregularities, the breach of natural justice must prejudice the rights of the aggrieved party for the court to intervene (see *Soh Beng Tee* at [82]). More specifically, it is incumbent on the applicant to demonstrate "some actual or real prejudice caused by the alleged breach", in contradistinction to "technical unfairness" that arises from "technical or procedural irregularities that have caused no harm in the final analysis" (see *Soh Beng Tee* at [91]). As clarified by the Court of Appeal in *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125, the law does not impose such a high watermark of requiring the applicant to prove that a different outcome *would* necessarily have resulted (at [54]):

> … it is important to bear in mind that it is never in the interest of the court, much less its role, to assume the function of the arbitral tribunal. To say that the court must be satisfied that a different result would definitely ensue before prejudice can be said to have been demonstrated would be incorrect in principle because it would require the court to put itself in the position of the arbitrator and to consider the merits of the issue with the benefit of materials that had not in the event been placed before the arbitrator. Seen in this light, it becomes evident that *the real inquiry is whether the breach of natural justice was merely technical and inconsequential or whether as a result of the breach, the arbitrator was denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to his deliberations. Put another way, the issue is whether the material* ***could reasonably*** *have made a difference to the arbitrator; rather than whether it* ***would necessarily*** *have done so.* Where it is evident that there is no prospect whatsoever that the material if presented would have

> made any difference because it wholly lacked any legal or factual weight, then it could not seriously be said that the complainant has suffered actual or real prejudice in not having had the opportunity to present this to the arbitrator …
>
> [original emphasis in bold italics; emphasis added in italics]

(2) The Jafarabad Finding was not in breach of natural justice

82 Applying the principles set out above, I did not agree with Swire's submission that the Jafarabad Finding had been made in breach of natural justice.

(A) SWIRE HAD A REASONABLE OPPORTUNITY TO ADDRESS THE JAFARABAD ISSUE

83 My review of the record of the Arbitration at [62]–[70] above illustrates that the Jafarabad Issue had been raised during the Arbitration. By the same token, Swire had a reasonable opportunity to address the Jafarabad Issue, and indeed, it did do so at paragraph 63 of its closing submissions when it attempted to downplay the significance of the qualification of "heavily laden vessels" that the *Port Guide*, Mr Kumar and Captain Chadha had all drawn when referring to the Jafarabad Waiting Place as a customary waiting place for vessels (see [68] above).

84 Given this, Swire's reliance on the High Court decision of *CVG v CVH* [2023] 3 SLR 1559 as authority for the proposition that "a party does not have a reasonable opportunity to present its case if the counterparty raises a case only at the post-hearing submissions stage of the arbitration" was misplaced.[57] The underlying premise of this reliance was that the Jafarabad Issue had, in fact, only been raised by Ace Exim in its reply submissions. But the fact of the matter

[57] AWS at paras 43–45.

was that the Jafarabad Issue had been raised *in evidence* and *pre-emptively* tackled by Swire in its own closing submissions even before Ace Exim itself addressed it in its reply closing submissions.

85 Swire submitted that Ace Exim's reliance on Mr Kumar and Captain Chadha's cross-examination as demonstrating that the Jafarabad Issue had been raised then was "contrived" because "the line of questioning advanced by counsel for Swire" was not on the distinction between "heavily laden vessels" and "vessels for recycling for anchoring" (like the Vessel).[58] I did not agree. It was clear from the extracted portions of Mr Kumar and Captain Chadha's evidence above that both witnesses had made much of this distinction. The fact that Swire's counsel's focus might have been on a different point, or that he might not have intended to elicit evidence of this distinction, did not change the fact that the witnesses had said what they said. A party cannot brush aside something said by a witness, or turn a blind eye or ear to it, simply because he finds it irrelevant or inconvenient to his case.

86 Relatedly, the submission above was also based on a false premise. Strictly speaking, it was irrelevant what Swire *subjectively* intended to convey to the witnesses and the tribunal in its pleadings, lines of questioning or written submissions. The test of a reasonable opportunity to address a point is an *objective* benchmark; the operative question is, therefore, not whether a party had *actual* notice that an issue was in play, but whether a party had *reasonable* notice that an issue was in play. A corollary of this is that, insofar as Swire's complaint lay in the fact that it did not perceive the issue because Ace Exim had not referred to the Jafarabad Issue with surgical precision in its pleadings or closing submissions prior to doing so in its reply closing submissions, such

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58 AWS at para 35.6.1.

suggestion, even if true, did not cut any ice. The objectivity of the test means that a party does not benefit from being obtuse or aloof in their interpretation of an opposing party's case or the shape of the dispute. In this regard, the following observations by Popplewell J (as he then was) in the English High Court decision of *Reliance Industries Ltd and another v The Union of India* [2018] 2 All ER (Comm) 1090 are apposite (at [32]):

> … ***It is always important to keep in mind the distinction between a lack of opportunity to deal with a case and a failure to recognise or take such opportunity***. It is commonplace in judicial decisions on points of construction that a judge may fashion his or her reasoning and analysis from the material upon which argument has been addressed without it necessarily being in terms which reflect those fully expressed by the winning party. There is not perceived to be, and is not, anything which is unfair in taking such a course. ***It is enough if the point is 'in play' or 'in the arena' in the proceedings, even if it is not precisely articulated.*** To use the language of Tomlinson J, as he then was, in *ABB AG v Hochtief Airport GmbH* [2006] 1 All ER (Comm) 529 (at [72]), ***a party will usually have had a sufficient opportunity if the 'essential building blocks' of the tribunal's analysis and reasoning were in play in relation to an issue, even where the argument was not articulated in the way adopted by the tribunal***. …
>
> [emphasis added in bold italics]

87 To be sure, I do not doubt that, in some cases, the failure to identify a certain point with precision may result in a party not having reasonable notice of it. The extent of the opportunity needed to be given depends on the nature of the issue (see the Court of Appeal decision of *Phoenixfin Pte Ltd and others v Convexity Ltd* [2022] 2 SLR 23 at [52]). And although it is correct that pleadings generally assume greater significance *vis-à-vis* issues of fact (see *CJA v CIZ* at [76]), my review of the record shows – particularly, in relation to Swire's own reliance on the *Port Guide*, as well as the answers it elicited from Mr Kumar and Captain Chadha – that Swire was staring down the barrel of the Jafarabad Issue at the latest by the time of closing submissions. The objective *existence* of

an opportunity to respond and whether Swire decided to *make use* of such opportunity are separate matters, and natural justice takes cognisance of only the former.

88 Finally, even assuming, *arguendo*, that Swire had genuinely perceived the Jafarabad Issue as having come into the picture for the first time in Ace Exim's reply submissions, it would have been incumbent on Swire to raise its concerns to the Arbitrator. Indeed, as Ace Exim pointed out, the Arbitrator did not immediately declare the period for submissions closed after Ace Exim's reply submissions had been tendered, such that it could potentially be argued that Swire had no opportunity to raise any such objection to the Arbitrator. Instead, it was *Swire* itself that moved to have submissions declared closed subsequent to the filing of the parties' reply submissions. In fact, in its email to the Arbitrator dated 2 May 2023 making the said request, Swire's lawyers expressly confirmed that there were *no points* arising out of Ace Exim's reply submissions that required a response from Swire.[59]

89 This confirmation by Swire was significant. A party intending to allege that the arbitral process has been tainted by a breach of natural justice (particularly on procedural matters) must give "fair intimation" to the tribunal of its intention to raise such objection. The corollary of this is that the court would not allow the complainant to engage in "hedging" against an adverse result in the arbitration, by warehousing its natural justice complaint for potential deployment in the event that it turns out dissatisfied with the substantive outcome of the arbitration (see *China Machine* at [170]). The

[59] 2ACB at pp 1152–1153: Emails between Swire's counsel and the Arbitrator dated 2 and 3 May 2023.

rationale of proscribing "hedging" was explained by Menon CJ in *China Machine* as follows (at [168]):

> … An assertion that the tribunal has acted in material breach of natural justice is a very serious charge, not just for the imputation that such an allegation makes as to the *bona fides* and professionalism of the tribunal, but also for the grave consequence it might have for the validity of the award. For this reason, *there can be no room for equivocality in such matters*. An aggrieved party cannot complain after the fact that its hopes for a fair trial had been irretrievably dashed by the acts of the tribunal, and yet conduct itself before that tribunal "in real time" on the footing that it remains content to proceed with the arbitration and obtain an award, only to then challenge it after realising that the award has been made against it. In our judgment, such tactics simply cannot be countenanced.
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> [emphasis in original]

90 If Swire was aggrieved at the supposedly belated raising of the Jafarabad Issue, instead of raising any objections (as was the case, for example, in *CAJ v CAI*), Swire did exactly the opposite by representing to the Arbitrator that it took no objection to the contents of Ace Exim's reply submissions. Indeed, Swire's position in this application was that it had actually been aware that Ace Exim had only raised this argument in its reply submissions (as opposed to having had no cognisance of it), but had made the *conscious* decision that it did not have to respond to the point as it "took the reasonable view that this point fell outside the scope of the Arbitration".[60] Leaving aside that the factual premise of this submission was untrue as the Jafarabad Issue had already been raised *before* Ace Exim's reply submissions (see [63]–[68] above), this submission turned the proscription against "hedging" on its head by turning the Arbitration into a game of "heads I win, tails I don't lose".

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60 AWS at para 39.2.

91 To sum up the above from a different perspective, if there had in fact been any denial of an opportunity for Swire to be heard on the Jafarabad Issue, it was a denial caused *by Swire's own hand*. The due process guarantee in Art 18 of the Model Law is not intended to give a party insurance against its own failures or strategic choices that backfire (see *Triulzi* at [51]). Thus, there is no breach of natural justice if a party fails to present evidence or submissions to the tribunal on an issue which is a link in the tribunal's chain of reasoning, either because the party fails to appreciate that the issue is before the tribunal through mistake or misunderstanding, or because the party makes a conscious tactical choice not to engage the opposing party on that issue (see the High Court decision of *CDX and another v CDZ and another* [2021] 5 SLR 405 at [34(h)(iv)], citing *Triulzi* at [137]). The courts would not allow setting aside applications to be abused by a party who, with the benefit of hindsight, wishes that it had presented its case in a different way or had taken certain strategic decisions differently (see *BLC v BLB* at [53]).

(B) THE JAFARABAD FINDING WAS REASONABLY CONNECTED TO THE ARGUMENTS RAISED BY THE PARTIES

92 Moreover, I was satisfied that in making the Jafarabad Finding, the Arbitrator adopted a chain of reasoning that flowed reasonably from the arguments advanced by the parties. As the Court of Appeal observed in *BZW and another v BZV* [2022] 1 SLR 1080 ("*BZW v BZV*"), 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 (at [60(b)], citing *Soh Beng Tee* at [65(d)]). The Jafarabad Finding was not such a case. Given that the reasoning flowed reasonably from the parties' cases, it was one that was objectively foreseeable to the parties and could not have taken them by surprise.

93 The Court of Appeal decision of *Glaziers Engineering Pte Ltd v WCS Engineering Construction Pte Ltd* [2018] 2 SLR 1311 ("*Glaziers Engineering*") is the lodestar on challenges of this nature. In that case, the Court of Appeal observed that, although a surprising or unforeseen outcome *may* usefully indicate that there has been a breach of the fair hearing rule, this would be hardly conclusive because a surprising outcome may be the product of several distinct types of situations, some of which may not involve any breach of natural justice at all (see *Glaziers Engineering* at [55]). The court then went on to identify three scenarios which may result in surprising outcomes for the parties, and whether these would involve breaches of natural justice (see *Glaziers Engineering* at [56]–[62]):

(a) First, where the parties have addressed a question which the decision-maker posed as a decisive issue, but the decision-maker answers that question in a way that was so far removed from any position which the parties had adopted that neither of them could have contemplated such a result (see *Glaziers Engineering* at [56]). This would amount to a breach of natural justice.

(b) Second, where the parties did not address the question which was posed by the decision-maker as a decisive issue because they did not know and could not reasonably have expected that it would be an issue (see *Glaziers Engineering* at [58]). This would also amount to a breach of natural justice.

(c) Third, where the parties did not address a particular issue even though they could reasonably have foreseen that the issue would form part of the tribunal's decision. This might occur because the parties failed to apply their minds to the issue, failed to appreciate its significance, or each assumed that the decision-maker would adopt their

> position on that issue. Regardless of the reason, this type of case would not entail a breach of natural justice because the parties cannot be heard to complain of a lack of a fair hearing if they could have reasonably foreseen that the issue would arise but nonetheless chose not to address it (see *Glaziers Engineering* at [60]).

94 In my judgment, it was clear that Swire's complaint fell within the third category above. The High Court decision of *TMM Division*, the facts of which I have set out at [50] above, is a useful reference. There, the court found that the tribunal's finding that the relevant term of the contract was a warranty could not have caught the parties by surprise given that the issue submitted for the tribunal's determination was whether there had been a repudiatory breach of the contract. Chan J held that the characterisation of the term was not only "reasonably connected" but a "reasonable follow-through" from the tribunal's conclusion that the term was not a condition so as to be incapable of giving rise to a repudiatory breach (see *TMM Division* at [70]). If a subsidiary issue (to the ultimate issue before the tribunal) ought reasonably to have been foreseen by the parties, the tribunal does not have to specifically invite submissions on the subsidiary issue, and if a party fails for whatever reason to address such a reasonably foreseeable issue, he cannot be heard to complain subsequently that he has been deprived of a right to a reasonable opportunity to be heard on said issue (see the High Court decision of *CDI v CDJ* [2020] 5 SLR 484 at [72], citing *Glaziers Engineering* at [64]).

95 Applying this principle, as I have explained above, the Jafarabad Finding was essentially one of the reasons offered by the Arbitrator for determining that the Jafarabad Waiting Place was not the Customary Waiting Place. Seen in this light, the Jafarabad Finding was, by any measure, "reasonably connected" or a "reasonable follow-through" from the Arbitrator's

finding that the Jafarabad Waiting Place was not the Customary Waiting Place. In the same way that a finding on whether a term is a condition or warranty is a necessary precursor to determining whether a breach of that term gives rise to a repudiatory breach (as in *TMM Division*), in the present case, a finding as to the type of vessels to which the Jafarabad Waiting Place applied was a logically anterior question to the Arbitrator's decision on the ultimate issue of whether the Jafarabad Waiting Place was the Customary Waiting Place for the Vessel under cl 9(b) of the MOA. It was thus patently unrealistic for Swire to claim that it had not been afforded a reasonable opportunity to address the Jafarabad Issue.

(C) IN ANY EVENT, THE JAFARABAD FINDING DID NOT CAUSE SWIRE PREJUDICE

96 Even if I had been persuaded that there had been a breach of natural justice in the making of the Jafarabad Finding, Swire's objection would nonetheless have failed as it was not able to demonstrate that the Jafarabad Finding caused its rights to be prejudiced.

97 Swire submitted that the Jafarabad Finding caused it real prejudice because it was the basis on which the Arbitrator had distinguished *The Shagang Giant* that Swire had relied heavily on and which, if applied to the facts of the present case, would necessarily have constrained the Arbitrator to find in Swire's favour.[61]

98 I did not accept this submission. The Jafarabad Finding was neither the sole reason for the Arbitrator's conclusion that the Jafarabad Waiting Place was not the Customary Waiting Place, nor was it the only reason cited by the

[61] AWS at paras 68–71.

Arbitrator for declining to follow and apply *The Shagang Giant* to the parties' dispute.

99 Specifically, it was reasonably clear that another independent factor that operated on the Arbitrator's mind was that the Indian authorities had taken the position that the Customary Waiting Place was not the Jafarabad Waiting Place but the area bounded by the VTS Alang Anchorage Coordinates. Indeed, the Arbitrator considered the Indian authorities' view on the matter to be decisive:[62]

> (pp) As further rightly contended by [Ace Exim] at paragraph 396(c)(xxix) above, *only the Indian authorities can decide the customary waiting place of vessels destined to Alang for recycling, not their owners, whether through a collective consensus among them or otherwise*;
>
> (qq) The Indian authorities have indeed declared that the one and only "customary place of waiting" for vessels destined for recycling at Alang, is the area bounded by the [VTS Alang Anchorage Coordinates];
>
> [emphasis added]

The decisive weight that the Arbitrator placed on the Indian authorities' position was also apparent from his statement that Swire's position – *ie*, that the Jafarabad Waiting Place was the Customary Waiting Place – "clearly undermine[d] the authority of GMB which, through VTS Khambhat's email … had designated the [VTS Alang Anchorage Coordinates] … as the only customary place of waiting for vessels going into Alang, for recycling",[63] whereas Ace Exim's contrary position "did not undermine the authority of GMB".[64]

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62 1ACB at p 471: Final Award at paras 398(pp)–(qq).

63 1ACB at pp 474–475: Final Award at para 398(ww)(ii)(B).

64 1ACB at p 475: Final Award at para 398(ww)(iii).

100 In oral submissions, counsel for Swire, Mr Lok Vi Ming SC ("Mr Lok"), sought to downplay the significance of the Indian authorities' views in the Arbitrator's reasoning. Starting from the premise that the governing law of the MOA and the parties' dispute was English law, Mr Lok submitted that it was necessary for the Arbitrator's analysis to proceed in a tiered manner, in the sense that it was only after the Arbitrator had "broke[n] free from the constraints of [*The Shagang Giant*]" that he could then go on to consider the Indian authorities' position on the issue.[65] Since the Jafarabad Finding was ostensibly the basis on which the Arbitrator had distinguished *The Shagang Giant*, a tainting of the Jafarabad Finding would taint the entirety of the Arbitrator's decision because he could not then go on to consider the Indian authorities' position; in short, if not for the Jafarabad Finding, the analysis would, so Mr Lok argued, have started and ended with *The Shagang Giant* as an authority directly on point.

101 While there was some ingenuity in this argument, I considered it to be misconceived. This was for the following two main reasons.

102 First, given that the Arbitrator placed determinative weight on the Indian authorities' position, in that no one but the Indian authorities could decide on the Customary Waiting Place, the Arbitrator must, by necessary implication, have considered that to the extent that *The Shagang Giant* took a different view to the Indian authorities, even the English High Court's view on the matter had to yield to the Indian authorities' position. Thus, the evidence adduced by Ace Exim on the Indian authorities' position did not only operate on the Arbitrator's mind after he satisfied himself that *The Shagang Giant* could be distinguished on the facts, but was assessed by the Arbitrator to be an *overriding* factor that

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65 NE (19 March 2024) at p 37 ln 28–p 38 ln 2.

would have furnished a sufficient basis in and of itself for him to reach the conclusion that he did.

103 Second, and following from the first point, even if the Arbitrator had erred in his view that the Indian authorities' position (or, for that matter, any other reason) allowed him to depart from *The Shagang Giant*, that would not be an issue of natural justice but an error of law. It was strictly immaterial whether *The Shagang Giant* was properly distinguishable or not. Even if I were to agree with Swire that there was no basis for the Arbitrator to properly avoid following *The Shagang Giant*, the correction of such an error *per se* was manifestly beyond the remit of a seat court hearing a setting aside application. It was plainly indisputable that the Arbitrator did consider *The Shagang Giant* and the arguments raised as to its applicability to the dispute before him. Indeed, the Arbitrator devoted an *entire section* of the Final Award to a discussion of *The Shagang Giant*, spanning 31 paragraphs (with his characteristic plethora of sub-paragraphs and sub-sub-paragraphs) and 22 pages.[66] It is trite that "[n]o party has a right to expect the arbitral tribunal to accept its arguments, regardless of how strong and credible it perceives its own arguments to be" (see *TMM Division* at [94]). Indeed, I would go further than this. No party has a right to have its arguments accepted *even if those arguments are objectively flawless in law and in fact*. There is no *freestanding* ground to set aside an award on the basis that the tribunal's substantive decision on the merits may be considered outrageous; any error of law or fact does not cease to be such no matter how gross or manifest (see the High Court decision of *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 at [21]).

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66 1ACB at pp 371–392: Final Award at paras 346–377.

Conclusion on the Jafarabad Finding

104 For the reasons canvassed above, the Jafarabad Finding was neither in excess of the Arbitrator's jurisdiction nor made by the Arbitrator in breach of natural justice. There was thus no merit in Swire's objection to this aspect of the Final Award.

Ground 2: The Agrawal Evidence Finding

Whether the Agrawal Evidence Finding was in breach of natural justice

105 I turn to Swire's challenge against the Agrawal Evidence Finding. To recapitulate, the Agrawal Evidence Finding referred to the Arbitrator's interpretation of Mr Agrawal as having given evidence supporting the Jafarabad Finding. Swire's objection was that this assessment was made in breach of natural justice for two reasons:

(a) First, the Agrawal Evidence Finding was a dramatic departure from the parties' submissions in the Arbitration.

(b) Second, the Agrawal Evidence Finding was wholly at odds with the evidence on record.

(1) There was no breach of natural justice in the Agrawal Evidence Finding

106 I considered that there was no merit in either of Swire's objections to the Agrawal Evidence Finding.

(A) THE AGRAWAL EVIDENCE FINDING WAS REASONABLY CONNECTED TO THE PARTIES' SUBMISSIONS

107 I deal with Swire's first submission briefly. Given my finding at [92]–[95] above that the Jafarabad Finding was reasonably connected with the

parties' cases in the Arbitration, it followed *a fortiori* that the Agrawal Evidence Finding was also at least reasonably connected with the parties' cases.

108 Moreover, and with respect, I would express doubt as to the utility and effectiveness of attempting to challenge an award by subdividing the tribunal's decision and findings into as many layers as possible in a bid at identifying a subsidiary finding that the tribunal apparently did not directly consult the parties on (see the English High Court decision of *BV Scheepswerf Damen Gorinchem v The Marine Institute (The "Celtic Explorer")* [2015] 2 Lloyd's Rep 351 at [36]). I say this because, in this case, the Agrawal Evidence Finding was not a standalone finding, but a subsidiary finding on the import of one witness's evidence by categorising the witness as "for" or "against" his decision on the main issue before him (*viz*, whether the Customary Waiting Place was the Jafarabad Waiting Place). In my view, there were at least two reasons why such an approach was a pointless endeavour.

109 First, it contradicted the courts' longstanding position on how arbitral awards should be approached in such applications. A losing party may well wish to scrutinise the award letter-by-letter, stacking up grievances as more and more perceived infelicities in the award are unearthed. But that is decisively the approach that the courts have set their face against. As V K Rajah JA stated in *Soh Beng Tee*, "it is not the function of the court to assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process" (at [65(f)]). Similarly, in a statement that is often cited by our courts and which I alluded to at [31] above, Bingham J (as he then was) noted in the English High Court decision of *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 that (at 14):

> … as a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a

> meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it. …

110 It is axiomatic that an arbitrator is under no 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 (see *Soh Beng Tee* at [55(h)], citing the New Zealand High Court decision of *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452 at 463). The reason for this is particularly clear in the present context where one is concerned with an arbitrator's evaluation of a witness's evidence. A tribunal is invariably required to synthesise and form a view of the evidence given by every witness, and it often does so unconsciously without thinking it necessary to spell out in minute detail what it has understood each witness as saying. But, on Swire's submission, a tribunal would be necessarily obliged to put its views on what to make of each witness's evidence to the parties for comment before committing to a view. It is self-evident that no system of dispute resolution can sensibly operate in such a way. The untenability of Swire's submission on the Agrawal Evidence Finding was thus clear if one took it to its logical conclusion.

111 Second, an approach that focuses on the minutiae in an award would rarely bear fruit because any challenge founded on such a basis would likely be stonewalled by the requirement of real prejudice occasioned by the breach. As I noted above, this requirement is instituted to prevent "technical unfairness" from becoming a golden ticket to escaping the strictures of an otherwise sound arbitral award (see [81] above). As a matter of logic, the more minute the alleged breach is – which would naturally occur when a party attempts to slice and dice

the issue that is the subject of the alleged breach – the *less* likely it would be to cross the threshold of demonstrable prejudice.

112 This was, in fact, the case as regards the Agrawal Evidence Finding. I have explained above that at least one (and a sufficient) basis for the Arbitrator to have reached his conclusion that the Jafarabad Waiting Place was not the Customary Waiting Place was the overriding weight which he accorded to the Indian authorities' stance on the matter (see [99] above). That being so, the same result would almost certainly have followed even if the Agrawal Evidence Finding were to be notionally excised from the Final Award, still less when the *Port Guide* and the evidence of Mr Kumar and Captain Chadha were also taken into account. Put simply, even without Mr Agrawal's evidence, the Arbitrator had before him sufficient evidence to arrive at the conclusions that he did on the Jafarabad Issue. That in turn meant that the outcome of the Arbitration would have been no different even if the Agrawal Evidence Finding had not been made. Accordingly, Swire suffered no demonstrable prejudice.

(B) THE ATTACK ON THE AGRAWAL EVIDENCE FINDING WAS AN IMPERMISSIBLE CHALLENGE ON THE MERITS

113 Finally, I come to Swire's second objection against the supposed irrationality of the Agrawal Evidence Finding *vis-à-vis* the evidence on record.

114 In my judgment, this submission was patently without merit. Of the multifarious challenges put forward by Swire in the present application, this was one where Swire expended essentially no effort to hide the fact that the sting of its complaint was against the merits of the Arbitrator's factual findings. An allegation that the tribunal has misconstrued a witness's evidence would, in the ordinary course, be nothing more than an error of fact which is not a ground for setting aside an award (see [103] above).

115 Swire placed reliance on the Court of Appeal's statement in *BZW v BZV* that "[a] manifestly incoherent decision shows that the tribunal has not understood or dealt with the case at all and, in our view, that would mean that parties have not been accorded a fair hearing" (at [56]). I observe that, in the relatively short time since *BZW v BZV* was decided, that statement has acquired favour amongst applicants seeking to set aside awards on the basis of what are nothing more than errors of fact or law. Although it would be clear on a holistic reading of the Court of Appeal's decision that it did not intend any qualification of the general rule that errors of fact or law *per se* are irrelevant, it seems to me useful to clarify the ambit of the proposition that "manifest incoherence" in an award affords an apparent avenue for the setting aside of awards.

116 If reduced into a single statement, the point is that "manifest incoherence" in an award is a means to an end, and *not* an end in itself. That an award is incoherent *per se* does not move the needle; rather, what is important is whether this incoherence is sufficient, whether directly or through some inference, to bring the case within one of the recognised grounds for setting aside an award under Art 34(2) of the Model Law or s 24 of the IAA.

117 This emerges from reading the statement in *BZW v BZV* referred to above at [115] in its entire context. I set out that statement in its relevant context in full, as it makes clear that the Court of Appeal was aware of the potential for its reference to "manifest incoherence" becoming a charter for those seeking a *de facto* right of appeal to the court on the merits (see *BZW v BZV* at [55]–[56]):

> 55 The appellants' second argument was that the enquiry as to whether a tribunal's chain of reasoning is sufficiently connected with the essential issues is not concerned with whether a tribunal's reasoning is cogent or correct. A tribunal may have misunderstood the facts or law; its reasoning may also be unclear – but none of this causes a breach of the fair hearing rule. There is only a breach if a tribunal decides an issue on the basis of reasoning which it was unfair for the

> tribunal to adopt because the parties had no reasonable opportunity to address it.
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> 56 *To the extent that the second argument propounds the well-known principle that a setting-aside application is not an appeal and therefore, the court will not interfere even if it considers that, in reaching its decision, the tribunal has made mistakes of facts or law or both, we of course accept it. But that is not what is in issue in this case.* The appellants' argument went far beyond that principle and it was, in fact, quite shocking that the appellants supported the right of a tribunal to be manifestly incoherent in making its decision. The fair hearing principle requires that a tribunal pays attention to what is put before it and gives its reasoned decision on the arguments and evidence presented. If its decision is manifestly incoherent, this requirement would not be met. A manifestly incoherent decision shows that the tribunal has not understood or dealt with the case at all and, in our view, that would mean that parties have not been accorded a fair hearing.
>
> [emphasis added]

Thus, the Court of Appeal's focus was not on the manifest incoherence *per se*, but what the manifest incoherence discloses *vis-à-vis* the parties' right to a fair hearing. This is buttressed by the fact that, after making the observations above, the Court of Appeal went on to hold, on the facts, that the tribunal in that case had breached the fair hearing rule by (a) failing to apply its mind to essential issues; and (b) adopting a chain of reasoning that had no nexus to the parties' submissions (see *BZW v BZV* at [61]). Thus, the analysis did not, and indeed cannot, stop at a characterisation of the award or the tribunal's reasoning as "manifestly incoherent". Rather, the analysis must necessarily terminate with a finding as to whether a recognised ground for setting aside has or has not been met.

118 Indeed, in the subsequent decision of the Singapore International Commercial Court in *CFJ and another v CFL and another and other matters* [2023] 3 SLR 1 ("*CFJ v CFL*"), Kannan Ramesh JAD made clear that the

"incoherence" of an award was not a freestanding ground on which the award could be set aside (at [193]–[194]):

> 193 The Seller argues that the Tribunal's reasoning is "incoherent", asserting that even if the Tribunal had treated the evidence of the Purchaser's witnesses as generally reliable, it could not have "justified the decision to ignore the concealment of internal documentation".
>
> 194 *It appears to us that the Seller's argument is a thinly veiled challenge against the merits of the Tribunal's decision. That this is the case is patently obvious from its submission that the Tribunal's reasoning was "incoherent".* ***Whether or not this is true, that an arbitral tribunal's reasoning does not make sense to a party is not a ground for setting aside an award.***
>
> [emphasis added in italics and bold italics]

The court in *CFJ v CFL* was, of course, bound by the Court of Appeal's decision in *BZW v BZV*; and indeed, *BZW v BZV* was referred to by the court (albeit for a different proposition) (at [203]).

119 Moreover, this same point is made by the learned authors of Darius Chan, Paul Tan & Nicholas Poon, *The Law and Theory of International Commercial Arbitration in Singapore* (Academy Publishing, 2022), albeit not in relation to the specific allegation of an award being "manifestly incoherent", but as regards the more general characterisation of challenges against errors of fact or law falling outside the recognised grounds for setting aside or refusing enforcement of awards. In their discussion under the header of "Immateriality of errors of law or fact *per se*", the authors observe that it is an "overstatement" to say that "an error of law or fact can never result in a successful challenge against an award" (at para 8.51), because the more accurate representation of the position is as follows (at paras 8.54–8.55):

> 8.54 The emphasis, therefore, is on whether an error of law or fact triggers one of the established grounds under the IAA read with the Model Law for challenging the award. Under this

> approach, the nature or type of error is a relevant consideration. Thus, an error of the tribunal that results in a fundamental misunderstanding or misapprehension of the parties' arguments may result in a finding of breach of natural justice. So also where the error is of a nature such that enforcement of the award would "shock the conscience" or amount to an abuse of the court's process, that would constitute sufficient grounds to set aside or refuse enforcement of the award. …
>
> 8.55 If there is [a] coherent principle, it is that in all cases, *the characterisation of an error by the tribunal as being one of fact or law, per se, is strictly irrelevant. The crux is whether the effect of the error can be said to trigger or constitute a ground for setting aside the award.*
>
> [emphasis added]

120 To sum up, there is no magic in referring to an award as being "manifestly incoherent". The mere invocation of that description would not attract the court's intervention, as at the end of the day, the court's focus would be on the substance of the complaint, rather than the form or language in which it is presented.

121 Recognising the point that I have just set out above, Mr Lok framed his submissions along the lines that the alleged disconnect between what Mr Agrawal had actually said, and the Arbitrator's finding that Mr Agrawal had given evidence that the Jafarabad Waiting Place was limited to heavily laden vessels, suggested that the Arbitrator "clearly failed to apply [his] mind" to Mr Agrawal's evidence.[67]

122 I disagreed. It is apposite to first set out the relevant parts of the Arbitrator's discussion on Mr Agrawal's evidence in full as the necessary context for my analysis below:[68]

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67 AWS at para 59.

68 1ACB at pp 462, 466 and 467: Final Award at paras 398(cc)–(ee).

398 Between the rival contentions, I largely accept those of [Ace Exim], for which my reasons, as a matter of findings or holdings, as applicable, are as follows:

…

> (cc) In his two reports, as can be gathered from paragraph 396(d)(xxxv) above, Mr Shashank Agrawal had maintained that vessels had waited "south of Jafarabad and Diu, as well as other places", presumably closer to either of them and, in view of (v) hereof, all within the area, described as being about 5nm south of Jafarabad, but without drawing any distinction between:
>
> > (i) Vessel(s), destined for recycling at Alang, within VTS Khambhat zone, on the one hand; and
> >
> > (ii) Heavily laden commercial or trading vessel(s), bound for only Bhavnagar, also within it, on the other;
>
> (dd) As can also be gathered from paragraph 396(d)(xxxv) above, Mr Shashank Agrawal, did provide, in more detail, oral evidence, adduced during his re-examination, appearing in paragraph 343(d)(viii) above and referred to in paragraph 396(d)(xxxiv) above, as regards the vessels that had waited "south of Jafarabad and Diu, as well as other places", presumably closer to either of them and, in view of (v) hereof, all within the area, described as being about 5nm south of Jafarabad;
>
> (ee) However, during such re-examination, as referred to in (dd) hereof, Mr Shashank Agrawal, did draw the distinction, raised in (cc) hereof, for:
>
> > (i) In the sentence at lines 5 to 11 of page 33, in particular, he clearly refers to vessels, waiting inside the VTS Khambhat zone at the "inspection anchorage" or the area bounded by the coordinates in the quotation in paragraph 131(b) above, for fresh MOA's, or for fresh sales to be done, as their original MOA's "had collapsed";
> >
> > (ii) In the sentence at lines 7 to 11 of page 34, in particular, he clearly refers to vessels with no cash buyers which means that there never was, in the first place, any agreement for their sale, like the MoA, which, in turn, means that the inaccessibility encountered by them, "south of Jafarabad and Diu, as well as other places",

> presumably closer to either of them, and, in view of (v) hereof, all within the area, described as being about 5nm south of Jafarabad, was not to any place of delivery, as would be expected to be specified in such agreement, but merely to the area bounded by the [VTS Alang Anchorage Coordinates], for purposes, unconnected with their sale, delivery or recycling;
>
> (iii) In view of (i) hereof, Mr Shashank Agrawal was therein acknowledging or recognising the area bounded by the [VTS Alang Anchorage Coordinates], as the customary waiting place for a vessel, already subject to a sale, or, already subject to an agreement therefor, and intending to go into Alang for recycling, upon securing a fresh one, like the MoA, since the original one had "collapsed"; and
>
> (iv) In view of (ii) hereof:
>
> > (A) Mr Shashank Agrawal was therein referring to the case of a fully laden vessel, referred to in (aa) hereof, intending to go to the area bounded by the [VTS Alang Anchorage Coordinates], for purposes, unconnected with her sale, delivery or recycling, that had waited at a place south of Jafarabad or Diu, or a place closer thereto, and, in view of (v) hereof, both within the area, described as being about 5nm south of Jafarabad; and
> >
> > (B) In view of (A) hereof, there would have been no requirement for her owner to issue, when she was waiting at such place, as therein referred to, his notice or invitation to any cash buyer to designate or nominate, within 24 hours of arrival or receipt of such notice or invitation, any safe and accessible berth or any anchorage, safe or otherwise, alternative to any place of delivery;

123 I make three points from the extract above to dispose of Swire's submission. First, it would not be an unfair criticism, based on this extract, for the Arbitrator's reasoning *vis-à-vis* Mr Agrawal's evidence to be described as

"incoherent". But, as I have explained at [115]–[120] above, this, *by itself*, was nothing to the point.

124 Second, despite presenting his views in a cypher, it was indisputable that the Arbitrator *had* applied his mind to the contents of Mr Agrawal's evidence. Indeed, to his credit, the Arbitrator did not only do so with a broad-brush but with granularity, analysing Mr Agrawal's evidence in re-examination on a line-by-line basis. In my judgment, that the Arbitrator had done so was the end of the matter, as it plainly contradicted Swire's claim that he had *failed* to apply his mind to Mr Agrawal's evidence.

125 In this connection, Swire's reliance on *BZW v BZV* was, with respect, misguided. In *BZW v BZV*, the Court of Appeal observed that (at [60(a)]):

> … That a tribunal's decision is inexplicable is but one factor which goes towards establishing that the tribunal failed to apply its mind to the essential issues arising from the parties' arguments (*TMM Division* at [89]). Thus, ***if a fair reading of the award shows that the tribunal did apply its mind to the essential issues but "fail[ed] to comprehend the submissions or comprehended them erroneously, and thereby c[a]me to a decision which may fall to be characterised as inexplicable", that will be simply an error of fact or law and the award will not be set aside*** (*TMM Division* at [90]–[91]; [*BLC v BLB*] at [100]). … An award will therefore not be set aside on the ground that the tribunal failed to apply its mind to an essential issue arising from the parties' arguments unless such failure is a ***clear and virtually inescapable inference*** from the award ([*AKN v ALC*] at [46]).
>
> [emphasis added in bold italics]

In circumstances where the Arbitrator had made pinpoint references to specific lines of the transcript of Mr Agrawal's evidence in re-examination, it was unrealistic for Swire to argue that a "clear and virtually inescapable inference" arose that the Arbitrator had failed to apply his mind to Mr Agrawal's evidence,

and the consequence was a "manifestly incoherent" decision in making the Agrawal Evidence Finding.

126 Indeed, the way in which Swire framed its submissions on this point inevitably gave the game away, as it revealed that its complaint ultimately lay in the *inference* that the Arbitrator had drawn from Mr Agrawal's evidence,[69] and not that *he had failed to consider it*. After reproducing the lines from the transcript of Mr Agrawal's re-examination that the Arbitrator had cited, Swire argued that:[70]

> … all that the extract quoted by the Arbitrator shows was that Mr Agrawal gave evidence that vessels had waited south of Jafarabad and Diu, as well as other places. *It is therefore inexplicable that the Arbitrator would make the Agrawal Evidence Finding when the very extract that the Arbitrator cited in support of this finding clearly shows otherwise.* The Arbitrator's finding was clearly a manifestly incoherent decision that shows that *the Arbitrator did not understand the evidence given on this issue at all.*
>
> [emphasis added]

127 The parts of Swire's written submissions that I have placed in emphasis make plain that Swire's grievance was focussed on the Arbitrator having supposedly made the *wrong* inference from the evidence of Mr Agrawal. Even if that were true, it would, at best, amount to a mere error of fact that did not entail a breach of natural justice. In a related vein, Swire's further more aggressive suggestion that "the Arbitrator did not understand the evidence given on this issue at all" fared no better, as Swire was effectively saying that the Arbitrator did not understand the evidence because he had given it an interpretation that Swire did not agree with. Even if the Arbitrator had not actually understood Mr Agrawal's evidence as Swire claimed, that would,

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69 AWS at paras 59–60.

70 AWS at para 61.

again, have been an error of fact *simpliciter*. In the English High Court decision of *Primera Maritime (Hellas) Ltd and other companies v Jiangsu Eastern Heavy Industry Co Ltd and another company* [2014] 1 All ER (Comm) 813, Flaux J (as he then was) expressed the point succinctly (at [50]):

> It is clearly not appropriate to use [a setting aside application] to challenge the findings of fact made by the tribunal. If it were otherwise every disappointed party could say it had been treated unfairly by pointing to some piece of evidence in its favour which was not referred to in the reasons or not given the weight it feels it should have been. That is precisely the situation in which the court should not intervene. *Matters of fact and evaluation of the evidence are for the arbitrators.*
>
> [emphasis added]

128 Nor, for completeness, did this amount to the Arbitrator acting *ultra petita*, given the established conceptual distinction between an "erroneous exercise by an arbitral tribunal of an available power vested in it" (which would merely be an error of fact or law) and the "purported exercise by [an] arbitral tribunal of a power which it did not possess" (see *CRW Joint Operation* at [33]; *AKN v ALC* at [73]). Any such suggestion would have been premised on the fallacy I have highlighted at [3] above of drawing a false (but often alluring) synonymity between an adverse finding and a finding in excess of the tribunal's jurisdiction.

129 Third, and following on from the second point above, assuming, *arguendo*, that the Arbitrator did indeed make a finding on Mr Agrawal's evidence that had no evidential basis, that would still have gotten Swire nowhere. In *CEF and another v CEH* [2022] 2 SLR 918, the Court of Appeal held that the "no evidence rule" in Australian and New Zealand authority – *viz*, a rule 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" – did not form

part of Singapore law as it would run contrary to the Singapore courts' steadfast observance of the policy of minimal curial intervention (at [101]–[102]).

Conclusion on the Agrawal Evidence Finding

130 For the above reasons, there was no merit in the objections taken by Swire against the Agrawal Evidence Finding. It was, in substance, a challenge against the correctness of the Arbitrator's interpretation of evidence – such a challenge fell squarely outside the ambit of a setting aside application.

Conclusion

131 For the reasons given above, I dismissed Swire's application to set aside the Final Award in its entirety.

132 In closing, I make two further points. First, I return to the observations I made at the outset of these grounds of decision on the limited role of the courts in reviewing arbitral awards, but this time with a different focus. There are two sides of the coin when it comes to minimal curial intervention in international commercial arbitration. From the parties' perspective, they must accept that the court will not rescue them from the consequences of their choice to resolve their dispute through arbitration, save in the limited circumstances set out in the IAA and the Model Law. But, on the flip side, from an arbitral tribunal's perspective, the fact that a court has not set aside an award should not be treated as an unqualified imprimatur of the quality of its award or reasons. Arbitral tribunals enjoy a measure of immunity from substantive challenge arising from the fact that parties to an arbitration do not have a right to a "correct" decision from an arbitral tribunal, but merely one within the scope of their agreement to arbitrate, and that is arrived at following a fair process (see *CJA v CIZ* at [1]). However, this immunity should not be seen as a licence to render awards that, while on

their face seemingly comprehensive and detailed, are in reality a labyrinthine tome that would test even the most stout-hearted.

133 In the present case, Swire's aggrievement at the lack of quality of the Final Award was justified. Ultimately, however, I found that there was no unfairness in holding Swire to the Final Award because this was a risk that it took with open eyes, and necessarily accepted with open arms, when it agreed to submit any disputes under or arising out of the MOA to arbitration.

134 The second point, related to the first, is to register concern at what appears to be another facet of the phenomenon known as "due process paranoia". That term, if I may broadly describe it, refers to the tendency of arbitral tribunals to act defensively in their procedural decisions and general conduct of the arbitration, borne out of a concern that exhibiting robustness may be subsequently challenged as a violation of a party's due process rights (see generally, Sundaresh Menon, "Dispelling Due Process Paranoia: Fairness, Efficiency and the Rule of Law" (2021) 17 *Asian International Arbitration Journal* 1; Lucy Reed, "Ab(use) of Due Process: Sword vs Shield" (2017) 33 *Arbitration International* 361 ("*Ab(use) of Due Process*")). Put simply, due to the proliferation of due process challenges against arbitral awards and tribunals, the threat of such challenges is wielded by arbitrants as a proverbial Sword of Damocles over tribunals' heads in order to extract concessions from them in the exercise of their broad procedural discretion.

135 Thus far, much of the literature on the subject has focussed on the cost and efficiency sacrifices that have been occasioned as a result of this paranoia.

A paradigm example of this is succinctly summarised in the following passage (see *Ab(use) of Due Process* at p 375):

> For example, one side might apply to put in late evidence, again 'absolutely critical to allow it to present its case'. If the tribunal says no, the applicant's due process flag goes up. If [the tribunal] says yes, the other party will hoist its due process flag, claiming prejudice unless it is allowed to respond to the new evidence, which may postpone the hearing or lead to one or both parties claiming prejudice. And so on, perhaps not *ad infinitum* but quite likely *ad nauseam*.

136 The Final Award in the present case, however, disclosed another potential facet of a tribunal being overly concerned with avoiding a due process challenge. It was clearly apparent from the structure of the award and reading it that the Arbitrator's *predominant* aim was to avoid being set aside, rather than focusing on resolving the parties' dispute in a satisfactory manner in an award that was not only reasoned but equally – if not more importantly – simple to read and understand. A glance at the table of contents of the Final Award (set out below) is indicative that the Arbitrator's main focus in structuring the award was to ensure that he had addressed every issue or sub-issue that the parties had raised, to obviate any risk that he might be criticised for leaving even one stone unturned:[71]

[71] 1ACB at p 97.

137 Although a tribunal does have a general duty to provide reasons for its decision (see Art 31(2) of the Model Law), it has recently been observed by the Court of Appeal that the law does not hold arbitrators to the same standard of reasoning that is imposed on judges (see *CVV and others v CWB* [2024] 1 SLR 32 ("*CVV v CWB*") at [33]). However, and at the risk of stating the obvious, the fact that a different, or even lower, standard may be observed does not mean that there is *no* standard at all. While arbitrators are to be commended for seeking to be comprehensive in their awards, that should not be an end in itself especially if the resultant end product is a twisted, mangled mess – brevity as well as ease of reading and understanding ought to be the ultimate objective of any tribunal's award. Furthermore, even if it might be that minimal curial

intervention means that the inadequacy of a tribunal's reasons are by itself insufficient to set aside an award (see *CVV v CWB* at [34]), it would be a regrettable state of affairs if tribunals and arbitrators were to interpret the absence of formal legal sanction or consequence as *carte blanche* to be cavalier, flippant or lackadaisical in the clarity of their reasoning in awards.

138 As I mentioned at [31] above, the Final Award did sail close to the wind. However, as I found that it had not crossed the line so as to warrant curial intervention, I dismissed Swire's application.

139 Finally, after hearing the parties, I fixed costs of the application in Ace Exim's favour in the sum of $17,000 (inclusive of disbursements).

S Mohan
Judge of the High Court

Lok Vi Ming SC, Mohammad Haireez bin Mohameed Jufferie, Tan Kah Wai and Thong Ying Xuan (LVM Law Chambers LLC) (instructed), Ang Kaili and Shannon Yeo Feng Ting (Virtus Law LLP) for the applicant;
Tan Boon Yong Thomas and Lieu Kuok Poh (Haridass Ho & Partners) for the respondent.