TMM Division Maritima SA de CV *v* Pacific Richfield Marine Pte Ltd
[2013] SGHC 186

Case Number : Originating Summons No 178 of 2012/E

Decision Date : 23 September 2013

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Vivian Ang, Andrew Chan and Paul Tan (Allen & Gledhill LLP) for the Plaintiff; Haridass Ajaib and Subashini Narayanasamy (Haridass Ho & Partners) for the Defendant.

Parties : TMM Division Maritima SA de CV — Pacific Richfield Marine Pte Ltd

Arbitration – Arbitral tribunal – Jurisdiction

Arbitration – Award – Setting aside

23 September 2013 Judgment reserved.

Chan Seng Onn J:

Introduction

1 However good or bad in the eyes of a party, the decision of an arbitral tribunal with the requisite jurisdiction is final and binding. This general proposition of law is a manifestation of the fundamental principle of *interest reipublicae ut sit finis litium* or finality in proceedings. Arbitration will not survive, much less flourish, if this core precept is not followed through by the courts. The integrity and efficacy of arbitration as a parallel dispute resolution system will be subverted if the courts appear unable or unwilling to restrain themselves from entering into the merits of every arbitral decision that comes before it. As is well-established under Singapore arbitration jurisprudence, the power to intervene in arbitrations generally, and more specifically to set aside awards, must and should only be exercised charily, in accordance with the rules under the applicable arbitral framework.

2 Although parties have a right and expectation to a fair arbitral process and the courts should give maximum effect to these safeguards in deserving cases, parties must not be encouraged to dress up and massage their unhappiness with the substantive outcome into an established ground for challenging an award. Particularly for international commercial arbitrations under the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"), it is imperative that an application to set aside an award under s 24 read with Art 34(2) of the UNCITRAL Model Law for International Commercial Arbitration 1985 ("Model Law") is not a guise for a rehearing of the merits. Unfortunately, as this case exemplifies, sieving out the genuine challenges from those which are effectively appeals on the merits is not easy under the present law.

Facts

Background

3 Originating Summons No 178 of 2012 is an application to set aside an arbitral award ("the Award") made in respect of two arbitrations which were consolidated ("the Arbitration"). The

Arbitration arose out of a dispute over the sale and purchase of two second-hand vessels, namely, the "*The Pacific 18*" and "*The Pacific 38*" (individually the "Vessel" and collectively the "Vessels").

The Memorandum of Agreement

4 On 24 September 2008, more than a month after negotiations commenced, Grupo TMM SAB ("Grupo TMM") entered into two Memoranda of Agreement ("MOAs") with Pacific Richfield Marine Pte Ltd ("PRM") for the purchase of the Vessels from PRM, one Memorandum of Agreement ("MOA") for each vessel. The MOAs were signed after the Vessels' classification records had been inspected between 16 August 2008 and 20 August 2008.

5 Each MOA was accompanied by, *inter alia*, two addenda, a specification describing the capabilities of each Vessel (collectively "the Specifications"), and a schematic diagram of each Vessel. Addendum No 2 [note: 1] provided that Grupo TMM shall novate the MOA to its subsidiary, TMM Division Maritima SA de CV ("TMM"). Thus, for all intents and purposes, TMM was the buyer and PRM was the seller of the Vessels.

6 Addendum No 1, the more crucial of the two addenda, stated that each Vessel shall be delivered with the repairs in the attached spreadsheet completed and accomplished at PRM's account and cost. Essentially, the two spreadsheets (collectively "the Spreadsheets") contained the items in each Vessel which TMM wanted to be repaired before delivery. [note: 2] There were a total of 16 items in the spreadsheet for *The Pacific 18*, and eight items for *The Pacific 38*.

7 One of the key repairs sought was the restoration of the Vessels to Dynamic Positioning (DP) System 1 (DP-1) Class notation and for the American Bureau of Shipping ("ABS") to classify them with the DP-1 Class notation. This was listed as Item 1 on the Spreadsheets. It is common ground that at the time the Vessels were inspected prior to the signing of the MOAs, and at the time of entering into the MOAs, the Vessels were neither equipped with a DP-1 system nor did their Class certificates contain a DP-1 Class notation.

8 TMM paid US$5.15m, 10% of the purchase price of the Vessels ("the Deposit"), into an escrow account with E S Platou (Asia) Pte Ltd ("Platou"). The delivery date for the Vessels was 7 November 2008.

The Notice of Readiness

9 The clauses in the MOAs which are particularly relevant to this dispute are cll 5(a), and 11. They provide:

> 5. Notices, time and place of delivery
>
> a) The Sellers shall keep the Buyers well informed of the Vessel's itinerary and shall provide the Buyers with 05 days, and 01 days notice of the delivery estimated time of arrival at the intended place of drydocking/underwater inspection/delivery. When the Vessel is at the place of delivery and in ***every respect physically ready for delivery*** in accordance with this Agreement, the Sellers shall give the Buyers a written Notice of Readiness for delivery. Such Notice of Readiness shall only be given in the period between the hours of 1800 hrs Mexican time on a Sunday and 1700 hrs Mexican time on a Wednesday during any such period that falls within the delivery spread as stated in Line 60 herein.
>
> ...

11. Condition for delivery

The Vessel with everything belonging to her shall be at the Sellers' risk and expense until she is delivered to the Buyers, but subject to the terms and conditions of this Agreement she shall be *delivered and taken over as is where is, but as she was at the time of inspection, fair wear and tear excepted*. However, the Vessel shall be delivered physically ready with her class maintained without condition/recommendation, free of average damage affecting the Vessel's class, and with her classification certificates valid for 3 months after delivery and national certificates, as well as all other certificates the Vessel had at the time of inspection, valid and unextended without condition/recommendation by Class or the relevant authorities at the time of delivery. ...

"Inspection" in this Clause 11, shall mean the Buyers' inspection, according Clause 4 a) or 4 b), if applicable, or the Buyers' inspection prior to the signing of this Agreement. If the Vessel is taken over without inspection, the date of this Agreement shall be the relevant date.

[original emphasis omitted; emphasis added in italics and bold italics]

10 Thus, the issuance of a valid Notice of Readiness for delivery of the Vessels ("NOR") pursuant to cl 5(a) of the MOAs is an important step in the transaction as it obliges the buyer to take delivery of the Vessels. This in turn affects the date on which the buyer is obliged to make payment of the balance purchase price, a matter governed by cl 3 of the MOA which reads:

The said deposit and the 90% balance of the Purchase Price shall be paid in full free of bank charges to an account with the Seller's nominated bank on the date of closing and delivery of the Vessel and simultaneously with the delivery of all closing / delivery documentation as mutually agreed in this MOA, but not later than 36 hours ~~3 banking days~~ after the Vessel is in every respect physically ready for delivery in accordance with the terms and conditions of this Agreement and Notice of Readiness has been given in accordance with Clause 5.

11 On 28 October 2008 (Mexican Time), PRM issued a NOR which reads: [note: 3]

On behalf of the Sellers, we hereby give you Notice of Delivery of the vessels. The vessels presently ready for delivery at mile 20 offshore Veracruz, Mexico in every respect ready for delivery. The present coordinates of the vessel are as follows reported at 17:00 hours on 28th October 2008 Mexican Time:

Pacific 18 Latitude 19-29.15N and Longitude 095-54.92W Pacific 38 Latitude 19-29.0N and Longitude 095-54.1W

In accordance with the said Memoranda of Agreement please take delivery of the vessels and make payment of the balance purchase price and R.O.B. Our lawyers in Singapore Haridass Ho & Partners are ready with all closing documents to close this transaction.

12 The NOR was promptly rejected by TMM on 29 October 2008. In an email to PRM, [note: 4] TMM explained that the NOR was not valid as TMM had not received evidence that the items in the Spreadsheets had been repaired. The Vessels were therefore not, in TMM's view, in every respect physically ready, as required under cl 5(a) of the MOAs.

13 A series of emails were then exchanged between the parties' respective solicitors on or about 31 October 2008. The first was from PRM's solicitors, Haridass Ho & Partners ("HHP"), stating that

PRM treated TMM's rejection of the NOR as a repudiatory breach of the MOAs which PRM accepted. PRM nevertheless reiterated that it had complied with the terms of the MOAs, and despite having accepted TMM's purported repudiation, offered the latter a chance to purchase the Vessels on the same terms as per the MOAs. [note: 5]

14 This was followed by a response from TMM's solicitors, Allen & Gledhill LLP ("A&G"), in which TMM denied that it had breached the MOAs by rejecting the NOR. A&G pointed to cl 5(a) of the MOAs and highlighted that the Vessels were not in every respect physically ready given that the repairs in the Spreadsheets had not yet been completed. In particular, ABS had not yet classified *The Pacific 18* with DP-1 Class notation. A&G noted that PRM's wrongful rejection of TMM's refusal to accept the NOR was itself a repudiation of the MOAs. In these circumstances, TMM reserved its right to accept PRM's repudiation but was prepared to await a valid NOR for the Vessels. [note: 6]

15 HHP responded, maintaining PRM's position that TMM had repudiated the MOAs. It added that TMM's superintendents were on board the Vessels throughout the repairs at the dry dock and shipyard and had inspected all the works. On the DP-1 Class notation, PRM's stance was that the ABS had inspected the DP-1 systems, and arrangements had been made to issue the DP-1 Class notations. That was the extent of PRM's obligation. [note: 7]

16 On 1 November 2008, A&G again stressed that the Vessels were not physically ready in every respect as they had not been classed with DP-1 Class notation, which was an express term under the MOAs. Other equipment on *The Pacific 18* were also not functioning. Nevertheless, TMM remained ready to perform the MOAs as long as PRM tendered a valid NOR for the Vessels. [note: 8]

17 The impasse remained. On 9 November 2008, A&G informed HHP that as the time for delivery of the Vessels was 7 November 2008 and PRM had not issued a NOR for the Vessels, PRM had repudiated the MOAs. Consequently, TMM accepted PRM's repudiation and demanded PRM's consent to the release of the Deposit held by Platou to TMM. [note: 9]

The Arbitration

18 PRM did not consent to Platou releasing the Deposit to TMM. Eventually, on 9 December 2008, TMM commenced the Arbitration against PRM claiming, *inter alia*, that the Deposit be released to TMM as well as damages arising from PRM's alleged repudiatory breach of the MOAs. The parties initially appointed Mr Thean Lip Ping as the sole arbitrator ("Mr Thean"). However, Mr Thean withdrew subsequently because of an unforeseen event. Mr G P Selvam ("the Arbitrator") was then appointed as the sole arbitrator on 21 December 2010.

The Memorandum of Issues

19 The parties' arguments have to be read together with the Memorandum of Issues ("MOI") for the separate arbitrations concerning each of the Vessels which, at that time, had not been consolidated. This only happened on 7 February 2011, after the Arbitrator was appointed. Each MOI was drawn up by Mr Thean in consultation with the parties. [note: 10] The most important section of each MOI for the purposes of these proceedings, headed "Main Issues", sets out the main issues in the dispute for each Vessel, albeit it was expressly stated to be neither exhaustive nor immutable. [note: 11] It also provided that the arbitrator, in his discretion, might rely on or refer to additional issues or facts in arriving at his decision.

20 Save for a couple of minor issues which were peculiar to *The Pacific 18*, the MOIs for both disputes were for most parts identical. In effect, there were 11 broad issues in dispute in the Arbitration. Restated, these included:

(a) Whether the NOR was valid and in compliance with the MOA. In particular, whether:

(i) PRM was obliged to arrange for the ABS to issue a class certificate for the Vessels with DP-1 Class notation at the time of delivery;

(ii) PRM was obliged to ensure that the DP system on each vessel was functioning and operating, and if there was such an obligation, whether the DP system was in fact functioning and operating;

(iii) all the repairs in the Spreadsheets were completed by PRM; and

(iv) PRM failed to allow TTM's representatives to physically witness the repairs.

(b) Whether TMM's refusal to accept PRM's NOR was in breach of the MOAs, and if so, whether such breach amounted to a repudiatory breach.

(c) If TMM was not in breach or repudiatory breach of the MOAs, whether PRM was in repudiatory breach of the MOAs in the circumstances that occurred between 28 October 2008 and 7 November 2008.

(d) The relief to be awarded to either party for the other's breach, if any, including the question of who the Deposit should be paid to.

21 It was apparent from the MOI, as well as the parties' submissions, that the validity of the NOR was central to the dispute. More specifically, the key factual issues with respect to the validity of the NOR were whether the Vessels were, at the time the NOR was issued, classed by ABS with DP-1 Class notation, and whether the DP-1 system on board each vessel was functioning and operational.

TMM's case in the Arbitration

22 TMM framed its submissions according to the list of issues in the MOIs. Each issue was argued comprehensively, with the closing [note: 12] and reply submissions [note: 13] totalling 320 pages, including annexes. On the central issue of the validity of the NOR, TMM's arguments before the Arbitrator were:

(a) The Specifications described the Vessels as having DP-1 capability, DP-1 equipment, and DP-1 Class notation. [note: 14]

(b) In addition to the Specifications, PRM had a duty to ensure that the items in the Spreadsheets were repaired at the time of delivery. This duty was more than a goodwill gesture as claimed by PRM; it was a contractual obligation under the MOAs. [note: 15]

(c) Flowing from the above, the requirement under cl 5(a) of the MOAs that the Vessels be "in every respect physically ready for delivery" had two aspects. First, the Vessels must fit the description in the Specifications, particularly those related to the DP-1 system. [note: 16] Second, the repairs in the Spreadsheets, particularly those related to the DP-1 system, must be

completed. The DP-1 system must not only be functioning and operational, the Vessels must be certified by ABS with a DP-1 Class notation. [note: 17] The Vessels were only physically ready in every respect if these two aspects were satisfied.

(d) The Vessels were not physically ready in every respect when the NOR was issued.

(i) For *The Pacific 18*, there was no evidence to show that the DP-1 Class notation had been restored. A Confirmation of Class certificate issued by ABS dated 28 October 2008 in fact contained all the notations except the DP-1 Class notation. [note: 18] There was also no evidence that the DP-1 system was functioning. Several parts of the system such as the fan beam, acoustic tracking system, and certain sensors had not been tested. [note: 19]

(ii) For *The Pacific 38*, there was similarly no Class certificate issued by ABS restoring the DP-1 Class notation at the time the NOR was issued. The DP-1 Class notation was eventually restored only on 5 November 2008. [note: 20] Further, the DP-1 system was not functioning as the trials on 22 October 2008 showed that there were defects with certain parts of the DP-1 system. Other parts had also not been tested. [note: 21]

PRM's case in the Arbitration

23 PRM denied that it had breached the MOAs, and sought in its counterclaim for an order that Platou release the Deposit to PRM. PRM's position on the issue of the validity of the NOR was that the Vessels did not have to be delivered with DP-1 capabilities, or need to be certified as such by ABS. PRM referred to cl 11 of the MOAs (see [9] above).

24 PRM contended:

(a) Following from the phrase "as is where is" in cl 11, the Vessels only needed to be in the same condition as they were at the time of inspection. [note: 22] The items in the Spreadsheets could not impose on PRM new conditions. [note: 23] PRM also buttressed this position by stating that it had communicated to Platou when returning the Spreadsheets that it would rectify the items in the Spreadsheets "as owner's goodwill" but that the items were not additional obligations under the MOAs as the MOAs were entered into on an "as is where is" basis. [note: 24]

(b) Following from the phrase "delivered physically ready with her class maintained without condition/recommendation" in cl 11, the Vessels were physically ready if their Class certificates were valid and were the same certificates which were on the Vessels when they were first inspected in late August 2008. [note: 25] At the time of delivery, the certificates available were the same as those present during the initial inspection. They were also valid till 1 June 2010, beyond the required three months after delivery under cl 11 of the MOAs.

(c) PRM also did not have an obligation to deliver the Vessels in a fully operational condition. In the negotiations leading up to the MOAs, TMM had insisted on the words "fully operational" upon delivery to remain in the MOAs but PRM wanted them removed. They were ultimately removed. As such, it was agreed that the condition of the Vessels at delivery needed only to match the condition at the time of inspection. [note: 26]

(d) Even if "physically ready" in cl 5(a) of the MOAs meant that PRM had to deliver the Vessels with the requisite Class certificate and fully functioning DP-1 systems, PRM's failure to do so

amounted at most to a breach of an intermediate term, not a condition. TMM might be entitled to damages, but it was not entitled to refuse to take delivery of the Vessels. [note: 27]

(e) The Confirmation of Class certificates for the Vessels which were sent to TMM by PRM confirmed that the status of the Vessels at that time was the same as on the date of the initial inspection. [note: 28]

The Award

25 The Arbitrator's decision was contained in an award which was released to the parties on 28 November 2011 ("the Award"). Spanning 62 pages and 151 paragraphs, the Award dismissed TMM's claims in respect of both *The Pacific 18* and *The Pacific 38*, and allowed PRM's counterclaim for the Deposit to be released by Platou to PRM. On the validity of the NOR, the Arbitrator made, *inter alia*, the following findings and conclusions:

39. The evidence before the Tribunal clearly established that as of 29 October 2008 MT [Mexican Time], the Claimants had not (a) deliberately put in place the financial arrangements for the payment of the 90% balance of the purchase price of the Vessels to be parked with DBS Bank as they said they would, (b) taken any measures for the underwater inspection of the Vessels while the Vessels were in drydock in Veracruz or afloat in port water in Veracruz before the Respondents tendered their delivery of the Vessels; (c) made any arrangements with ABS for the supervision of the underwater inspection by divers or (d) made any arrangements for their Master and crew to take possession of the Vessels on their behalf [*sic*]

... [Correspondence between HHP and A&G on behalf of their clients as well as correspondence between DBS Bank and A&G omitted]

47. In the result, the Claimants never paid nor demonstrated their ability to pay the balance of the purchase price of the Vessels as promised and resolutely refused to take delivery of the Vessels. They say that the Respondents were in repudiatory breach of the MOAs. ...

...

86. ... [T]he Claimants during the hearing and in post hearing submissions suggested that the sale of the Vessels might be "sale by description". The Tribunal cannot accept this argument or submission. "Sale by description" is a term of art in English law of sale of goods. According to English law of sale of goods, where a second hand chattel such as *The Pacific 18* or *The Pacific 38* is sold after inspection and acceptance by the buyers ... and is to be "delivered and taken over, but as she was at the time of inspection", the sale is not a sale by description. *It is an "as is where is" sale. It remains to be so even if the seller agrees to make certain improvements to the goods. ... In this case, the Claimant inspected the Vessels and their Class Certificates. They were fully and perfectly aware that at the time of inspection and contract, the Vessels were not equipped with the DP (Dynamic Position) System and the Class Certificates did not bear a DP Notation.* That was why they stipulated Item 1 in the Spreadsheets of both Vessels. ***It is a collateral warranty.*** *More importantly, the Claimants did not stipulate in Clause 17 of the MOAs which read with Clause 8 is a condition precedent, that the Class Certificates must bear a DP notation*. ...

...

95. Firstly, as a matter of construction of the MOAs, the Tribunal holds with moral certainty

that Clause 3 read with Clause 5 and Clause 8 read with Clause 17 are condition precedents. ...

96. Secondly, also as a matter of construction, Clauses 13 and 14 of the MOAs provide the situation where one party is in breach of the obligation stated in those clauses, the other party is entitled to cancel the MOAs and claim the deposits and damages.

...

98. *Fourthly, the Tribunal holds that Clause 11 is not a condition or condition precedent. It is a n innominate term to use the phraseology of Hirst J in The Aktion (see below). It is an independent convenant, contract or agreement to use the termilogy* [*sic*] *of Blackburn J in Bettini v Gye, the breach of which by the Sellers does not entitle the Buyers to terminate the MOAs and consider themselves discharged from further liability.* ***It is a collateral warranty*** .

99. *Fifthly, ... the parties did not view the MOAs as "sale by description", but "as is where is" basis. The Buyers agreed to purchase the Vessels in the condition they found them when they inspected the Vessels and the condition according to the basic ABS Class Certificates and other documents relating to the conditions of the Vessels which are specified in Clause 17.1.* The words in Clause 5 "in every respect physically ready for delivery" mean actual physical condition in contrast to documentary condition according to the documents. The Vessels must not only be ready in every respect as stated in the classification and other documents listed in Clause 17.1 but also as a matter of physical state.

...

104. The Tribunal shall now address Clause 11 in the MOAs for its meaning and effect. To do this, it is necessary to refer to the decision of Hirst J (later Hirst L.J.) in *Aktion Maritime Corporation of Liberia v S. Kasmas & Brothers Ltd and others, The "Aktion"* [citation omitted]. ...

... [Summary of the facts and decision in *The "Aktion"* omitted]

109. The result in *The "Aktion"* case was that the rejection of the notice of readiness was wrongful. The sellers were entitled to the deposit and damages because the market price of the ship was below the contract price at the time of rejection.

...

112. *The Tribunal is of the view that the logic of Hirst J in The "Aktion" and Blackburn J in Bettini v Gye stated above should be applied to Clause 11 of Saleform 1993 as it appears in the MOAs. That is to say, the Buyers are not entitled to reject the notice of delivery on the ground that the vessel's physical condition did not comply with Clause 11 assuming that to be the case. In other words, in order to reject the notice of readiness and claim the deposits under Clause 14, the Buyers must prove that the Sellers did not comply with Clause 3 read with Clause 5 and Clause 8 read with Clause 17*.

...

115. *The Tribunal will now consider whether the Respondent had satisfied the requirements under the MOA to earn and be entitled to the deposits held by Platou. In this regard, the Tribunal must have in the forefront of its mind the fact that the sale of the two Vessels under the terms and conditions of the MOAs was to be performed by the delivery of the Vessels and the*

documents specified in Clause 17. Included in the list of documents are the bills of sale the delivery of which transfers property in the Vessels to the Buyers. *Also included in the list are class certificates and other national and international certificates which make the vessels legally fit in every respect to navigate and function as offshore, support, towing and fire-fighting Vessels. There must be some objective criteria which qualify them as such vessels. The Parties agreed that the ABS Classification Society and not the Claimant or the Respondent would make that determination.* ***ABS surveyed the Vessels and certified them to be fit and functioning*** *.* ***... It is not the case of the Claimant that the documents listed in Clause 11.1 were false in that respect*** .

...

117. ***In the circumstances, the Tribunal reiterates that the contents of Clause 11 including Addendum No. 1 and the contents of the Spreadsheets do not constitute a condition precedent. In so holding, the Tribunal adopts and applies the logic of Hirst J in The "Aktion" as to the meaning and effect of Additional Clause 18 in that case. Accordingly, as a matter of law, the Claimants in this arbitration were not entitled to rely on Clause 11 to reject the Notices of Delivery*** .

118. In the circumstances, having considered all the documents and evidence, the Tribunal finds, holds and declares for a certainty that the Respondents as Sellers had discharged their obligation to earn and be entitled to the payment of the purchase price of both Vessels on 28 October 2008 (MT) plus 36 hours.

[original emphasis omitted; emphasis added in italics and bold italics]

26 Notwithstanding his conclusion that the obligation to repair the items in the Spreadsheets was not a condition but a collateral warranty, the Arbitrator nevertheless found that the items which TMM claimed were not repaired in its initial letter rejecting the NOR were in fact repaired by 28 October 2008. TMM had surfaced seven items which it claimed were not repaired on *The Pacific 18*, and one item in relation to *The Pacific 38*. The Arbitrator found that all the items were repaired by referring to two ABS Statement of Fact Survey dated 5 November 2008 (collectively "the ABS Surveys") [note: 29] confirming that those items were operational. Although the ABS Surveys were dated 5 November 2008, the Arbitrator accepted that the contents were true and reflected the condition of the Vessels on 28 October 2008 when the NOR was issued. [note: 30]

The present proceedings

27 Dissatisfied, TMM commenced the present application on 27 February 2012 to set aside the Award on two grounds, namely: [note: 31]

(a) pursuant to s 24(*b)* of the IAA, that a breach of the rules of natural justice occurred in connection with the making of the Award by which TMM's rights have been prejudiced; and

(b) pursuant to Art 34(2)(*a*)(iii) of the Model Law, that the Award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration.

Parties' submissions

TMM's written submissions

Breach of the rules of natural justice

28 The rules of natural justice which Ms Vivian Ang ("Ms Ang"), first counsel for TMM, claimed were breached were (a) that TMM lacked an opportunity to be heard, and (b) that the Arbitrator was apparently biased.

(1) Lack of opportunity to be heard

29 Ms Ang gave a host of reasons why TMM was not given an opportunity to be heard, chief of which were:

(a) First, whether cl 11 of the MOAs was a condition or warranty was not raised in the pleadings or MOI. Thus, no arguments were presented by TMM on that issue. Yet, the Arbitrator examined that issue on his own and relied on it in coming to his decision. [note: 32]

(b) Second, the Arbitrator disregarded TMM's evidence relating to its financial standing and ability to pay the balance purchase price. TMM had adduced much evidence to show that it could complete the purchase, but the Arbitrator had overlooked or did not deal with that evidence. There was also no mention in the Award of the evidence adduced by TMM. [note: 33]

(c) Third, the Arbitrator disregarded evidence from TMM's broker which, in TMM's view, confirmed its assertion that PRM had agreed to effect all the repairs as listed in the Spreadsheets. The Arbitrator also completely ignored and failed to deal with evidence from PRM's own witness who allegedly admitted during cross-examination that PRM was selling the Vessels as described in the Specifications which expressly stated that the Vessels had DP-1 capabilities. [note: 34]

(d) Fourth, the Arbitrator did not refer to any of the statements given by TMM's 11 witnesses. On the face of the Award, it appeared that the Arbitrator had paid no heed to the statements of TMM's witnesses and reached his conclusions without considering that evidence. [note: 35]

(e) Fifth, the Arbitrator ignored TMM's evidence on the physical condition of and the defects existing in the Vessels at the time of the issuance of the NOR. He chose to sweep all that evidence aside and rely solely on the ABS Surveys despite TMM's evidence to the contrary. [note: 36]

(f) Sixth, the Arbitrator held that the repairs on *The Pacific 38* were completed because he mistook the FiFi pump, a type of fire-fighting equipment, for the Harbour Generator.

(2) Apparent bias

30 Ms Ang again provided a plethora of reasons why a reasonable person would develop a reasonable suspicion that the Arbitrator was biased. These include:

(a) The cross-examination of PRM's two factual witnesses raised serious doubts as to their credibility. One gave evidence on a document which he had never seen before while the other contradicted his witness statement. However, the Arbitrator accepted the evidence from those witnesses as if there was nothing untoward about it and made no mention of these discrepancies in his Award. [note: 37]

(b) The Arbitrator mentioned in the Award that there was ample material in the form of documentary evidence to conclude that all the repairs were successfully completed. However, he did not state what those documentary evidence were. The ABS Surveys which the Arbitrator accepted as evidence that the challenged items had been repaired also did not contain any statement attesting to the state of the Vessels before 5 November 2008. The Arbitrator also ignored the testimonies of PRM's own witnesses to the effect that certain repairs were not completed until after the NOR was issued. In short, he blindly accepted the confirmations in the ABS Surveys as determinative of the issue. [note: 38]

(c) The Arbitrator had a preconceived notion that TMM's witnesses were not credible or truthful. This was manifested by his finding that TMM had deliberately not put in place the financial arrangement for the payment of the balance purchase price, a finding which went directly against the evidence given by TMM's witnesses. [note: 39]

(d) Although the Arbitrator was an experienced adjudicator, he committed an inordinate number of egregious errors of fact and law. It was not that these errors themselves found a basis for setting aside. Rather, these errors were indicative of an apparent bias.

(i) For instance, the Award provided several seemingly conflicting interpretations of the phrase "in every respect physically ready" under cl 5(a). At one point, the Award stated that what was required to be physically ready was the actual physical condition in contrast to the documentary condition. At another point, the Award stated that the mere tendering of the classification certificate was sufficient to prove the actual physical state. [note: 40]

(ii) Another example was the Arbitrator's conclusion that TMM had manifestly repudiated the MOAs by failing to make payment of the balance purchase price before the expiry of 36 hours after the NOR was issued. This was illogical as TMM could not have made payment, even if it wanted to, as PRM had, in its reply, accepted TMM's purported repudiation of the MOAs even before the expiration of the 36 hours. [note: 41]

(iii) Last but not least, the Arbitrator confused and conflated the rejection of a NOR with the termination of the MOAs. TMM had a right to reject the NOR if the Vessels were not physically ready in every respect. [note: 42] The Arbitrator did not seem to have understood or tried to understand TMM's case that it was not terminating the MOAs by rejecting the NOR. [note: 43]

Issues falling outside the scope of submission

31 Ms Ang only raised one argument under this ground. She submitted that whether cl 11 of the MOAs was a condition which if breached entitled PRM to terminate the MOAs was not an issue before the Arbitrator. It was not in any of the pleadings or the MOI. In finding that cl 11 was not a condition such that TMM was not entitled to reject the NOR even if there was a breach of cl 11, the Arbitrator had determined an issue which was not in the terms of reference. He had therefore exceeded his authority as arbitrator. [note: 44]

PRM's written submissions

32 Mr Haridass Ajaib ("Mr Ajaib"), counsel for PRM, began his submissions with the established

principle that the court should not sit as an appellate tribunal over the Arbitrator. The grounds for challenging the Award must be construed narrowly and strictly. In this regard, TMM's application must fail as the alleged breaches of natural justice raised by TMM were vague, lacked contour, or fell outside the grounds for setting aside an award. [note: 45]

33 Mr Ajaib divided his submissions into two categories. The first was whether cl 11 of the MOAs was a condition was properly before the Arbitrator. He argued that it was for the following reasons: [note: 46]

(a) It was part of the issue under paragraph 15(6) in the MOI, *viz*, whether TMM was entitled to reject the NOR. In any event, the MOI itself stated that the issues listed were neither exhaustive nor immutable, and the arbitral tribunal could "in its discretion" rely on additional facts or law which were necessary to decide the dispute.

(b) Apart from the MOI, it was clear from the parties' pleadings that whether TMM was entitled to reject the NOR was a live issue.

(c) PRM's closing submissions addressed whether cl 11 was a condition. TMM had ample opportunity – 21 days – to address this in its reply submissions but it chose not to do so.

34 The second category was on whether breaches of the rules of natural justice had occurred. Mr Ajaib submitted that none had occurred as:

(a) The Arbitrator's treatment of the evidence was proper. He did not deprive TMM of an opportunity to be heard nor was he apparently biased as:

(i) The Arbitrator had the power under Art 19 of the Model Law to conduct the arbitration in such manner as he considered appropriate, including determining the admissibility, relevance, materiality and weight of any evidence. [note: 47]

(ii) The mere fact that the Arbitrator did not list or make explicit reference to TMM's witnesses did not mean that he had disregarded its evidence. Indeed, the Arbitrator had expressly stated in the Award that he had considered both parties' submissions and evidence. [note: 48] The allegation that the Arbitrator had preconceived views about TMM's witnesses was also vague, frivolous, bare and meaningless. [note: 49]

(iii) Even if there was a disregard of TMM's submissions and evidence, that was not a ground for setting aside an award. It is trite law that even if the arbitral tribunal was manifestly unreasonable in coming to a conclusion, as long as it had conducted the arbitration fairly, the court should not be concerned with the substantive outcome. [note: 50]

(b) The Arbitrator had not made the egregious errors alleged by TMM. Even if there were numerous egregious errors, such errors cannot be raised as a ground for setting aside an award. [note: 51]

35 Mr Ajaib concluded his written submissions by reiterating that the court's role is not to retry issues. He urged the court to protect the finality of arbitration proceedings by adhering to the policy of minimal curial intervention. [note: 52]

Oral submissions

Oral submissions

36 The oral arguments for these proceedings stretched over several days, during which TMM's counsel made substantial arguments in addition to their written submissions. I shall briefly summarise the thrust of those submissions.

37 First, Ms Ang stated that the heart of the issue on the validity of the NOR comprised three elements: (a) whether or not the Vessels were in fact in every respect physically ready; (b) whether or not TMM's rejection of the NOR was justified; and (c) whether or not TMM's rejection of the NOR amounted to a repudiatory breach. [note: 53] One of the elements which the Arbitrator did not address was the law on repudiation. According to Ms Ang, the law on repudiation is that a person should not accept what he thinks is a repudiatory breach unless it is so plainly obvious that the other party has repudiated. [note: 54] Even if the items in the Spreadsheets had all been repaired, the Arbitrator ought to have considered whether TMM had evinced such an unambiguous intention not to perform the MOAs before concluding that TMM had repudiated the MOAs. [note: 55] He did not. [note: 56] She stressed that on the face of the NOR and the surrounding circumstances, there could be no inference of an intention by TMM to repudiate the MOAs. [note: 57] In other words, there was a "missing link" in his reasoning. [note: 58]

38 Second, Mr Andrew Chan ("Mr Chan"), second counsel for TMM, clarified that the issues raised by Ms Ang and himself not only showed apparent bias. They also showed that the Arbitrator had disregarded TMM's submissions or failed to try to understand them, thereby depriving TMM of a right to be heard. [note: 59] While an arbitral tribunal is not expected to understand all submissions put forth by counsel, Mr Chan stressed that the law requires the arbitral tribunal to show that it has attempted t o understand the submissions. If the arbitral tribunal did not even try to comprehend the submissions, and swept them under the carpet as if they were not there, that would have deprived the party making the submissions of the opportunity to be heard. [note: 60]

Issues

39 TMM's submissions on the right to be heard and apparent bias had numerous overlaps. It was not clear when a submission went towards establishing the breach of one rule or the other or both. To be fair to both Ms Ang and Mr Chan, the same facts can often sustain both grounds. Thus, putting aside the labels, the two major complaints of TMM can be broadly characterised as:

(a) The Arbitrator had breached the rules of natural justice by disregarding and ignoring TMM's submissions; and/or not fully explaining his reasons for his conclusions; and/or making findings which were not in issue before him and/or not applying his mind fully to the issues before him. [note: 61]

(b) The Arbitrator had exceeded his jurisdiction by determining an issue which was not listed in the MOI, that is, the issue of whether cl 11 of the MOAs was a condition which if breached entitled PRM to terminate the MOAs.

40 TMM's arguments on natural justice can be further grouped into four categories, each establishing an independent duty of the arbitral tribunal:

(a) the duty to give reasons and explanations;

(b) the duty to attempt to understand the parties' submissions;

(c) the duty to deal with every argument presented; and

(d) the duty to not look beyond the parties' submissions.

41 I must point out that in addition to natural justice, TMM's arguments in categories (c) and (d) actually straddled another ground for challenge, *viz*, excess of jurisdiction pursuant to Art 34(2)(*a*)(iii) of the Model Law. This is because arbitral awards that fail to deal with issues that should have been dealt with, or dealt with more issues than ought have been dealt with are *infra petita* and *ultra petita* respectively: *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (Emmanuel Gaillard and John Savage eds) (Kluwer Law International, 1999) at para 987. Although there is no Singapore decision that explicitly states that awards *infra petita* may be challenged under Art 34(2)(*a*)(iii), it would appear from the Court of Appeal's decision in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 ("*CRW*") at [31] and [33] that Art 34(2)(*a*)(iii) covers such awards. As such, I will deal with the arguments on both the natural justice and excess of jurisdiction bases.

Analysis

General principles for curial scrutiny

42 When a challenge is brought against an award, the court has a duty to entertain and engage the challenge. That is what the IAA and Model Law provide and that is what the court must do. If the complaint against the award is that the arbitral tribunal did too much or did not do what it was supposed to do, regardless of whether one couches the challenge under natural justice or excess of jurisdiction, the court is effectively asked to review the actions or inactions of the arbitral tribunal. Invariably, the court must look at the evidence on the record to determine the merits of the challenge. However, it does not follow, and neither do I accept, that this process *always* entails sifting through the entire record of the arbitral proceedings with a fine-tooth comb.

43 In the seminal decision of *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*"), the Court of Appeal cautioned (at [65(c)–(f)]):

> … [F]airness justifies a policy of minimal curial intervention, which has become common as a matter of international practice. To elaborate, minimal curial intervention is underpinned by two principal considerations. First, there is a need to recognise the autonomy of the arbitral process by encouraging finality, so that its advantage as an efficient alternative dispute resolution process is not undermined. Second, having opted for arbitration, parties must be taken to have acknowledged and accepted the attendant risks of having only a very limited right of recourse to the courts. It would be neither appropriate nor consonant for a dissatisfied party to seek the assistance of the court to intervene on the basis that the court is discharging an appellate function, save in the very limited circumstances that have been statutorily condoned. Generally speaking, a court will not intervene merely because it might have resolved the various controversies in play differently.
>
> …
>
> … It must always be borne in mind that 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; rather, an award should be read generously such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied.

44 To that I would add the observations in the English High Court case of *Atkins Limited v The Secretary of State for Transport* [2013] EWHC 139 (TCC) where Akenhead J stated [at 36]:

> I consider that it is very important that, where the Court is asked to conduct an exercise to determine whether or not in reality and substance an arbitrator has failed to deal with all the issues put to it within the meaning of Section 68(2)(d), *the Court is not required to carry out a hypercritical or excessively syntactical analysis of what the arbitrator has written*. This is particularly so where the arbitrator in question is not only eminent and highly respected in his field but also has immense legal experience in the relevant field of law concerned. *In a clear and obvious case, of course the Court will find that the ground exists and can then move on to consider whether or not the circumstances merit interfering with the award*. [emphasis added]

45 The court should not nit-pick at the award. Infelicities are to be expected and are generally irrelevant to the merits of any challenge: see *IRB Brasil Resseguros SA v CX Reinsurance Company Ltd* [2010] EWHC 974 (Comm) ("*IRB Brasil*") at [47]. In *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 ("*Zermalt*"), Bingham J stated (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. [emphasis added]

46 Bingham J's statement has been cited with approval in numerous English decisions and represents the prevailing approach in England: see for *eg*, *ABB AG v Hochtief Airport GmbH and another* [2006] 2 Lloyd's Law Rep ("*Hochtief*") at [64]; *IRB Brasil* at [31]; and *Fidelity Management SA & Ors v Myriad International Holdings BV & Or* [2005] EWHC 1193 (Comm) at [2].

47 It should also not be forgotten that one of the main reasons for choosing arbitration is the fact that arbitrators are commercially minded persons with expertise and experience with the subject-matter which may be extremely technical. Their value to the parties comes from their knowledge of the trade, and not necessarily their knowledge of the law. Some may have a legal background, but the legislation and rules usually do not prescribe a law degree or training as a prerequisite for appointment as an arbitrator. This is not a suggestion that a lower standard is expected of such arbitrators but a reminder that if parties have agreed to appoint specific individuals to preside over their disputes, they should be held to their agreement to the fullest extent possible.

48 There may be a potential objection to the general use of English authorities which I might as well dispose of now. I am cognisant that the English arbitration regime is governed by the English Arbitration Act 1996 ("1996 Act") and not the Model Law. The 1996 Act is – it could be said – a different creature from the Model Law. For that reason, some might consider English decisions as unhelpful, and that regard should be had instead to other common law jurisdictions which have adopted the Model Law such as Australia, Malaysia and Hong Kong.

49 I accept all of that. Nevertheless, while it would be justified to treat English decisions on arbitration with some degree of caution, to ignore them completely would be throwing the baby out with the bathwater. The 1996 Act was, after all, drafted with close regard to the Model Law: see Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* (February 1996) (Chairman: Lord Justice Saville QC) (the "*DAC Report*") at para 4. There are therefore numerous similarities in language and philosophy. That is also why the English courts occasionally refer to the

Model Law: see for *eg Sovarex SA v Romero Alvarez SA* [2011] 2 Lloyd's Rep 320; and *Sea Trade Maritime Corporation v Hellenic Mutual War Risks Association (Bermuda) Ltd (The "Athena")* [2006] 2 Lloyd's Rep 147. Good judicial common sense should dictate whether an English decision should be of meaningful persuasive value. If an issue falls to be decided under the 1996 Act in the same way and under the same principles that would apply under the Model Law and IAA, I can see no reason militating against a Singapore court having regard to a decision of the English court on that point.

50 On the intensity of curial scrutiny, the prevailing English approach is undoubtedly instructive because it is informed by the principle of minimal curial intervention which is similarly, if not equally, forceful in England (see the *DAC Report* at para 22; and *Lesotho Highlands Development Authority v Impregilo SpA and others* [2006] 1 AC 221 at [26]–[27]) as it is in Singapore (see *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 ("*Tjong*") at [29]). Similarly, the English arbitration cases on natural justice are also useful as the concept of natural justice under the English arbitration regime is not any different from that under the Singapore arbitration regime.

Excess of jurisdiction

The law

51 The law on setting aside an award on the ground of excess of jurisdiction under Art 34(2)(*a*)(iii) of the Model Law is relatively settled. It has been clearly explained in a handful of Court of Appeal decisions, the most recent being *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 ("*Kempinski*"). According to the wording of Art 34(2)(*a*)(iii), there is an excess of jurisdiction if the arbitral tribunal deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or decides on matters that are outside of the scope of the submission to the arbitration. Although "matters" is not defined in the Model Law, the Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi*"), in interpreting Art 34(2)(*a*)(iii), held (at [37]) that the arbitral tribunal "has no jurisdiction to decide any *issue* not referred to it for determination" [emphasis added]. Thus, the determination of an issue which has not been submitted to arbitration will also render that part of the award liable to be set aside under Art 34(2)(*a*)(iii).

52 In some cases, whether a particular matter or issue in dispute has been submitted to the arbitral tribunal is contentious. Sometimes, as in the present case, the parties will submit a memorandum of issues. However, that may not be exhaustive proof of the matters that are within the arbitral tribunal's jurisdiction. In the first place, memoranda of issues may contain catch-all provisions which give arbitral tribunals the discretion to decide on matters which are not expressly listed. Indeed, in the present case, the MOI conferred on the Arbitrator the discretion to rely on additional facts or law which are necessary to decide the dispute. Furthermore, as stated in *Kempinski* at [33], pleadings and its contents are also relevant as they illuminate the matters that have been submitted to the arbitral tribunal. In fact, *Kempinski* recognised (at [47]) that "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". Hence, an issue which surfaces in the course of the arbitration and is known to all the parties would be considered to have been submitted to the arbitral tribunal even if it is not part of any memorandum of issues or pleadings.

53 Last but not least, even if a party is able to show that the arbitral tribunal exceeded its jurisdiction pursuant to Art 34(2)(*a*)(iii) of the Model Law, the award may still not be set aside. The crucial question in every case, as the Court of Appeal puts it in *CRW* at [32], is "whether there has been real or actual prejudice to either (or both) [or all] of the parties to the dispute". As the editors

of Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) stated at para 10.40 (which was cited by the court in *CRW* with approval at [32]), "[t]he significance of the issues that were not dealt with has to be considered in relation to the award as a whole".

The facts

54 I cannot agree with Ms Ang's submission that the Arbitrator did not have the jurisdiction to determine whether cl 11 of the MOAs was a condition or not. Paragraph 15 of the MOI sets out the *main* issues in the arbitration: [note: 62]

> **Main Issues**
>
> 15. Without limiting the scope of the Cases of the Claimant and the Respondent respectively, on the basis of Parties' written Statements and in consultation with the Parties, the Tribunal identifies the following as the main issues in this arbitration:
>
> …

55 The words in paragraph 15 of the MOI suggest that the issues set out in the MOI are intended to assist in the identification of the *main* areas of contention. The list is inclusive, rather than exclusive or exhaustive. Paragraph 16 erases any doubt to the contrary:

> 16. For avoidance of doubt, the main issues as stated above are neither exhaustive nor immutable, and subsequently, additional issues of fact or law may arise, which the Tribunal, in its discretion, may deem necessary in deciding its arbitral award.

56 In my view, TMM's case is untenable for these reasons alone. But even if the issues in the MOI were exhaustive, I would have found that whether cl 11 amounted to a condition or not was an issue which would fit comfortably into the sixth issue in the list which reads:

> (6) Whether the Claimant's notice dated 29 October 2008 refusing to accept the Respondent's Notice of Delivery dated 28 October 2008 as a valid Notice of Readiness for the delivery of [the Vessels] was in breach of the MOA, and *if it was, whether such breach amounted to a repudiatory breach*.
>
> [emphasis added]

57 The parties had, pursuant to issue (6), asked the arbitral tribunal to determine whether TMM's refusal to accept the NOR was a repudiatory breach. In these circumstances, it was certainly open to the Arbitrator, in reading issue (6), to take the view that he ought to determine whether cl 11 was a condition because that would have a bearing on the question of whether TMM had repudiated the MOAs. Moreover, it is clear from the parties' submissions in the Arbitration that the nature of cl 11 was in issue. TMM in fact made reference to those submissions in its submissions before me. [note: 63] Last but not least, for the reasons mentioned at [67]–[69] below, it is beyond question that the nature of cl 11 was always in issue between the parties. The Arbitrator therefore did not exceed his jurisdiction as understood under Art 34(2)(*a*)(iii).

Rules of natural justice

58 It is trite that natural justice demands faithful observance of the two famous maxims, *audi*

alteram partem and *nemo iudex in causa sua*. However, what does affording an opportunity to be heard exactly entail? Does it require the arbitral tribunal (a) to give parties a chance to respond to every single argument raised by their opponents or every factual and legal premise which the arbitral tribunal intends to rely on, and (b) to address all the arguments canvassed and evidence its consideration by explaining why it accepted or rejected each argument? Similarly, does the rule against being a judge in his own cause preclude an arbitrator from forming an opinion before the conclusion of the arbitration and if he does so, must he recuse himself?

59 These are painstakingly obvious questions. Yet, the law in Singapore has not developed clear answers, albeit it has provided some broad guiding principles. In *Soh Beng Tee*, the Court of Appeal surveyed decisions on natural justice from multiple Commonwealth jurisdictions, and summarised (at [65]) a list of principles which the court should have regard to when confronted with a natural justice challenge to an award. These include:

(a) Arbitrators who exercise unreasonable initiative without the parties' involvement may attract serious and sustainable challenges.

(b) The failure of an arbitrator to refer every point for decision to the parties for submissions is not invariably a valid ground for challenge. A court *may* only intervene in instances where:

(i) the impugned decision reveals a dramatic departure from the parties' submissions;

(ii) involves an arbitrator receiving extraneous evidence;

(iii) adopts a view wholly at odds with the established evidence adduced by the parties; or

(iv) the conclusion is unequivocally rejected by the parties as being trivial or irrelevant.

(c) The arbitral tribunal is entitled to embrace a solution or conclusion which lies somewhere in between the parties' submissions. It is not bound to take an either/or approach. The arbitral tribunal may do so even without apprising the parties of its thinking or analysis, so long as it is based on evidence that is before the arbitral tribunal. It is only where the arbitral tribunal's reasoning involves a dramatic departure from what has been presented to it that the arbitral tribunal should consult the parties on its thought process before finalising the award.

60 In my view, the emphasis in *Soh Beng Tee* is on the *extent* of departure from the evidence and submissions before the arbitral tribunal without any advance notice. The more surprising the decision and its reasoning – *ie* the more inexplicable it is in the light of the evidence and submissions – the more likely it is that the arbitral tribunal has crossed from permissible discretionary decision-making into the forbidden territory of impermissible breach of natural justice. In terms of practical application, the question remains: what is – in the words of the court in *Soh Beng Tee* – a "dramatic departure" or "unreasonable initiative" by the arbitral tribunal? What is the level of departure or unreasonableness beyond which it can be said that the rules of natural justice have been breached?

61 Perhaps it is because the requirements of natural justice ultimately depend on the circumstances of each case (*Russell v Duke of Norfolk* [1949] 1 All ER 109 at 113) that the test for when the line has been crossed is inherently vague. To borrow the words of Ungoed-Thomas J in *Lawlor and Others v Union of Post Office Workers* [1965] Ch 712 at 718, the content of the rules of natural justice is generally "lacking in precision".

62 Nevertheless, I shall attempt to delineate the content and scope of the four sub-rules of natural justice relied upon by TMM (see [40] above). I should re-state at the outset that TMM recycled some of the factual allegations across multiple sub-rules. In the interest of avoiding excessive repetition, I have placed the allegations under the sub-rule which in my view best encapsulates the heart of the argument.

Duty to not look beyond submissions

(1) The law

63 In *Pacific Recreation Pte Ltd v SY Technology Inc* [2008] 2 SLR(R) 491, the Court of Appeal held (at [30]) that a court or arbitral tribunal might be in breach of the rules of natural justice if it decided a case on a ground not raised or contemplated by the parties. That is uncontroversial. There is, however, a nuanced difference between deciding the dispute on a ground that has never been expressly raised or contemplated, and deciding the dispute on a premise which, though not directly raised, is reasonably connected to an argument which was in fact raised. In this regard, I gratefully adopt the observation of Tomlinson J in *Hochtief* at [72]:

> I do not consider that the duty to act fairly required the tribunal *to refer back to the parties its analysis of the material and the additional conclusion which it derived from the resolution of arguments as to the essential issues which were already squarely before it*. In my judgment, ABB had had a fair opportunity to address its arguments on all of the essential building blocks in the tribunal's conclusion.
>
> [emphasis added]

64 There is also some support from the New Zealand High Court's decision in *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452 ("*Rotoaira*") which was cited favourably in *Soh Beng Tee* at [57]. After a survey of English and New Zealand cases, the court in *Rotoaira* stated (at 463):

> …
>
> (e) In the absence of express or implied agreement to the contrary, the arbitrator will normally be precluded from taking into account evidence or argument extraneous to the hearing without giving the parties further notice and the opportunity to respond.
>
> (f) The last principle extends to the arbitrator's own opinions and ideas *if these were not reasonably foreseeable as potential corollaries of these opinions and ideas which were expressly traversed during the hearing*.
>
> (g) On the other hand, *an arbitrator is not bound to slavishly adopt the position advocated by one party or the other*. It will usually be no cause for surprise that arbitrators make their own assessments of evidentiary weight and credibility, pick and choose between different aspects of an expert's evidence, *reshuffle the way in which different concepts have been combined*, make their own value judgments between the extremes presented, *and exercise reasonable latitude in drawing their own conclusions from the material presented*.
>
> (h) *Nor is an arbitrator under any general obligation to disclose what he is minded to decide* so that the parties may have a further opportunity of criticising his mental processes before he finally commits himself.

(i) It follows from these principles that *when it comes to ideas rather than facts, the overriding task for the plaintiff is to show that a reasonable litigant in his shoes would not have foreseen the possibility of reasoning of the type revealed in the award*, and further, that with adequate notice it might have been possible to persuade the arbitrator to a different result.

…

[emphasis added]

65 I accept that there might be – and probably are – authorities suggesting the contrary. There is no uniformity in the authorities on the extent to which the arbitral tribunal may decide a pleaded issue using premises not argued by the parties but which were reasonably connected to arguments canvassed by the parties. The interpretation of authorities is further compounded by the fact that natural justice cases almost inevitably turn on the individual facts of the case. Nevertheless, the foundational principle which courts should not lose sight of is that parties who choose arbitration as their preferred system of dispute resolution must live with the decision of the arbitrator, good or bad. Commercial parties appoint arbitrators for their expertise and experience, technical, legal, commercial or otherwise. These arbitrators cannot be so straightjacketed as to be permitted to *only* adopt in their conclusions the premises put forward by the parties. If an unargued premise flows reasonably from an argued premise, I do not think that it is necessarily incumbent on the arbitral tribunal to invite the parties to submit new arguments. The arbitral tribunal would be doing nothing more than inferring a related premise from one that has been placed before it.

(2) The facts

66 As mentioned earlier in the context of Art 34(2)(*a*)(iii) of the Model Law (see [54]–[56]), I disagree with the submission that the Arbitrator had, in determining the nature of cl 11 of the MOAs, dealt with an issue outside of the scope of submissions. I also disagree with the submission that because the point that cl 11 was a warranty, and not a condition or innominate term, was not part of either party's submissions, the Arbitrator's determination that cl 11 was a collateral warranty occasioned a breach of the rules of natural justice.

67 First, at the very least, as TMM conceded in its written submissions in these proceedings, whether cl 11 was a condition or an innominate term was an issue before the Arbitrator: [note: 64]

3 3 . *After stating at paragraph 98 of the Award that Clause 11 was an innominate or intermediate term, the Tribunal then referred to Clause 11 as a collateral warranty [references omitted]. The Tribunal knowing the difference in the legal nature of the term appears to have contradicted itself and characterised Clause 11 as both an innominate or intermediate term and a warranty*.

34. In fact, the Defendant [PRM] at ***paragraph 485*** of its Closing Submissions very helpfully sets out the difference in the classes of contractual terms. "A warranty is a term, breach of which sounds in damages but does not terminate, or entitle the other party to terminate, the contract. An innominate or intermediate term is one, the effect of non-performance of which the parties expressly or (as is more usual) impliedly agree will depend upon the nature and the consequences of breach."

35. The Tribunal has contradicted itself and made an inconsistent finding on Clause 11 without giving any reasons as to why Clause 11 was a warranty.

> 36. Further, it was neither party's case that Clause 11 was a warranty. ***The Defendant [PRM] sets out clearly at paragraph 33 of its Closing Submissions that Clause 11 was an intermediate or innominate term.*** The Tribunal in finding that Clause 11 was a warranty had ignored all the parties' submissions and went to make a determination on its own.
>
> [emphasis added in italics and bold italics]

68 Curiously, although TMM stated that "it was neither party's case that Clause 11 was a warranty", the converse is actually true. In the same paragraph 485 of PRM's submissions that TMM cited, PRM made it clear that its case was that cl 11 was not a condition, but either a warranty or an innominate term which had the effect of a warranty: [note: 65]

> 485. In *Bunge Corporation v. Tradex Export SA* [citation omitted] … a decision of the English House of Lords ably summarises the law relevant to *our case on whether the terms of the MOA and Addendum No. 1 is a condition, or a* ***warranty*** *or an innominate term*. …
>
> [Extracts from cases on conditions, innominate term and warranties omitted]
>
> 486. We submit that on the basis of the law as set out here, *one cannot treat any alleged breach of the Respondents as a breach of condition of the MOAs*. What each party knew when they entered into the MOAs and subsequently to Addendum No. 1 and in particular if one asks: 'well if some of the items in Addendum No. 1 were not done, can the Claimants throw up the contract and refuse to perform or should they only have a claim in money to put right what the Respondents had not completed in that list of repairs', *the answer is obvious. It must result in a claim for money alone*. …
>
> 487. Further, see [citation omitted] where the law as to what are *conditions*, ***warranties*** *and intermediate terms* are set out. …
>
> …
>
> 491. If the learned Arbitrator does not consider Addendum No. 1 as a collateral contract then, ***it is submitted, that Addendum No. 1*** does not represent conditions under the contract as understood by the English Sale of Goods Act 1979 but ***are warranties*** , the breach of which does not entitle the Claimants to reject the Vessels and treat the contract as repudiated.
>
> …
>
> [emphasis added in italics and bold italics]

69 I could go on. Indeed, there is an entire section entitled "Warranties and Conditions" [note: 66] that comes shortly after the above extracted paragraphs. Thus, not only was the nature of cl 11 in issue, it was expressly part of PRM's case that the breach of cl 11 did not entitle termination of the MOAs because cl 11 was a warranty. This is not even a case where the impugned argument is only reasonably connected to and not actually part of any party's submissions. It is curious and ambitious of TMM to submit that the issue of whether cl 11 was a warranty was never in issue in the Arbitration.

70 But even if TMM was right, and the only issue which *it* had put before the Arbitrator was whether cl 11 was a condition or innominate term, I do not think that it can be said that the Arbitrator, in deciding that cl 11 was a collateral warranty, had deprived TMM of its right to be heard.

TMM's submission as can be inferred from the extract above appears to be that because its case had restricted the possibility of cl 11 being either a condition or an innominate term *simpliciter*, the Arbitrator was bound to find that cl 11 was an innominate term if he did not think that it was a condition. I cannot see the principle or logic behind this restraint. The finding that cl 11 was a collateral warranty was not only reasonably connected to the arguments raised by both parties; it was a reasonable follow-through from his finding that cl 11 was not a condition.

71 Accordingly, I reject the argument that the Arbitrator's determination that cl 11 was a warranty had deprived TMM of its right to be heard.

Duty to deal with every argument presented

(1) The law

72 An arbitral tribunal is not obliged to deal with every argument. It is neither practical nor realistic to require otherwise. Toulson J summed up neatly the extent of the arbitral tribunal's obligation in *Ascot Commodities NV v Olam International Ltd* [2002] CLC 277 at 284 (see also *Hochtief* at [80]):

> … Nor is it incumbent on arbitrators to deal with *every argument on every point raised. But an award should deal, however concisely, with all* ***essential*** *issues*.
>
> [emphasis added in italics and bold italics]

73 All that is required of the arbitral tribunal is to ensure that the *essential issues* are dealt with. The arbitral tribunal need not deal with each *point* made by a party in an arbitration: *Hussman (Europe) Ltd v Al Ameen Development and Trade Co* [2000] 2 Lloyd's Rep 83 ("*Hussman*") at [56]. In determining the essential issues, the arbitral tribunal also should not have to deal with *every* argument canvassed under each of the essential issues.

74 What then is considered "essential"? This is not easy to define. Notwithstanding, in my view, arbitral tribunals must be given fair latitude in determining what is essential and what is not. An arbitral tribunal has the prerogative and must be entitled to take the view that the dispute before it may be disposed of without further consideration of certain issues. A court may take a contrary view *ex post facto*, but it should not be too ready to intervene.

75 It may be queried whether the line between issues and arguments is too fine. I do not think so. An argument is a proposition that inclines towards a specific conclusion. It typically contains reasons or premises, either factual or legal or both, which are presented as driving one towards a particular conclusion. An issue, on the other hand, is a topic. It is non-prescriptive, and usually expressed as a question.

76 In proposing that the issue should be determined in its favour, a party may submit different arguments that could operate cumulatively or independently. As long as one argument resolves the issue, there is no justification for insisting that the arbitral tribunal go on to consider the other arguments which have been rendered academic. In *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 ("*SEF*"), Judith Prakash J held (at [60]) that "[n]atural justice requires that the parties should be heard; it does not require that they be given responses on all submissions made." I completely agree. It is the right to be heard and not a right to receive responses to all the submissions or arguments presented that is protected. Although *SEF* was about a curial review of an adjudicator's decision under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed), I find that it applies equally to arbitrations.

77 It should be emphasised that an issue need not be addressed expressly in an award; it may be implicitly resolved. Resolving an issue does not have to entail navigating through all the arguments and evidence. If the outcome of certain issues flows from the conclusion of a specific logically prior issue, the arbitral tribunal may dispense with delving into the merits of the arguments and evidence for the former. Using a claim in tort as an example, if the arbitral tribunal has found that there is no duty of care, it follows of course that there can be no breach of a duty of care and consequently, damages. The arbitral tribunal is not obliged to pursue a moot issue and consider the merits of either the standard of care or the claim for damages.

(2) The facts

78 The Arbitrator dealt with all the essential issues. The dispute between the parties was over the purported repudiation of the MOAs. The essential issues were therefore those which touch on whether TMM's actions amounted to a repudiation of the MOAs and if so, whether the repudiation was justified. Hence, once the Arbitrator took the position that PRM's failures in respect of the repairs (if any) only amounted to a breach of a warranty and not a condition, TMM was accordingly not entitled to reject delivery of the Vessels. TMM's rejection of the NOR and refusal to take and complete delivery therefore amounted to a wrongful repudiation of the MOAs. Thus, the essential issues were addressed.

79 Although TMM submitted the Arbitrator did not deal with certain issues, the resolution of those issues flowed from his decision on other issues. It was therefore not necessary for him to expressly deal with those issues. It was not essential that the Arbitrator expressly rendered a decision on the issues of whether PRM was obliged to (a) arrange for ABS to issue a class certificate with DP-1 Class notation for the Vessels, [note: 67] and (b) ensure that the DP system was functioning and operational. [note: 68] This is because he had already found that the Vessels were sold "as is where is" and not "by description". In other words, because the Vessels did not have DP-1 capabilities at the time of purchase, the operability of the DP-1 system and its classification were inconsequential to TMM's right to reject to the NOR. In the Arbitrator's view, the obligation to effect the repairs listed in the Spreadsheets, including the DP-1 system, was not a condition. He set out his explanations at, *inter alia*, paragraphs 86, 99 and 117 of the Award.

80 TMM had one more arrow in its bow (see [37] above). Ms Ang argued that the Arbitrator did not determine whether TMM had evinced an unambiguous intention not to perform the MOAs which is the test for repudiation. In my judgment, the Arbitrator *did* deal with this issue. At paragraphs 119 to 123 of the Award, he explained that TMM's wrongful rejection of the NOR coupled with its failure to make funds available to pay the balance 90% purchase price evinced an unequivocal intention not to perform the MOAs. In his words, TMM "failed to prove they had the wherewithal to honour their contractual obligations". [note: 69] To this, Mr Chan and Ms Ang then argued that the Arbitrator did not explain how TMM's obligation to make funds available had arisen in the first place, thereby making its failure to do so a repudiatory breach. Apparently, the complaint is that TMM's obligation to make funds available to complete the transaction had not arisen at the point that the Arbitrator said it had repudiated the MOAs because the deadline of 36 hours to tender the balance of the purchase price had not passed. If TMM was not obliged to make payment at the time of its rejection of the NOR, the fact that it did not do so cannot be evidence of repudiation. That is how I understood Ms Ang and Mr Chan's submissions. [note: 70]

81 I struggled with this submission because it was clear in the Award that the Arbitrator stated that the parties had *agreed* to pay the balance 90% purchase price into an account with the Development Bank of Singapore ("DBS"). [note: 71] Mr Chan protested that the Arbitrator was simply

reciting facts and not making any finding. When I suggested that the language used by the Arbitrator was more imperative rather than descriptive, Mr Chan then said that the Arbitrator's statement did not amount to a finding of an obligation as "it only says an agreement." [note: 72] With respect, this submission is difficult to follow. The Arbitrator's statement was:

> 23. As to the payment of the 90% of the purchase price, the Claimants *agreed to place* the funds in an escrow account with DBS Bank, Singapore, to whom the Vessels were mortgaged. In fact, Mr. Angel Diaz, the point man and principal representative of the Claimants, who was handling the purchase, *personally attended* before the offices of DBS Bank *to accomplish this*.
>
> [emphasis added]

82 It is clear that the Arbitrator's statement was referring to cl 3 of the MOAs which states that: [note: 73]

> … 90% balance of the Purchase Price *shall be paid* … to an account with the Seller's nominated bank … *on the date of closing and delivery* of the [Vessels] … *but not later than 36 hours after the [Vessels are] in every respect physically ready for delivery* …
>
> [emphasis added]

83 The Arbitrator interpreted cl 3 of the MOAs as requiring TMM to ensure the 90% of the purchase price was paid to PRM's account in DBS on the date of closing and delivery but no later than 36 hours after the issuance of the NOR, *viz*, 28 October (Mexican Time) or 29 October (Singapore Time). It is not disputed that TMM was not going to place any funds with DBS because the allegedly remaining defective items in the Spreadsheets were not fully repaired according to TMM. Until those defective items were repaired, TMM was not going to make any payment. Since PRM was taking the position that the requirements in Addendum No 1, and more importantly the completion of the repairs in the Spreadsheets, were not a condition for delivery and since PRM was also disputing whether the items were defective as alleged, the on-going stalemate would necessarily result in no funds being placed by TMM with DBS in any event, whether or not TMM was minded to wait out the 36 hours or longer, after receiving a rejection of its NOR. In short, from the perspective of PRM, TMM was never going pay the balance of 90% of the purchase price based on the NOR as issued and TMM was clearly refusing to take delivery. As a matter of fact, no funds were parked in PRM's DBS account at any time within that material window. In that context, and without descending into the merits of the Arbitrator's construction of the payment obligation in the MOAs which appears to be of a type which is fairly standard in the industry (see Iain Goldrein QC *et al*, *Ship Sale and Purchase* (Informa, 6th Ed, 2012) at para 5.17.1), it seems incongruous that TMM could argue there was no operative payment obligation which the Arbitrator could have pegged his conclusion of repudiatory breach onto. Parenthetically, it bears noting that in its closing submissions in the Arbitration, TMM had actually stated:

> In the present case, if which is denied, the NOD was a valid notice of readiness, the Claimants [TMM] *would be required to make payment under Clause 3 of the MOAs within 36 hours*. If they did not do so within this time, they would be in breach. As the NOD was given on 28 October 2008 at 1806hrs (Mexico Time), the Claimants had until 0606hrs on 30 October 2008 (Mexico Time) *to make payment before the Claimants [TMM] would be in breach*.
>
> [emphasis added]

84 To close the loop, TMM also argued that it refused to make payment pending its request for the

repairs to be completed *first* because it would otherwise lose interest on funds parked in a suspense account. [note: 74] TMM's position was that the Arbitrator had completely ignored this in his conclusion. I do not agree. The Arbitrator construed the agreement as imposing a "strict obligation" [note: 75] on TMM to ensure that funds were transferred into PRM's DBS account. Accordingly, the reasons why TMM did not make funds available within 36 hours of the presentation of the NOR, or the fact that it had funds available elsewhere which TMM said showed that it had the wherewithal to complete the transaction, are beside the point. The Arbitrator found that no funds were made available within the requisite window as required by cl 3 of the MOAs. This led the Arbitrator to then conclude that TMM had displayed an intention to repudiate the MOAs. It should also be mentioned that cl 13 of the MOAs states that "should the Purchase Price not be paid in accordance with Clause 3, the Sellers have the right to cancel the Agreement …".

85 As the transcripts show, the real core of the submission which Ms Ang was driving at is that the Arbitrator had misunderstood the law on repudiation: [note: 76]

> Ms Ang:… appreciate the approach that Your Honour is taking and where you are coming from which I think goes to the heart of the issues in this case *whether or not the vessel was in fact ready for delivery at that time and whether or not the notice of rejection of the delivery was justified or not justified and whether or not the action in rejecting the notice of delivery was a repudiatory breach. That is the key point which the Tribunal did not consider.* ***He just jumped to the conclusion that's it's a condition – it's not a condition precedent and therefore you cannot reject a notice of delivery*** . ***And if you follow that line or argument, then in no case can a buyer reject a notice of delivery because it's never a condition precedent. So in every case when buyer were to do that, he immediately runs the risk of repudiating the contract which the cases and the authority showed is wrong. It's not the position in law.*** But more critically following through from that, the last issue which the Arbitrator had to consider is, even if he was right that the defects, as you say, were all remedied at the time, did our action in setting out our rejection of the notice of delivery where we identified all the things that we thought were not completed and, in particular, we did mention the DP system although contrary to my learned friend's point that we didn't, whether we were justified in rejecting the notice of delivery and if there was justification, whether that conduct amounted to a repudiatory breach in law? *And that's the whole area that the Tribunal failed to – to consider. And in order to consider whether that action was repudiatory, the background facts are critical, Your Honour.* ***The background circumstances*** *, both vis-a-vis the buyers and the project that they bid for, the buyers and the steps they were taking towards completion of the delivery of the vessel are critical because it* ***shows that we were not repudiating the contract*** . We were actually taking steps to complete it ***but for the fact*** **that there were these defects** and the defects are very clear from the evidence of the – the sellers themselves, not even our evidence, their own evidence.
>
> So there were many things which the Tribunal ignored which is why we said the Tribunal only chose to come to – how we say it is the Tribunal had already made up its mind that because of the financial crisis, we were not going to perform this contract and therefore the arguments in this award was tailored towards justifying that conclusion. But he failed to consider very critically on that score as well that, financially, the buyers had the wherewithal to purchase.

[emphasis added in italics and bold italics]

86 Even if the Arbitrator had misapplied the law on repudiatory breach, that does not justify setting aside the Award. It cannot be the law that every time there is an error of law, the arbitral tribunal must be taken to have ignored the submissions of the party which is relying on that error. In any event, for reasons which I shall elaborate on (see [94]–[96] below), it is also not accurate for TMM to claim that the Arbitrator did not consider whether TMM's actions and conduct amounted to a repudiatory breach.

87 For the above reasons, I cannot agree with Ms Ang's submission that the essential issues were not addressed.

Duty to attempt to understand submissions

(1) The law

88 The relevant authority cited to me by TMM on this point is Andrew Ang J's decision in *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 ("*Front Row*"). [note: 77] The gist of the plaintiff's case in *Front Row* was that the arbitrator had disregarded its case by ignoring two representations in its counterclaim for misrepresentation in the arbitration. The arbitrator had disregarded the representations as he took the view that the plaintiff had abandoned reliance on the two representations by the close of its case, a finding which the plaintiff characterised as "inexplicable". After perusing the pleadings and submissions, Ang J agreed with the plaintiff that it had not abandoned the representations. The arbitrator was therefore in breach of the *audi alteram partem* rule by dismissing the counterclaim without considering the plaintiff's arguments on the other representations.

89 In arriving at his decision, Ang J found attractive a series of Australian decisions on building adjudication which proposed that natural justice requires the adjudicator to "attempt to understand and address the issues"; "[endeavour] to understand and deal with the issues": see *Timwin Construction v Façade Innovations* [2005] NSWSC 548; and *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394. I have no difficulty agreeing with the proposition that to ensure that the right to be heard is effectively safeguarded, an arbitral tribunal must demonstrably have at least attempted to comprehend the parties' arguments on the essential issues. However, it is also clear that the inquiry should not be side-tracked by the explicability of a decision *alone*. The inexplicability of the decision is only one factor which goes towards proving that the arbitral tribunal did not in fact properly attempt to consider or comprehend the parties' arguments. As Ang J ultimately concluded in *Front Row* at [39]:

> … [T]he court will look at the *face of the documents* and the tribunal's decision to determine whether the tribunal has in fact fulfilled its duty to *apply its mind* to the issues placed by the parties before it and *considered the arguments* raised.
>
> [emphasis added]

90 Indeed, the central inquiry in all such cases is whether the award reflects the fact that the arbitral tribunal had applied its mind to the critical issues and arguments. Ang J set aside part of the award because he was not persuaded that the arbitrator had "had regard to the submissions of parties and the material before him in arriving at his decision": *Front Row* at [45]. *Front Row* does not stand for the proposition that a decision which is inexplicable is evidence that the arbitral tribunal had necessarily not applied its mind to the parties' submissions. The general principle that errors of law do not found a basis for challenging an award would also be denuded of any significant meaning if the court is too fixated with the explicability of a decision.

91 An assessment of whether the arbitral tribunal had attempted to understand the parties' submissions is effectively an investigation into the inner workings of the respective arbitrator's minds. Ostensibly, the arbitral tribunal may, after applying its mind, fail to comprehend the submissions or comprehended them erroneously, and thereby come to a decision which may fall to be characterised as inexplicable. In my view, such a situation falls short of a breach of the rules of natural justice, particularly when one is cognisant of the diverse types of arbitrators that may be appointed by parties (see [47] above). There is no clear bright line separating a decision which was made without any attempt to understand a party's submissions on the one hand, and a decision which was made with a concentrated attempt which proved futile or ineffective not because of a want of desire to understand on the part of the arbitrator on the other. In the difficult cases, any distinction which can be drawn will invariably be very fine. Hence, it is usually not profitable to refer to the *outcome* of other court decisions as supportive authorities.

(2) The facts

92 TMM claimed that the Arbitrator had not tried to understand its arguments as evidenced by his apparent confusion and conflation of the rejection of the NOR with the repudiation of the MOAs. [note: 78] According to TMM, if the Arbitrator had tried to understand TMM's arguments, he would have realised that TMM's case was that it was rejecting the NOR, and not terminating the MOAs.

93 With respect, I am unable to see the logic of this submission. In the first place, the facts do not support the distinction which TMM has drawn. In the email exchanges between the parties at the relevant time of issuance and subsequent rejection of the NOR (see [11]–[16] above), it was clear that TMM's primary if not sole reason for rejecting the NOR and not taking delivery was its insistence on receipt of evidence that the items in the Spreadsheets were repaired. With PRM insisting that the repairs were not a condition precedent to the issuance of a NOR and that in any event those repairs were completed, if TMM did not want to give the impression that it was stonewalling and did not intend to carry on with the MOAs, it could have accepted delivery of the Vessels and claimed damages if the repairs were indeed incomplete. Instead, it took the position then that on a proper construction of the MOAs with the respective Addendum No 1, the items in the Spreadsheets must be repaired before the Vessels could be said to be physically ready in every respect in accordance with cl 5 of the MOA. In these circumstances, the Arbitrator's view that TMM's continued refusal to accept delivery amounted to a repudiation of the MOAs is not inexplicable.

94 Furthermore, to say that the Arbitrator *ought* to have appreciated the distinction which TMM made had he tried to understand TMM's case, a failure of which amounts to failing to attempt to understand TMM's submissions, is essentially to force the Arbitrator to accept – and not just consider or comprehend – its argument. That goes far beyond the test in *Front Row* which only requires the arbitral tribunal to have applied its mind to the submissions. It is also very different from saying that the Arbitrator had not invested the requisite effort to consider TMM's submissions in arriving at his decision. No 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.

95 The Arbitrator was entitled to hold that by wrongfully rejecting the NOR and insisting that the completion of repairs is a condition precedent to the issuance of a valid NOR, and not having made the requisite funds available to complete the sale, TMM had demonstrated its intention to repudiate the MOAs. While TMM is entitled to draw the distinction between rejecting the NOR and *not* repudiating the MOAs for tactical reasons, that does not foreclose the Arbitrator from continuing with the natural path of the analysis after finding that TMM had wrongfully rejected the NOR, particularly since the issue of whether TMM had committed a repudiatory breach was explicitly listed in the MOI.

Indeed, it is unfathomable that the Arbitrator would have taken the approach and analysis which he did if he had not applied his mind to the essential issues and TMM's submissions.

96 Natural justice only protects the parties' right to be heard. It is an important right that arbitral tribunals must respect diligently and which the courts will protect unreservedly. However, that right does not extend to functioning as a guarantee that the arbitral tribunal *will* comprehend or appreciate the parties' submissions *and* endorse the reasonableness, cogency and appeal of any party's arguments. In so far as that is how I understood TMM's case, I reject the claim that the Arbitrator had failed to attempt to understand TMM's submissions.

Duty to give reasons and explanations

(1) The law

97 The arbitral tribunal is generally bound to give reasons for its decision. This is provided for in Art 31(2) of the Model Law. However, Art 31(2) is silent on the content of this duty. The *travaux préparatoires* to the Model Law too contain minimal elaboration (see *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary General* (25 March 1985) (A/CN.9/264) at pp 65–67; and *Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session* (3–21 June 1985) (A/40/17) at paras 251–252. Nevertheless, it has been suggested that failure to give reasons would be a breach of Art 31(2) and may render the award liable to be set aside or enforcement may be refused on the grounds that it was not in accordance with the arbitral procedure or public policy: Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 3rd Ed, 2009) at para 6-063; and Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) ("*Waincymer*") at para 16.9.1.

98 As far as I am aware, there is no authority in Singapore which directly touches on the scope of an arbitral tribunal's duty to give reasons and explain its decision. There is a suggestion in the High Court decision of *Prestige Marine Services Pte Ltd v Marubeni International Petroleum (S) Pte Ltd* [2012] 1 SLR 917 at [39] that the inadequate provision of reasons by an arbitral tribunal is a mere error of law. I agree with that suggestion and would go on to add that given that it is trite that the court normally does not intervene in an award under the IAA on the basis of errors of law *per se*, it must follow that an allegation of inadequate reasons and explanations is therefore generally not capable of sustaining a challenge against an award. This is so even if one characterises inadequacy of reasons and explanations as a breach of the rules of natural justice.

99 That said, it is obvious that the very concept of adequacy carries with it the idea of a spectrum. On one end resides awards which have no reasons; such awards would be in breach of Art 31(2) of the Model Law and are extremely vulnerable to challenges. Awards at the other end will have comprehensive and cogent reasons. Attempts to challenge these awards on the basis of natural justice are almost certain to fail. Most awards fall in the middle of this spectrum. Viewed in this light, it should be apparent that whilst awards with the barest of reasons can be argued as merely having inadequate reasons, they might not be safe from impeachment. The question thus is this: how much reasons and explanations are required after which any further criticism of inadequate reasons and explanation will not warrant curial intervention?

100 In *World Trade Corporation v C Czarnikow Sugar Ltd* [2005] 1 Lloyd's Rep 422, an issue arose as to whether the arbitral tribunal dealt with the arguments and evidence adequately. While recognising that there is a duty to give reasons, Colman J said (at [8]–[9]):

8. … [Arbitrators] are under no duty to deal with every possible argument on the facts and to explain why they attach more weight to some evidence than to other evidence. *Unless their award is so opaque that it cannot be ascertained from reading it by what evidential route they arrived at their conclusion on the question of fact there is nothing to clarify*. To arrive at a conclusion of fact expressly on the basis of evidence that was before them does not call for clarification for it is unambiguously clear that they have given more weight to that evidence than to other evidence.

9. In this connection, it is *clear that arbitrators are not in general required to set out in their reasons an explanation* ***for each step taken by them*** *in arriving at their evaluation of the evidence* and in particular for their attaching more weight to some evidence than to other evidence or for attaching no weight at all to such other evidence.

[emphasis added in italics and bold italics]

101 In *Bremer Handelsgesellschaft mbH v Westzucker GmbH* (No 2) and others [1981] 2 Lloyd's Rep 130 ("*Bremer*"), Donaldson LJ said (at 132–133):

All that is necessary is that the arbitrators should set out what, on their view of the evidence, *did or did not happen* and should explain succinctly *why*, in the light of what happened, they have *reached their decision* and what that decision is. …

[emphasis added]

102 This was echoed by Thomas J in *Hussman* who held (at [56]) that arbitrators are not obliged to "set out each step by which they reach their conclusion." I agree.

103 The Singapore Court of Appeal's decision in *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676 ("*Thong Ah Fat*") which sets out the scope and content of the *court's* duty to give reasons offers, in my view, an instructive parallel. I note in passing that Professor Jeffrey Waincymer suggests that it is unhelpful to define the content of arbitrators' duty to give reasons by reference to judicial standards: *Waincymer* at para 16.9.3. In support of his view, he referred to the High Court of Australia decision of *Westport Insurance Corporation & Ors v Gordian Runoff Limited* [2011] HCA 37 where Kiefel J stated (at [168]–[169]) that there is nothing in the relevant Australian legislation, the Commercial Arbitration Act 1984, which stipulates that the *standard* for giving reasons in arbitration should be the same as the judicial standard. The same is true of the IAA but as the court in *Thong Ah Fat* held (at [19]), the general duty of a judicial body to explain its decision is ineluctably "a function of due process, and therefore of justice". While there are structural differences between a court and an arbitral tribunal, it cannot be gainsaid that arbitrations are subject to the same ideals of due process and justice. It bears mentioning that Kiefel J concluded that the requirement to give a reasoned award cannot be devoid of content and for that reason, he was content to adopt Donaldson LJ's statement in *Bremer* (see [101] above).

104 Therefore, in my view, the standards applicable to judges are assistive indicia to arbitrators. While the rules of natural justice must be applied rigorously in arbitrations as they are in court litigation, the practical realities of the arbitral ecosystem such as promptness and price are also important (see *Soh Beng Tee* at [63]). On this note, the following are clear from *Thong Ah Fat*:

(a) The standard of explanation required in every case must correspond to the requirements of the case. Costs and delays are relevant factors to consider when determining the extent to which reasons and explanations are to be set out in detail: at [29]–[30].

(b) In "very clear cases" with specific and straightforward factual or legal issues, the court may even dispense with reasons. Its conclusion will be sufficient because the reasons behind the conclusion are a matter of necessary inference: at [32].

(c) Decisions or findings which do not bear directly on the substance of the dispute or affect the final resolution of the parties' rights may not require detailed reasoning. As a rule of thumb, the more profound the consequences of a specific decision, the greater the necessity for detailed reasoning: at [33].

(d) There should be a summary of all the key relevant evidence but not all the detailed evidence needs to be referred to: at [34].

(e) The parties' opposing stance and the judge's findings of fact on the material issues should be set out. However, the judge does not have to make an explicit ruling on each and every factual issue: at [35]–[36].

(f) The decision should demonstrate an examination of the relevant evidence and the facts found with a view to explaining the final outcome on each material issue: at [36].

105 Even if some of an arbitral tribunal's conclusions are bereft of reasons, that is not necessarily fatal. There are a variety reasons why an arbitral tribunal may elect not to say something. In my view, the crux is whether the contents of the arbitral award taken as a whole inform the parties of the bases on which the arbitral tribunal reached its decision on the material or essential issues: *Egil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119 at 122. In this regard, I agree fully with Prakash J's following observation in *SEF* at [60]:

> The fact that the [Adjudicator] did not feel it necessary to discuss his reasoning and explicitly state his conclusions in relation to the third and fourth jurisdictional issues, though unfortunate in that it gave rise to fears on the part of SEF that is points were not thought about, cannot mean that he did not have regard to those submissions at all. It may have been an accidental omission on his part to indicate expressly why he was rejecting the submissions since the Adjudicator took care to explain the reasons for his other determinations and even indicated matters on which he was not making a determination. Alternatively, he may have found the points so unconvincing that he thought it was not necessary to explicitly state his findings. Whatever may be the reason for the Adjudicator's omission in this respect, I do not consider that SEF was not afforded natural justice.

106 There is plainly no requirement for the arbitral tribunal to touch on "each and every point in dispute" in its grounds of decision: *Checkpoint Ltd v Strathclyde Pension Fund* [2003] EWCA Civ 84 at [48]. Last but not least, it bears repeating that as guided by *Thong Ah Fat*, decisions or findings which do not bear directly on the substance of the dispute or affect the final resolution of the parties' rights may not require detailed reasoning.

(2) The facts

107 The complaints under this sub-rule form the principal thrust of TMM's case. At the outset, I do not agree with Mr Ajaib's argument that it is sufficient to meet the rigours of this sub-rule if the arbitral tribunal merely states in its award that it had considered both parties' submissions and evidence, as the Arbitrator did. The court will not allow itself to be side-tracked by such superficialities. However, the Arbitrator did more than that. He summarised the relevant facts and evidence relating to the material issue, [note: 79] *viz*, whether the NOR was wrongfully rejected by

TMM; crystallised the parties' cases on that key issue; [note: 80] and thereafter set out his conclusions on the construction of the Spreadsheets, the MOAs, and the merits of TMM's reliance on a purported breach of cl 11 to reject the NOR. [note: 81] In so doing, the Arbitrator has crossed the minimum standard for giving reasons and explanations which is expected of an arbitral tribunal. While the Arbitrator could have given more reasons by, for example, dissecting the evidence in greater detail; explaining why he preferred one version of events or one witness to another; or explaining why he chose to omit discussion of certain facts, the fact that he did not do any or even all of these must be taken in the round and in the context of an award which has already addressed the key issues. At best, TMM's claims amount to "a criticism of the reasoning, but it is no more than that": see *Hussman* at [57].

108 Most of TMM's arguments target the absence of any mention of specific evidence raised by TMM. It is in that sense that TMM argued that the Arbitrator had failed to give reasons or provide a proper explanation as to why he had omitted to mention those pieces of evidence. For instance, TMM alleged that the Arbitrator did not refer to any of TMM's evidence when he was ascertaining TMM's financial ability and means to complete the purchase. TMM also complained that the Arbitrator ignored TMM's evidence that the Vessels were not repaired at the time of the issuance of the NOR.

109 On whether TMM could have completed the purchase, the Arbitrator stated that he accepted the testimony of PRM's witness who said that he was informed by the principal representative of TMM in the transaction that TMM were unable to complete the purchase because TMM had been adversely impacted by the financial crisis in 2008. [note: 82] On whether the repairs were effected, the Arbitrator had arrived at his conclusion by relying on documentary evidence. In his view, the ABS Surveys showed that the repairs had been effected, [note: 83] and that was sufficient for his purposes. Therefore, contrary to TMM's submissions, the Arbitrator did in fact give reasons for his various conclusions.

110 Whatever may be said about the justification for the Arbitrator's preference for a particular piece of evidence is strictly irrelevant; the court does not exercise appellate jurisdiction over the rightness or wrongness of a substantive decision of the arbitral tribunal in setting aside proceedings under the IAA. The danger of accepting TMM's case is exemplified when the case is brought to its logical extreme. There will be a challengeable deficit of reasons and explanations in most if not all arbitral awards because counsel can always come up with a further "why" question to any reason given for a conclusion. For instance, even if the arbitral tribunal states in its award that it considered a specific witness more credible than another because of their respective demeanour and confidence when responding to questions, it may then be queried in what way the former's demeanour and confidence was more persuasive than the latter; even if that were the case, why does that justify believing the former's evidence over the latter; did the arbitral tribunal compare and weigh the documentary evidence against the oral testimony, and if not, why not; and so on and so forth. Judging from the drift of TMM's arguments generally, it would be surprising if it simply accepted a reason such as one witness appearing more credible than another in terms of demeanour. Therefore, accepting TMM's arguments here would not only do violence to the scheme of the IAA and the Model Law which do not countenance such intrusions (see *Tjong* at [29]), it would also encourage counsel to do precisely what Bingham J in *Zermalt* cautioned courts against doing, *viz* casting a meticulous legal eye and endeavouring to pick holes, inconsistencies and faults in awards (see [45] above). The IAA and the Model Law should not be so exploited.

111 Unpacked, TMM's complaints about the absence of any references to its arguments and evidence in the Award are, in substance, complaints that the Arbitrator *should* not have drawn certain factual inferences (see [29(b)]–[29(f)] above). The nature of the bulk of TMM's submissions is

self-evident: [note: 84]

(1) The Tribunal found that as a matter of English law, no evidence can be admitted on this issue. *However, evidential issues would not be a matter of English law*. It is a matter of procedure, which the Tribunal must allow evidence in to determine the issue which the Tribunal is required to determine. … The Tribunal has ***wrongly excluded evidence*** on an issue …

(2) The Tribunal accepted the Plaintiff's contention that Platou was the broker of the Defendant. *However, the Tribunal chose to entirely ignore the evidence of Platou's representative Mr Robert Henley* … ***on the basis that his evidence was substantially in the nature of a layman's opinion on legal issues and therefore essentially irrelevant or inadmissible*** . … *However, Mr Henley's evidence in cross examination was very pertinent* as to whether or not this deal could have been salvaged from the point of view of a broker. *The evidence is* ***highly relevant*** *to these proceedings and* ***should not have been ignored*** in its totality …

(3) Detailed submissions were made as to what the terms of the MOA comprised and the evidence of the Defendant's Mr Iskandar Dahlan that the Specifications attached to the MOA was to be part of the description of the Vessels. … The Tribunal, however ***totally ignored*** this and ***came to the view at [86] of the Award that this was not a "sale by description"*** . … *[W]ithout explaining why, the Tribunal was of the view that where a second hand chattel such as The Pacific 18 or The Pacific 38 is* ***sold after inspection and acceptance by buyers … is not a sale by description. It is an "as is where is" sale*** . It remains to be so even if the seller agrees to make improvements to the goods. … Apart from the foregoing, the Tribunal does not appear to have addressed this issue directly but indirectly where he held that the Plaintiff was wrong to reject the Respondent's Notice of Delivery and that such an act was a repudiation of the MOA.

(4) By the Defendant's own evidence therefore it would have been physically impossible for the ABS surveyor to have tested all 11 items as they claimed they did. Notwithstanding this the Tribunal completely ignored the Defendant's witnesses own admission and *chose to rely on the ABS report which was clearly questionable*. … *[N]ot a single reason was given … Why was the Tribunal satisfied?* Why did they accept the Defendant's Closing Submissions and not the Plaintiff's? … ***How can the ABS Statement of Fact Survey be accurate when operationally testing the (sic) all the items would have taken more than one hour and the ABS representative was on board for only 20 minutes*** **.**

(5) The Tribunal deals (*sic*) does not deal with this issue [of safety of underwater inspection] at all. Instead, he deals with a separate issue which is not raised at all which is whether or not the place of delivery was a "safe place of delivery" as opposed to a safe place for "underwater inspection". He said [at] [141] of the Award:

> "The Claimants further contended that Mile 20 offshore Veracruz was not a safe place of delivery on 28 October 2008MT. The Tribunal does not agree. Once the place of delivery was changed by consensus of the Parties, Claimants cannot ask for the Vessels to be "delivery and taken over safely afloat at a safe and accessible berth or anchorage" as these words in the MOAs had been deleted. Accordingly, their counterclaim in this point was without merit and is accordingly rejected.

The words delivery and taken over safely afloat at a safe and accessible berth or anchorage are found in Clause 5 of the MOA. … This Clause deals with the place of Delivery and not the place

for underwater inspection. In any case, even if the point as to whether the place of delivery was not a safe place was in issue, the Tribunal has again got it wrong as the words "safely afloat" were not deleted from clause 5(b). … It is therefore submitted that this again is a clear breach of natural justice in that the Tribunal wholly failed to deal with the stipulated issue, dealt with a different issue, and arrived at his decision based on a wrong reading of the MOA which again led to the erroneous decision …

(6) In arriving at this conclusion [that the Claimant had repudiated the MOAs and the Respondent accepted the termination], *the Tribunal has* ***paid no heed to the law or the principles of repudiation*** . … If [the Respondent was] so convinced that the [Claimant] did not have the wherewithal to perform the original MOAs, why would the Defendant want to re-offer the Vessels to them on the same terms …? … *It goes totally against the Tribunal's finding that the [Claimant] was in desperate straits and that they were unable to close and complete the sale because the financial crisis disabled them from doing so*. …

[original emphasis omitted; emphasis added in italics and bold italics]

112 At its highest, TMM's case is basically that the Arbitrator had erred in his findings of fact and/or law which TMM knew does not found a basis for challenge under the IAA and which was why it had to couch its case as a breach of natural justice. This was not a genuine case of the Arbitrator failing to provide sufficient explanations. As was evidenced in its own submissions above, TMM in fact highlighted some of the reasons given by the Arbitrator for his decision. TMM even noted that it was "implied" [note: 85] from the Arbitrator's reasoning that the NOR must have been valid. If TMM could gather the Arbitrator's reasoning from the Award, it cannot be open to them to argue at the same time that it is unclear how the Arbitrator arrived at his decision.

113 There was a point in the oral arguments where counsel were arguing over the Arbitrator's findings that the repairs on the FiFi pump were completed. Ms Ang stated that there was evidence such as certain reports which suggested that the FiFi pump was not working. [note: 86] Mr Ajaib then repeated several times that the ABS Surveys had certified that the FiFi pumps were in order, to which Ms Ang then insisted, without showing any evidence, that the ABS surveyor who had inspected the Vessels did not test the FiFi pumps. [note: 87] Such exchanges were not uncommon, and in my view, symptomatic of the case which TMM was running, *viz*, that the Arbitrator *should* not have made the inferences which he did.

114 The consistent theme in TMM's case, namely, that the Arbitrator "simply [accepted] the ABS certificate and [ignored] all the other evidence showing that the [Vessels] were in fact not physically ready", is not indicative of the lack of reasons. [note: 88] Indeed, the Arbitrator had explained why he chose the ABS Surveys as the yardstick for assessing the state of the repairs: [note: 89]

There must be some objective criteria which qualify them as such vessels. The Parties agreed that the ABS Classification Society and not the Claimant or Respondent would make that determination. ABS Surveyed the Vessels and certified them to be fit and functioning. …

… Such completion [of the repairs] is to be determined not by the subjective judgment of the Claimants and their representatives but by independent evidence. Applying the objective standard, the Tribunal concludes without hesitation that the Respondents did complete and accomplish all the repairs before 28 October 2008. In doing this, the Tribunal accepts the report of ABS as objective and unbiased.

115 I must stress that I am not judging the quality of TMM's arguments in the Arbitration. Perhaps the Arbitrator could have accorded more weight to the countervailing evidence when determining the reliability of the ABS Surveys, including whether the ABS Surveys could be relied upon to reflect the state of affairs on a date preceding the date of the ABS survey certificates. However, balanced against that is the principle that the arbitral tribunal generally has wide prerogative and autonomy to evaluate the available competing evidence and arrive at its conclusion. It may even make findings of fact which differ from the facts which either party contended for: *London Underground Limited v Citylink Telecommunications Limited* [2007] EWHC 1799 (TCC) at [37]. That is buttressed further by the established principle which is binding upon me that errors of law and fact *per se* are final and binding on the parties and an award containing such errors may not be appealed against or set aside by a court unless they *independently* engage a ground expressly prescribed under s 24 of the IAA and/or Art 34(2) of the Model Law: *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [57]. In *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 ("*Sui Southern*"), Prakash J applied this principle (at [38]) and held that the plaintiff's allegation that the arbitral tribunal had ignored certain facts amounted to an "error of fact, in respect of which there is also no remedy under the [IAA]."

116 Even if TMM was right in that the evidence overwhelmingly pointed to the repairs not being completed and that the ABS Surveys were in fact inaccurate and unreliable with the corollary that these evidenced a *prima facie* breach of the rules of natural justice, that would not in my view have caused actual or real prejudice to TMM in the manner required by *Soh Beng Tee* read with *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 ("*L W Infrastructure*") before an award can be set aside for breach of the rules of natural justice.

117 The test, as articulated by Sundaresh Menon CJ in *L W Infrastructure* at [54], 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 (cf *Soh Beng Tee* at [86])

118 Applying this test, even if the Arbitrator had found that the repairs had not been completed, it would probably not have made a difference to his deliberation on the outcome. The Arbitrator would, in all likelihood, have maintained his view that TMM ought not to have rejected the NOR because the obligation to repair the items in the Spreadsheets only had the effect of a warranty for which a breach would only sound in damages. The Arbitrator alluded to this when he said: [note: 90]

> *In view of the above decision that [TMM] wrongfully reject (sic) [PRM's] Notice of Delivery and that the act was a repudiation of MOAs, it is unnecessary* to consider [TMM's] main assertions based on their contention that [PRM] were in breach of Clause 11 and Addendum No. 1. All the same, the Tribunal will state its views on them and consider [TMM's] case …
>
> [emphasis added]

TMM therefore did not suffer any actual or real prejudice arising from the Arbitrator's determination of the state of the repairs.

119 For completeness, there was an argument which surfaced in the course of oral arguments which I shall mention briefly. In a nutshell, Mr Chan suggested that there may be cases where decisions premised on findings of fact made without *any* evidential basis, *ie* no rationally probative evidence capable of supporting the findings, are liable to be set aside for breach of natural justice. He did not cite any authority but there appears to be some recognition of this "no evidence" rule falling under the umbrella of natural justice in Australia and New Zealand, both of which are jurisdictions which apply the Model Law: see *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214 at [103]–[109]; and *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554 at [83].

120 As far as I am aware, this "no evidence" rule has yet to be argued fully before a Singapore court, much less accepted as part of Singapore law. Mr Ajaib's position was somewhat ambivalent. At one point he candidly accepted that the "no evidence" rule might come within the ground of natural justice. [note: 91] On another occasion, citing *Sui Southern*, Mr Ajaib said that a finding of fact which is unsupported by any evidence might be an egregious error, but is not one that invites curial intervention under the IAA. [note: 92] As the law on this point was not argued fully by counsel, I shall not express a view on whether TMM would have succeeded under the "no evidence" rule if it forms part of Singapore law.

121 TMM might not have liked or agreed with the way the Arbitrator construed the evidence and the law, but the bottom line is that TMM evidently knew how and on what basis the Arbitrator arrived at his decision. It also knew that the Arbitrator had preferred one version of events and evidence to another. To look at it another way, TMM's dissatisfaction was not that it was not heard, but that it was not believed. No party to an arbitration has a right to have its *evidence* believed, just as no party has a right to have its *submissions* comprehended and consequently accepted (see [94]–[96] above). TMM and PRM contracted and bargained for the Arbitrator's expertise and adjudicatory abilities – including his evaluative faculties – when they chose arbitration and appointed him. TMM might be unhappy with the outcome of the application of his faculties, but it got what it bargained for.

122 In summary, for the reasons stated above, the facts do not disclose breaches of the rules of natural justice, much less an actual or real prejudice to TMM arising from the alleged breaches. I find that the Arbitrator did have regard and applied his mind to TMM's submissions, dealt with the essential issues generated by the dispute, and gave and explained his reasons adequately in the Award. There was also no excess of jurisdiction which resulted in a deprivation of TMM's right to be heard. Holistically, applying the general overarching guiding consideration in *Rotoaira* (see [64] above), a reasonable party in the shoes of TMM would have foreseen the possibility of the reasoning of the type revealed the Award. It was therefore not entitled to complain about it now.

Apparent bias

123 Given that TMM's arguments on apparent bias were mostly built upon the same premises as its arguments on the right to be heard, the factual premises on which TMM mounted its apparent bias claim are consequently unsustainable. I should however address one point on the issue of apparent bias. The test for apparent bias is whether the circumstances gave rise to a reasonable suspicion or apprehension in a fair-minded reasonable person with knowledge of the relevant facts that the arbitral tribunal was biased (*Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR(R) 85 at [91]). TMM expressly prefaced its submissions with the qualification that it was not relying on the Arbitrator's errors *per se* to establish apparent bias. Instead, without citing any authority, TMM sought to argue that the "egregious errors of law and fact" from such an experienced arbitrator like the Arbitrator invited a

reasonable person to develop a reasonable suspicion that he was biased. [note: 93] Even if TMM had cited authorities, I would be slow to find in favour of its submission for several reasons.

124 First, the egregious errors which TMM is relying on are differences in interpretation of the law, assessment of the evidence and the like. Reasonable people can take different – sometimes even diametrically opposing – views. It would be a remarkable principle and precedent to set if an adjudicator is deemed to be apparently biased just because he or she takes to the law and the facts in a peculiar way. Second, even if an arbitrator has utterly misapplied the law or misunderstood the facts, that will not suffice even as *prima facie* evidence that the arbitrator was apparently biased. Inexperienced adjudicators do not have a monopoly over the making of mistakes of fact or law; even the most experienced adjudicators are fallible. Third, words and expressions often have a penumbral meaning. Thus, the exercise of interpreting the meaning of what was said or written – whether in the form of witness testimonies, documentary evidence, or propositions in case law and statutes – will invariably have an element of subjectivity. The same goes for the interpretation of conduct and actions. To add to that, as Lord Hoffmann observed in *Piglowska v Piglowski* [1999] 1 WLR 1360 at 1372, findings of fact are:

> … inherently an incomplete statement of the impression which was made upon [the judge] by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.

125 For all these reasons, I hesitate to agree with TMM's suggestion that a reasonable person will labour under the conception that an (experienced) adjudicator who takes a completely contrary position from one party is predisposed to finding against that party and therefore apparently biased. On TMM's best case, the Arbitrator committed certain errors of fact and law. TMM may lament that higher standards are usually expected of an experienced arbitrator of the Arbitrator's calibre. But that is all it can do. It was given full opportunity to present its case. The Arbitrator heard its case and delivered his verdict with supporting reasons. I am not convinced that TMM has made out a case for apparent bias.

Conclusion

126 Arbitrations are meant to be an efficient alternative to court litigation. This has, unfortunately, not been the case. In these proceedings, TMM provided a compendious record of the Arbitration by way of two affidavits which ran into about 3,200 pages across eight volumes. Excluding oral submissions captured in more than 1,300 pages of transcripts, TMM also tendered several rounds of written submissions which totalled 241 pages from cover to cover. I find this to be both unnecessary and unsatisfactory. Especially for challenges against an award founded on the breach of natural justice, the court's role is, in very general terms, to ensure that missteps, if any, are more than arid, hollow, technical and procedural (*Soh Beng Tee* at [98]). Any real and substantial cause for concern should be demonstrably clear on the face of the record without the need to pore over thousands of pages of facts and submissions. Otherwise, curial recourse against an award will be used (and abused) as an opportunity to invite the court to judge the full merits and conduct of the arbitration. As a further aside, an over-zealous scrutiny of the arbitral tribunal's decision will also encourage parties to, via the statutorily permitted mechanism of curial recourse, tactically frustrate and delay the enforcement of the arbitral award. In the present case, taking the commencement of the Arbitration as the date at which the dispute arose, the parties' dispute is already in its fifth year. If my decision is appealed, parties may well have to wait for several more months to finally resolve this dispute. This runs contrary to one of the original aims of arbitration as an expedient alternative dispute resolution mechanism.

127 TMM's application to set aside the Award is therefore dismissed. The Registry will fix a date for the hearing on costs.

[note: 1] 1st Affidavit of Rodriguez, vol 1, at pp 141 and 174.

[note: 2] 1st Affidavit of Rodriguez, vol 1, at pp 142 and 167.

[note: 3] 1st Affidavit of Rodriguez, vol 1, at p 271.

[note: 4] 1st Affidavit of Rodriguez, vol 1, at pp 329–331.

[note: 5] 1st Affidavit of Rodriguez, vol 1, at p 328.

[note: 6] 1st Affidavit of Rodriguez, vol 1, at pp 333–334.

[note: 7] 1st Affidavit of Rodriguez, vol 1, at p 337.

[note: 8] 1st Affidavit of Rodriguez, vol 1, at p 339.

[note: 9] 1st Affidavit of Rodriguez, vol 4, at p 1400.

[note: 10] 1st Affidavit of Rodriguez, vol 2, at pp 645–663.

[note: 11] 1st Affidavit of Rodriguez, vol 2, pp 653 and 663, at para 16.

[note: 12] 1st Affidavit of Rodriguez, vol 2, at pp 704–877.

[note: 13] 1st Affidavit of Rodriguez, vol 3, at pp 1125–1273.

[note: 14] 1st Affidavit of Rodriguez, vol 2, p 735, at paras 64–65.

[note: 15] 1st Affidavit of Rodriguez, vol 2, pp 736–737, at paras 66–69.

[note: 16] 1st Affidavit of Rodriguez, vol 2, pp 743–745, at paras 90–98.

[note: 17] 1st Affidavit of Rodriguez, vol 2, p 742, at paras 85–86; pp 748–754, at paras 105–131.

[note: 18] 1st Affidavit of Rodriguez, vol 2, p 755 at para 134.

[note: 19] 1st Affidavit of Rodriguez, vol 2, pp 760–762, at para 149.

[note: 20] 1st Affidavit of Rodriguez, vol 2, p 763, at para 155.

[note: 21] 1st Affidavit of Rodriguez, vol 2, pp 763–768, at para 157.

[note: 22] 1st Affidavit of Rodriguez, vol 3, at pp 884–886.

[note: 23] 1st Affidavit of Rodriguez, vol 3, pp 884, at para 19.

[note: 24] 1st Affidavit of Rodriguez, vol 3, pp 883, at para 16.

[note: 25] 1st Affidavit of Rodriguez, vol 3, pp 886, at para 24.

[note: 26] 1st Affidavit of Rodriguez, vol 3, at pp 887–890.

[note: 27] 1st Affidavit of Rodriguez, vol 3, p 891, at para 37; p 897 at para 40; pp 1044–1063, at paras 483–518.

[note: 28] 1st Affidavit of Rodriguez, vol 3, p 906, at paras 68–69.

[note: 29] 1st Affidavit of Rodriguez, vol 3, at pp 1075–1076 (*The Pacific 18*), and pp 1105–1106 (*The Pacific 38*).

[note: 30] Award, at para 130.

[note: 31] 1st Affidavit of Rodriguez, vol 1, at p 13.

[note: 32] TMM's submissions dated 24 July 2012, at paras 85–91.

[note: 33] TMM's submissions dated 24 July 2012, at paras 92–102.

[note: 34] TMM's submissions dated 24 July 2012, at paras 103–105.

[note: 35] TMM's submissions dated 24 July 2012, at paras 106–111.

[note: 36] TMM's submissions dated 24 July 2012, at paras 112–115.

[note: 37] TMM's submissions dated 24 July 2012, at paras 120–126.

[note: 38] TMM's submissions dated 24 July 2012, at paras 127–133.

[note: 39] TMM's submissions dated 24 July 2012, at paras 135–136.

[note: 40] TMM's submissions dated 24 July 2012, at paras 143–146.

[note: 41] TMM's submissions dated 24 July 2012, at paras 139–140, and 149–150.

[note: 42] TMM's submissions dated 24 July 2012, at paras 154–155.

[note: 43] TMM's Supplemental Skeletal Arguments dated 22 Oct 2012, Attachment F, at Item 1 of the Table.

[note: 44] TMM's submissions dated 24 July 2012, at paras 160–166.

[note: 45] PRM's submissions dated 20 July 2012, at para 16.

[note: 46] PRM's submissions dated 20 July 2012, at para 17.

[note: 47] PRM's submissions dated 20 July 2012, at para 23.

[note: 48] PRM's submissions dated 20 July 2012, at para 23(1)(b).

[note: 49] PRM's submissions dated 20 July 2012, at para 23(2)(a).

[note: 50] PRM's submissions dated 20 July 2012, at para 23(1)(a).

[note: 51] PRM's submissions dated 20 July 2012, at para 23(2)(e)(i)–(f).

[note: 52] PRM's submissions dated 20 July 2012, at para 25.

[note: 53] Transcript dated 23 October 2012, at p 29.

[note: 54] Transcript dated 23 October 2012, at p 15.

[note: 55] Transcript dated 23 October 2012, at p 13.

[note: 56] Transcript dated 23 October 2012, at pp 29–30.

[note: 57] Transcript dated 23 October 2012, at pp 139–141.

[note: 58] Transcript dated 23 October 2012, at p 143.

[note: 59] Transcript dated 24 October 2012, at pp 15–19.

[note: 60] Transcript dated 24 October 2012, at pp 33–34.

[note: 61] TMM's submissions dated 22 May 2013, at paras 52–54.

[note: 62] See 1st Affidavit of Rodriguez, vol 2, at p 660.

[note: 63] See for eg TMM's submissions dated 22 May 2013 at paras 33 to 37.

[note: 64] See for eg TMM's submissions dated 22 May 2013, at paras 33 to 37.

[note: 65] 1st Affidavit of Rodriguze, vol 3, at p 1044–1050.

[note: 66] 1st Affidavit of Rodriguez, vol 3, at pp 1051–1068.

[note: 67] TMM's submissions dated 24 Jul 2012, Attachment A, at paras 9–17.

[note: 68] TMM's submissions dated 24 Jul 2012, Attachment A, at paras 23–43.

[note: 69] Award, at para 122.

[note: 70] Transcript dated 24 Oct 2012 at pp 72–73; 154 – 156

[note: 71] Award, at para 23.

[note: 72] Transcript dated 24 Oct 2012, at p 165.

[note: 73] 1st Affidavit of Rodriguez, vol 1, at p 217.

[note: 74] TMM's List of Items, undated, at pp 2–3.

[note: 75] Award, at para 119.

[note: 76] Transcript dated 23 Oct 2012, at p 29.

[note: 77] TMM's submissions dated 24 Jul 2012 at paras 51 and 54; TMM's Supplemental Skeletal Arguments dated 22 Oct 2012, Attachment F, at Item 1 and 2 of the Table; and TMM's submissions dated 22 May 2013, at paras 6 and 10.

[note: 78] TMM's Supplemental Skeletal Arguments dated 22 Oct 2012, Attachment F, at Item 1 of the Table.

[note: 79] Award, at paras 6 to 46.

[note: 80] Award, at paras 92 to 93.

[note: 81] Award, at paras 94 to 127 read with paras 67 to 91.

[note: 82] Award, at para 121.

[note: 83] Award, at para 115.

[note: 84] TMM's submissions dated 24 Jul 2012, Attachment A, at paras 4; 7–8; 9–16; 55–57; 83–91; and 115–116.

[note: 85] TMM's submissions dated 24 Jul 2012, Attachment A, at para 17.

[note: 86] Transcript dated 25 Oct 2012, at pp 126–127.

[note: 87] Transcript dated 25 Oct 2012, at p 127.

[note: 88] TMM's List of Items, undated, at p 1.

[note: 89] Award, at paras 115 and 138.

[note: 90] Award, at para 128.

[note: 91] Transcript dated 24 Oct 2012, p 3, at lines 5–9.

[note: 92] Transcript dated 21 May 2013, at p 72.

[note: 93] TMM's submissions dated 24 Jul 2012, p 63, at para 142.

Copyright © Government of Singapore.