IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 126

Originating Summons 5 of 2014

Between

JVL AGRO INDUSTRIES LTD

… *Plaintiff*

And

AGRITRADE INTERNATIONAL PTE LTD

… *Defendant*

GROUNDS OF DECISION

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

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JVL Agro Industries Ltd
v
Agritrade International Pte Ltd

[2016] SGHC 126

High Court — Originating Summons No 5 of 2014
Vinodh Coomaraswamy J
30 April; 28, 30 May; 28 November 2014; 29 April; 30 October; 30 November 2015

13 July 2016

Vinodh Coomaraswamy J:

Introduction

1 In an arbitration commenced in 2011, the plaintiff sought damages against the defendant for breach of contract.[1] A three-member arbitral tribunal dismissed the plaintiff's claim in 2013, albeit by a majority.[2] The plaintiff applied to set the award aside in 2014, arguing that there had been a breach of natural justice in the arbitration which had caused it prejudice. After hearing the parties' submissions, and at the defendant's invitation, I decided not to set the award aside but instead to suspend the setting aside proceedings and to remit the award to the tribunal. The purpose of the remission was for the tribunal to consider whether it was necessary or desirable, and if so to what

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1 1st Affidavit of S.N. Jhunjhunwala at page 197.

2 1st Affidavit of S.N. Jhunjhunwala at page 65.

extent, to receive further evidence or submissions on three specific issues (see [126] below) on which the plaintiff complained the tribunal had not afforded it a reasonable opportunity to be heard.[3] After hearing submissions from the parties towards the end of 2014, the tribunal found that it was neither necessary nor desirable to receive either evidence or submissions on those three issues.[4] The tribunal recorded its findings in an addendum to the award.

2 Shortly after the tribunal issued the addendum, my suspension of these proceedings expired. The plaintiff's application came back before me in 2015. The plaintiff argued that the tribunal's addendum had failed to address the basis for its setting aside application and once again invited me to set aside the award.

3 I have accepted the plaintiff's submission and have set aside the award. I have done so because the tribunal dismissed the plaintiff's claim on an issue which the defendant had never chosen to advance as part of its case. This issue was one which originated from the tribunal and which it put to the plaintiff's counsel only in the course of his oral closing submissions. Despite having several opportunities thereafter to adopt the issue and to advance it as part of its own case, the defendant never did so. Indeed, it could be said that the defendant rejected this issue as part of its case by the forensic choices it made in pleading its case and presenting its submissions to the tribunal. Further, the tribunal did not direct the plaintiff to address this issue even though it formed no part of the defendant's case. Finally, the plaintiff suffered prejudice because the tribunal's decision on the ultimate issue before it – whether the

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3 Page 95 of 3rd Affidavit of S.N. Jhunjhunwala filed 29 January 2015.

4 Addendum at [53], page 50 of 3rd Affidavit of S.N. Jhunjhunwala filed 29 January 2015.

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defendant was liable in damages to the plaintiff for breach of contract – turned entirely on the tribunal's finding against the plaintiff on this issue.

4 The defendant has appealed against my decision to set the tribunal's award aside. I therefore set out my reasons.

The parties' dispute

The parties

5 The plaintiff, JVL Agro Industries Limited ("JVL"), is a company incorporated in India.[5] It manufactures edible oils at its factories there. One of the basic raw materials which its factories require is palm oil.[6] Indeed, its factories require an uninterrupted supply of palm oil in order to maintain uninterrupted production.

6 The defendant, Agritrade International Pte Ltd ("Agritrade"), is a company incorporated in Singapore.[7] Agritrade, as its name suggests, trades in agricultural commodities. One of those commodities is palm oil.[8]

The High Price Contracts

7 By a series of 29 contracts entered into between March and August 2008, JVL agreed to buy from Agritrade a total of 18,000 metric tonnes of palm oil to be shipped to JVL's factories in India between July and November 2008.[9] In the second half of 2008, however, the market price of palm oil fell

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5 Award [1.1], page 70 of 1st Affidavit of S.N. Jhunjhunwala.

6 1st Affidavit of S.N. Jhunjhunwala at [5].

7 Award [1.2], page 70 of 1st Affidavit of S.N. Jhunjhunwala.

8 1st Affidavit of Ng Say Pek at [4].

9 Award [12.1], page 105 of 1st Affidavit of S.N. Jhunjhunwala.

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significantly below the prices which JVL had committed itself to pay under each of these contracts.[10] For that reason, these initial 29 contracts have been called "the High Price Contracts".

8 The collapse in the price of palm oil made it commercially disadvantageous for JVL to perform the High Price Contracts.[11] As a result, JVL approached Agritrade in August 2008 through a broker by the name of Mr Gobind Ram Poddar.[12] Through Mr Poddar, JVL and Agritrade agreed to what the parties have called the "price-averaging arrangement". The purpose of the price-averaging arrangement was to allow JVL additional time to discharge its obligations to Agritrade under the High Price Contracts and also to average down the overall unit price at which it had bought and was to buy palm oil from Agritrade.[13]

The price-averaging arrangement

9 The price-averaging arrangement operated as follows. JVL and Agritrade kept the High Price Contracts on foot but deferred delivery under them. At the same time, JVL continued entering into new contracts with Agritrade to buy palm oil at the prevailing market price. These new contracts have been called "the Market Price Contracts".

10 Whenever Agritrade was ready to ship a fresh cargo of palm oil to JVL, the parties would carry out a price-averaging exercise. Each price-averaging exercise required the parties to discuss and agree two issues: (i) the quantity of palm oil which was to be shipped in that particular cargo; and

10 Award [8.1], page 105 of 1st Affidavit of S.N. Jhunjhunwala.

11 Award [12.2], page 105 of 1st Affidavit of S.N. Jhunjhunwala.

12 Award [12.3], page 105 of 1st Affidavit of S.N. Jhunjhunwala.

13 Award [12.3], page 106 of 1st Affidavit of S.N. Jhunjhunwala.

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(ii) the ratio in which the palm oil comprising that cargo was to be attributed to the palm oil deliverable under a selected High Price Contract and to the palm oil deliverable under a selected Market Price Contract. Once they had agreed these two issues, Agritrade would issue a revised contract for the total tonnage of palm oil comprised in that cargo. The unit price for the cargo would be equivalent to the average of the price per tonne of the palm oil under the selected High Price Contract and the selected Market Price Contract, weighted in accordance with the agreed ratio.[14] The parties would then perform the revised contract by shipment and payment.[15] As each cargo shipped, the parties would treat JVL's obligation to accept the agreed tonnage of palm oil under the selected High Price Contract and the selected Market Price Contract as having been discharged.[16]

11 Under the price-averaging arrangement, the unit price for each cargo of palm oil which Agritrade would actually ship to JVL would fall somewhere between the high price which JVL had agreed in the selected High Price Contract and the market price which Agritrade had agreed in the selected Market Price Contract. In this way, the overall unit price at which JVL purchased its supply of palm oil from Agritrade was to be averaged down over time.

12 Over the ensuing months, as the parties carried out the price-averaging arrangement, some of the Market Price Contracts which they had entered into remained unperformed, even after their shipment dates had passed. These contracts have been called the "Unperformed Market Price Contracts". The parties agreed to treat these Unperformed Market Price Contracts as though

14 Award [12.3], page 106 of 1st Affidavit of S.N. Jhunjhunwala.

15 Award [12.4], page 106 of 1st Affidavit of S.N. Jhunjhunwala.

16 Award [17.4], page 141 of 1st Affidavit of S.N. Jhunjhunwala.

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they were High Price Contracts and thereby to discharge them under the price-averaging arrangement.[17]

13 The price-averaging arrangement would necessarily come to an end when all of the parties' unperformed contracts had been discharged. Notably, however, the parties left the price-averaging arrangement open-ended as to time.[18] In other words, they imposed no deadline by which all unperformed contracts had to be discharged.

14 Each price-averaging exercise had two parts, both of which required the parties to negotiate with each other and reach a commercial agreement. First, the parties had to continue entering into fresh Market Price Contracts. This was essential. Without a queue of fresh Market Price Contracts – and in particular, without agreeing on the market prices to be reflected in those contracts – there could be no countervailing market price to average with the historical price reflected in the selected High Price Contract. Second, the parties had to negotiate and agree three commercial terms for each shipment of palm oil: (i) the tonnage to be shipped; (ii) the ratio in which that tonnage should be attributed to the selected High Price Contract and the selected Market Price Contract; and (iii) the shipment date.[19]

15 The parties' cooperation on both parts of the price-averaging exercise was therefore essential if successive price-averaging exercises were to be successfully carried out and if the commercial purpose of the price-averaging arrangement was to be achieved. If the parties failed or refused to cooperate, the price-averaging arrangement would necessarily break down. The

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17 Award [12.6] – [12.7], page 107 of 1st Affidavit of S.N. Jhunjhunwala.

18 Award [12.5], page 107 of 1st Affidavit of S.N. Jhunjhunwala.

19 Award [12.5], page 106 of 1st Affidavit of S.N. Jhunjhunwala.

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breakdown of the price-averaging arrangement would give rise to a difficult question which the parties wholly failed to anticipate and address: what legal consequences were attached to the High Price Contracts and the Market Price Contracts which remained unperformed? That is precisely the question which eventually came before the tribunal.

All except five contracts discharged by June 2010

16 The price-averaging arrangement was first applied to run down the High Price Contracts. By the end of August 2009, JVL had discharged virtually all of its purchase obligations under these contracts.[20] All that remained then was for JVL to discharge in the same way its purchase obligations under the Unperformed Market Price Contracts.

17 The parties duly turned their attention to the Unperformed Market Price Contracts. By June 2010, only five Unperformed Market Price Contracts remained to be discharged.[21] It is these five contracts which, subject only to minor variations which are undisputed and immaterial, form the subject-matter of the parties' dispute. The five disputed contracts were entered into between January 2009 and September 2009 and obliged Agritrade to deliver, and obliged JVL to purchase, 9,000 metric tonnes of palm oil between February 2009 and October 2009.[22]

18 By June 2010, however, the market price of palm oil had risen significantly.[23] The parties found themselves unable to agree on the prices to

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20 Award [14.13], page 130 of 1st Affidavit of S.N. Jhunjhunwala; transcript of 30 November 2012, page 76 lines 6 to 10 page 1502 of 1st Affidavit of S.N. Jhunjhunwala.

21 Award [12.11], page 110 to 111 of 1st Affidavit of S.N. Jhunjhunwala.

22 Page 268 of 1st Affidavit of S.N. Jhunjhunwala.

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be reflected in the fresh Market Price Contracts necessary for the price-averaging arrangement to continue,[24] let alone to agree on the additional commercial terms necessary to carry out the necessary price-averaging exercises.[25]

19 It is common ground that Agritrade should be treated as having discharged its obligation to ship 16 metric tonnes out of the total tonnage of 9,000 metric tonnes due under the disputed contracts. That therefore left Agritrade with the obligation to deliver 8,984 metric tonnes of palm oil to JVL. It is equally common ground that Agritrade has never shipped this 8,984 metric tonnes of palm oil to JVL.

Notice of default

20 In December 2010, JVL served a notice of default under all five disputed contracts on Agritrade, asserting that Agritrade was in breach of its delivery obligation under each contract. JVL further put Agritrade on notice that it would mitigate its loss by buying 8,984 metric tonnes of palm oil from the market, and thereafter hold Agritrade responsible for the difference between the contract price stipulated in the disputed contracts and the market price at which JVL would have to buy the palm oil.[26]

21 In December 2010 and January 2011, JVL duly bought 8,984 metric tonnes of palm oil from the market.[27] It calculated its loss as US$5.51m. In

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23 Award [15.5], page 135 of 1st Affidavit of S.N. Jhunjhunwala.

24 Award [13.18] and [15.5], pages 120 and 135 of 1st Affidavit of S.N. Jhunjhunwala.

25 Award [12.12], page 111 of 1st Affidavit of S.N. Jhunjhunwala.

26 Award [3.5], page 72 of 1st Affidavit of S.N. Jhunjhunwala.

27 Notice of Arbitration paragraph 16, page 201 to 202 of 1st Affidavit of S.N. Jhunjhunwala.

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February 2011, as foreshadowed in its notice of default, JVL demanded that Agritrade pay US$5.51m within seven days as compensation for its breach of the disputed contracts.[28]

22 In March 2011, Agritrade through its solicitors wholly denied JVL's claim. Agritrade's position was that it was actually JVL who was in repudiatory breach of the disputed contracts and that that repudiatory breach had been accepted by Agritrade. The result, Agritrade said, was that it had terminated the disputed contracts and therefore had no liability to compensate JVL for any alleged loss.[29]

23 Two weeks later, the parties agreed to refer their dispute to arbitration under Singapore law before a three-member arbitral tribunal constituted under the Rules of the Singapore International Arbitration Centre (4th ed, 1 July 2010) ("the SIAC Rules").[30]

The arbitration

JVL commences arbitration

24 In April 2011, JVL lodged a notice of arbitration at the Singapore International Arbitration Centre ("the SIAC").[31] JVL's notice of arbitration set out its claim against Agritrade and designated its nominee to the tribunal ("the first arbitrator"). A few days later, Agritrade designated its nominee to the tribunal ("the second arbitrator").[32] In June 2011, the first and second arbitrators agreed on the presiding arbitrator.

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28 1st Affidavit of S.N. Jhunjhunwala, page 254.

29 1st Affidavit of S.N. Jhunjhunwala, page 259.

30 1st Affidavit of S.N. Jhunjhunwala, page 261.

31 1st Affidavit of S.N. Jhunjhunwala, page 197.

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25 The three-member tribunal was thus constituted.[33]

The pleadings

Statement of claim

26 JVL filed its statement of claim in September 2011. In it, JVL advanced a straightforward claim for damages for breach of contract. It pleaded the disputed contracts.[34] It pleaded that Agritrade had failed to perform any of the disputed contracts[35] despite empty promises to do so.[36] It prayed for an award of US$5.51m as damages against Agritrade, alternatively for an award of damages to be assessed.[37]

Defence

27 Agritrade filed its defence in November 2011. Agritrade pleaded two defences in the alternative. Both defences relied on the price-averaging arrangement, but to different effect.[38]

28 Agritrade's primary defence was that the price-averaging arrangement rendered each disputed contract void for uncertainty.[39] It pleaded that, under the price-averaging arrangement, the contractual terms of price, quantity,

32 1st Affidavit of S.N. Jhunjhunwala, page 264.

33 Award [4.1], page 75 of 1st Affidavit of S.N. Jhunjhunwala.

34 Statement of Claim [3], page 267 of 1st Affidavit of S.N. Jhunjhunwala.

35 Statement of Claim [4] and [10], pages 268 and 270 of 1st Affidavit of S.N. Jhunjhunwala.

36 Statement of Claim [5] – [6], page 269 and [11] and [13], page 271 of 1st Affidavit of S.N. Jhunjhunwala.

37 Statement of Claim [26], page 275 of 1st Affidavit of S.N. Jhunjhunwala.

38 Defence & Counterclaim [3] to [15], page 358 to 362 of 1st Affidavit of S.N. Jhunjhunwala.

39 Defence & Counterclaim [15], page 362 of 1st Affidavit of S.N. Jhunjhunwala.

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shipment period and discharge port under a particular Market Price Contract were to be fixed only when Agritrade actually shipped the palm oil attributed to that contract to JVL.[40] Because the disputed contracts had been entered into as Market Price Contracts, and because the parties had not carried out a price-averaging exercise in relation to any of them, the parties were not *ad idem* on these four essential terms. The result, Agritrade pleaded, was that each disputed contract was void for uncertainty.[41] I shall call this Agritrade's "uncertainty defence".

29 Agritrade's alternative defence was that, even if the disputed contracts were not void for uncertainty, they had been mutually terminated, thereby releasing the parties from all further obligations to each other.[42] It must be said that the legal reasoning connecting the factual elements of this defence to the legal conclusion exonerating Agritrade is not easy to discern. Agritrade's pleading appears to assert that the disputed contracts, being Market Price Contracts, were entered into purely to facilitate the price-averaging arrangement and not to be performed as standalone contracts.[43] When the shipment date under each disputed contract passed without its being performed, that contract was mutually terminated.[44] I shall call this Agritrade's "mutual-termination" defence.

30 Agritrade's pleaded defence raised only its uncertainty defence and its mutual-termination defence. It could have, but did not, advance a further

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40 Defence & Counterclaim [7], page 360 of 1st Affidavit of S.N. Jhunjhunwala.

41 Defence & Counterclaim [15] and [19], pages 362 and 363 of 1st Affidavit of S.N. Jhunjhunwala.

42 Defence & Counterclaim [20], page 363 of 1st Affidavit of S.N. Jhunjhunwala.

43 Defence & Counterclaim [27], page 367 of 1st Affidavit of S.N. Jhunjhunwala.

44 Defence & Counterclaim [26], page 359 of 1st Affidavit of S.N. Jhunjhunwala.

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alternative case to meet the eventuality that the tribunal found that the disputed contracts were not void for uncertainty and had not been mutually terminated. In other words, Agritrade was left entirely defenceless if the tribunal rejected both its uncertainty defence and its mutual-termination defence.

Reply

31 JVL filed its reply in January 2012. In it, JVL acknowledged the existence of the price-averaging arrangement[45] but denied that its effect was to render the disputed contracts void for uncertainty by reopening for renegotiation the essential terms of the parties' unperformed contracts. Instead, JVL pleaded that the effect of the price-averaging arrangement was merely to defer the time for shipment under each unperformed contract, leaving all other terms untouched.[46] On that ground, JVL denied both Agritrade's uncertainty defence and its mutual-termination defence.

A comment on Agritrade's pleaded case

32 I pause at this juncture to take a step back and to make some observations on the nature of Agritrade's case. These observations will be relevant both for my narrative and for my analysis.

JVL's unattractive case

33 JVL's pleadings invited the tribunal to embrace a most unattractive case. JVL had found itself in August 2008 committed to bad bargains under the High Price Contracts. Agritrade had agreed, at JVL's request, not to hold

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45 Reply and Defence to Counterclaim [5], page 498 of 1st Affidavit of S.N. Jhunjhunwala.

46 Reply and Defence to Counterclaim [5(a)], page 498 of 1st Affidavit of S.N. Jhunjhunwala.

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JVL to those bargains and instead to allow JVL the opportunity to mitigate its overall price over time through the price-averaging arrangement. No doubt Agritrade derived a benefit for itself in doing so. But the fact remains that Agritrade was not obliged to do so at all. It could easily have given JVL an ultimatum either to perform each High Price Contract in accordance with its terms or to pay damages for its failure to do so.

34 Over the next twenty-one months, JVL enjoyed the benefits of the price-averaging arrangement.[47] This was possible only with Agritrade's cooperation. Part of that cooperation included entering into the disputed contracts with JVL. On their face, the disputed contracts were unconditional, standalone contracts. But the parties' commercial intention in entering into the disputed contracts was to perform them only subject to a price-averaging exercise. In the course of carrying out the price-averaging arrangement, and as a consequence of it, the parties deferred performance of the disputed contracts indefinitely.

35 All five of the disputed contracts were entered into in 2009 for delivery in 2009. A year later, by mutual agreement, the disputed contracts remained to be performed. By then, however, the market price of palm oil had again moved significantly, but this time in JVL's favour.[48] For obvious reasons, JVL was now either not interested in applying the price-averaging arrangement to the disputed contracts or refused to do so.[49] JVL instead insisted that Agritrade perform each disputed contract as a standalone contract. Agritrade refused.

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47 Award [17.4], page 144 of 1st Affidavit of S.N. Jhunjhunwala.

48 Award [17.3], page 143 of 1st Affidavit of S.N. Jhunjhunwala.

49 Award [17.5], page 145 of 1st Affidavit of S.N. Jhunjhunwala.

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36 In the arbitration, JVL asked the tribunal to award it US$5.51m in damages against Agritrade on the basis that the disputed contracts were standalone contracts. JVL's case studiously ignored the price-averaging arrangement. It was, in effect, asking the tribunal to require Agritrade to sell palm oil to JVL in 2010 at the lower 2009 prices. That was not what the parties had agreed or intended.

37 That is an unattractive outcome which many tribunals would undoubtedly and understandably struggle to countenance.

The parol evidence rule

38 However unattractive that outcome may have appeared, it had a clear basis in law. Under the parol evidence rule, unless one of a limited number of exceptions applies, a party to a contract which has been reduced into documentary form cannot rely on evidence which is extrinsic to the document to vary, contradict, add to or subtract from the contract.

39 The price-averaging arrangement was obviously extrinsic to the disputed contracts. The parol evidence rule therefore applied *prima facie* to the arbitration of the parties' dispute. Although the parol evidence rule is a single doctrine, it comes in two guises. In its guise as a rule of evidence embodied in s 94 of the Evidence Act (Cap 97, 1997 Rev Ed) (the "Evidence Act"), it has no application to arbitration. That is the express effect of s 2(1) of that Act. But in its guise as a doctrine which forms a part of Singapore's substantive law of contract, the parol evidence rule applies to every contractual dispute which is resolved in accordance with Singapore law, whatever mode of dispute resolution is used.

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40 Neither party had engaged with the parol evidence rule in its pleadings. This was so even though, unusually, both a rejoinder[50] and a surrejoinder[51] were filed.

The weaknesses in Agritrade's defences

41 Agritrade's uncertainty defence and its mutual-termination defence did not engage at all with the parol evidence rule, not even obliquely. They were not crafted to anticipate JVL deploying the parol evidence rule by dovetailing pre-emptively with the rule's established exceptions.

42 Agritrade could have availed itself of at least two defences which would have had this characteristic. First, Agritrade could have characterised the price-averaging arrangement as a condition to which its performance obligation under the disputed contracts was subject. Alternatively, Agritrade could have characterised the price-averaging arrangement as a contract in its own right, running collateral to the disputed contracts and supported by consideration of its own. Both a condition precedent and a collateral contract are well established exceptions to the parol evidence rule, both at common law and under s 94 of the Evidence Act.

43 This is not to say that either a conditional-contract defence or a collateral-contract defence would have been free of difficulty, let alone that it would have been bound to succeed. But both of these defences would have had the merit of being crafted to dovetail with the well-established exceptions to the parol evidence rule. To that extent, they were superior to the defences

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50 Rejoinder, page 518 to 530 of 1st Affidavit of S.N. Jhunjhunwala.

51 Surrejoinder, page 532 to 545 of 1st Affidavit of S.N. Jhunjhunwala.

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which Agritrade did deploy: the uncertainty defence and the mutual-termination defence.

44 Agritrade never advanced a case at any time – whether formally or informally – which characterised the price-averaging arrangement as a collateral contract. That is, however, the basis on which the majority of the tribunal dismissed JVL's claim, notwithstanding the operation of the parol evidence rule.

45 I now return to the procedural narrative.

The evidential phase

Agritrade abandons its mutual-termination defence

46 The evidential phase in the arbitration took place over four days in August 2012. Immediately after the opening pleasantries on the very first day of this phase of the hearing, counsel for Agritrade, Mr Bazul Ashhab, formally abandoned Agritrade's mutual-termination defence.[52] He confirmed on the record that Agritrade's defence henceforth would be confined to its uncertainty defence.[53]

47 Agritrade's decision to abandon the mutual-termination defence was significant for four reasons. First, Agritrade was now running its uncertainty defence as an all-or-nothing defence. Its only defence now was that the disputed contracts were void for uncertainty. All of Agritrade's eggs were now in the uncertainty basket. If the tribunal were to hold that these contracts were

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52 Award [7.1], page 85 of 1st Affidavit of S.N. Jhunjhunwala.

53 Transcript of 13 August 2012, page 6 line 18 to page 7 line 4, page 720 to 721 of 1st Affidavit of S.N. Jhunjhunwala.

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sufficiently certain to be binding, Agritrade could not, on its own case, escape being found liable to JVL.

48 Second, Agritrade's entire case now was that the price-averaging arrangement governed only the *validity* of the disputed contracts: by depriving them of the certainty necessary for them to be contracts. It no longer alleged, through the abandoned mutual-termination defence, that the price-averaging arrangement governed in any way the *performance* of the disputed contracts: by giving rise to a mutual termination in lieu of performance.

49 Third, Agritrade abandoned with the mutual-termination defence the only aspect of its case – pleaded or otherwise – which characterised the price-averaging arrangement as a *contract*. As an integral part of its mutual-termination defence, Agritrade expressly pleaded that the price-averaging arrangement was an "agreement" and that it comprised seven "express terms".[54] Once Agritrade abandoned its mutual-termination defence, it abandoned with it the assertion that the price-averaging arrangement was any sort of a contract, conditional, collateral, standalone or otherwise.

50 Finally, a whole swathe of evidence ceased to be relevant in the arbitration. Agritrade's decision to abandon the mutual-termination defence withdrew both of the following issues from the tribunal: (i) whether the price-averaging arrangement governed the *performance* of the disputed contracts as opposed to their *validity*; and (ii) whether the price-averaging arrangement was a contract in its own right of any sort whatsoever. Even before the tribunal received the evidence of the very first witness in the evidential phase, therefore, each party knew that it no longer needed to lead evidence in chief

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[54] Defence & Counterclaim [21], page 363 to 365 of 1st Affidavit of S.N. Jhunjhunwala.

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from its own witnesses or to cross-examine opposing witnesses on these two issues. Indeed, each party knew that any attempt to explore these two issues in the evidential phase would be met – quite correctly – by an objection either from the tribunal or from the opponent that the evidence to be elicited or the line of cross-examination was wholly irrelevant to the matters which remained in issue before the tribunal.

The parol evidence rule

51 Even at this late stage, however, the elephant in the hearing room remained the parol evidence rule. Neither party had raised it, even at this late stage.

52 It ultimately fell to the tribunal itself to draw the parol evidence rule to the parties' attention. It did so in an exchange with counsel on the third day of the evidential phase.[55] This exchange between the tribunal, Mr Bazul, and counsel for JVL, Mr Prakash Pillai is significant. I set it out in full:[56]

> [FIRST ARBITRATOR]: Before you resume the cross-examination, another question I had for Mr Bazul …. At the moment, Mr Pillai's case is that he has these five contracts, which are written contracts, and he is simply saying your clients have not performed.
>
> Mr Bazul's defence is that these contracts do not mean what they say or what is stated in the contract notes are not all the terms of the arrangement, for want of a better term, that was entered into; correct?
>
> In that light, I am wondering whether you have considered the applicability of the parole [sic] evidence rule, that where parties have signed a piece of paper, which is meant to be binding on them – of course, that is the "if" – then you cannot add to it unless you invoke one of the exceptions.

55 Transcript of 15 August 2012, page 2 line 1 to page 4 line 11, page 849 to 850 of 1st Affidavit of S.N. Jhunjhunwala.

56 Transcript of 15 August 2012, page 2 line 7 to page 4 line 10, page 849 to 850 of 1st Affidavit of S.N. Jhunjhunwala.

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> MR BAZUL: That is what you alluded to yesterday.
>
> [FIRST ARBITRATOR]: Yes, but not in the express terms that there is this rule of interpretation called the "parole [sic] evidence rule". …
>
> You do not have to answer me now, this is one of the things you can think about. When you frame your argument, you want to bear in mind where all the points we have raised fit into your contractual structure; in other words, what is the contractual framework or basis for your eventual arguments. You have a lot of arguments in your submissions, but they do not zone in on the exact legal box, the legal category --
>
> [PRESIDING ARBITRATOR]: *As [the first arbitrator] says, you may have to consider the exceptions to this parole [*sic*] evidence rule.* One of the exceptions, if I remember correctly – I am speaking from memory – is that there may be some conditions which prevent the operation of the contract, so this may or may not overcome the parole [*sic*] evidence rule. *But it is up to you to explore the exceptions, if they apply to your case.*
>
> We are not raising this point for you to address us now, at the moment, but in the course of the arbitration you will definitely have to address that point.
>
> MR PILLAI: Right, that is noted. Thank you.
>
> [PRESIDING ARBITRATOR]: *Do you understand the point we are making, Mr Bazul?*
>
> MR BAZUL: I am most grateful. What I need to do, first, is to see if that rule will apply to my case. That is the first step which I need to take. The Evidence Act does not apply, but that does not necessarily mean the common law principles do not apply, so I need to deal with this straight on; and if they do apply, are there exceptions. That is what I need to achieve.
>
> [SECOND ARBITRATOR]: As a matter of law, *you may invoke an exception, but you still have the evidentiary burden*, so that you must adduce evidence to show that your case comes within one of the exceptions.
>
> MR BAZUL: Sure.
>
> [emphasis added]

I make three points about this exchange.

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53 First, by this exchange, the tribunal unequivocally and expressly put the parol evidence rule and its exceptions in play in the arbitration. The tribunal saw the parol evidence rule as a legal issue lying on the critical path to its ultimate decision. But the tribunal also realised neither party had pleaded reliance on the parol evidence rule or its exceptions. It therefore directed both parties, of its own motion and unequivocally, to consider the parol evidence rule and its exceptions and to address the tribunal in the course of the arbitration on both. It even ensured that Mr Bazul was aware that the evidential burden lay on him to adduce the evidence to establish whichever exception or exceptions he chose to rely on. Even after this exchange, it remained the case that reliance on the parol evidence rule was wholly unpleaded by JVL and that reliance on its exceptions was wholly unpleaded by Agritrade. But the rule was well and truly in play in the arbitration, by express direction of the tribunal.

54 Second, although the tribunal's exchange was directed at both parties, it is clear from the context that the tribunal initiated the exchange for Agritrade's benefit. Thus, the first arbitrator begins the exchange by characterising his point as a question for Mr Bazul. Further, the presiding arbitrator concludes the exchange by asking Mr Bazul to confirm that he understands the tribunal's point. It is obvious why that should be so. The parol evidence rule was not an impediment to JVL's case. But the rule was fatal to Agritrade's case, unless Agritrade was able to surmount it.

55 Third, although the second arbitrator reminded Mr Bazul that he had the evidential burden of surmounting the parol evidence rule, that reminder cannot be read as the tribunal giving Agritrade *carte blanche* to adopt new and unpleaded defences in order to do so. The tribunal's encouragement to Mr Bazul to grapple with the parol evidence rule must be read against the

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backdrop of Agritrade's case at that time. By then, its case was confined to the uncertainty defence. If Agritrade wished to change tack and advance new defences in order to surmount the parol evidence rule, either instead of or in addition to its uncertainty defence, that was over and above the issues which had been put in play by this exchange. The tribunal would have to assess on separate criteria whether, and if so on what terms, that change of tack ought to be permitted.

56 It is true that the presiding arbitrator specifically raised the conditional contract exception to the parol evidence rule in this exchange with Mr Bazul. That exception posits a valid contract and is therefore fundamentally incompatible with Agritrade's sole pleaded defence, *ie* uncertainty. But it is clear from the context that the presiding arbitrator raised the conditional contract exception by way of example to Mr Bazul rather than by way of suggestion or by way of invitation. In other words, the presiding arbitrator was not then permitting Mr Bazul to advance a defence which characterised the disputed contracts as conditional contracts subject to the price-averaging arrangement, or even suggesting to him that he should consider doing so. If Mr Bazul wished to do so, it was for him to adopt that as his case and to persuade the tribunal that he ought to be permitted to advance it at that late stage.

57 In any event, it does not appear from this exchange that Mr Bazul foresaw any need to change tack.

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The close of the evidential phase

58 When the evidential phase concluded, Mr Pillai expressly asked Mr Bazul to confirm on the record that Agritrade's mutual-termination defence would not be revived. Mr Bazul gave the confirmation:[57]

> MR PILLAI: Just a final wrap-up point: because of the various changes … and some consequential amendments to pleadings and mutual termination point and so on, *we both agreed that we will do what is necessary, but we will not be proceeding on what we say we are not proceeding on. I just want to make that absolutely clear.*
>
> MR BAZUL: *You are right.*
>
> MR PILLAI: *I just want to be absolutely clear on that.*
>
> MR BAZUL: *Right.*
>
> Presiding arbitrator: What else?
>
> MR PILLAI: That's it.
>
> [PRESIDING ARBITRATOR]: Thank you very much. We appreciate the friendly way in which both the parties have conducted the proceedings.
>
> [emphasis added]

This exchange is significant for two reasons.

59 First, Mr Bazul confirmed expressly that Agritrade would not revive its mutual-termination defence. He therefore reiterated by necessary implication that Agritrade would not revive: (i) its case that the price-averaging arrangement governed the *performance* of the disputed contracts, as opposed to their *validity*; and (ii) its case that the price-averaging arrangement was a *contract*.

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[57] Transcript of 16 August 2012, page 161 line 17 to page 162 line 6, page 990 of 1st Affidavit of S.N. Jhunjhunwala.

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60 Second, Mr Bazul did not expressly make his confirmation subject to the earlier exchange in which the tribunal had encouraged him to engage with the parol evidence rule and its exceptions (see [52] above). In particular, he did not qualify his confirmation by reserving his right to address the tribunal's point by raising entirely new defences crafted specifically to surmount the parol evidence. This exchange was therefore implicit confirmation from Mr Bazul that Agritrade would grapple with the parol evidence rule only within the context of Agritrade's sole defence of *uncertainty*.

The written submissions

First exchange of written submissions

61 The parties exchanged written submissions in September 2012. Mr Pillai took Mr Bazul at his word. He confined himself in his submissions to dealing with Agritrade's uncertainty defence. JVL's submissions rejected that defence on the ground that the parties had agreed on all essential terms in each of the disputed contracts.[58]

62 Also in its written submissions, JVL advanced the parol evidence rule as part of its case.[59] It submitted that the disputed contracts were written agreements which contained all the essential terms for the sale and purchase of palm oil. Therefore a rebuttable presumption arose that the parties intended each document to contain all the terms of the parties' agreement. The parol evidence rule precluded Agritrade from relying on evidence of the price-averaging arrangement to contradict, vary, add to or subtract from the terms of the disputed contracts. No exception to the parol evidence rule applied.[60]

[58] Claimant's Written Submissions [110], page 1216 of 1st Affidavit of S.N. Jhunjhunwala.

[59] Claimant's Written Submissions [103], page 1211 of 1st Affidavit of S.N. Jhunjhunwala.

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63 For its part, Agritrade responded in its written submissions to the tribunal's invitation (see [52] above) to grapple with the parol evidence rule. But in doing so, it went beyond the confines of its uncertainty defence. Instead, it advanced an entirely new and entirely unpleaded defence. Agritrade now submitted as an alternative to its uncertainty defence that Agritrade was not in breach of the disputed contracts because the price-averaging arrangement meant that Agritrade's obligation to perform the disputed contracts was not yet due. In Agritrade's own words:[61]

> Assuming the Honourable tribunal finds that the [disputed contracts] were valid and binding contracts, [Agritrade's] position is that it was not in breach of these agreements. This is because the performance of these [disputed contracts] had not become due yet. It had not become due yet as no price averaging exercise had been carried out. This was because the parties could not agree on an average price to ship out the palm oil. If the parties could eventually agree on a price, the palm oil for the [disputed contracts] would be supplied.

64 Agritrade's new defence amounted to an alternative assertion that the price-averaging arrangement governed the *performance* of the disputed contracts rather than their *validity*. Specifically, Agritrade was now advancing a case that, if the tribunal were to find the disputed contracts to be valid and binding, performance of its obligation under these contracts became due only after a price averaging exercise had been carried out. In other words, Agritrade's new defence was that JVL's assertion that a breach of contract had occurred was premature.

65 Agritrade's prematurity defence was a significant departure from its case. It went beyond Agritrade's uncertainty defence, the only defence which

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60 Claimant's Written Submissions [131], page 1228 of 1st Affidavit of S.N. Jhunjhunwala.

61 Respondent's Written Submissions, paragraph 86, page 1292 of 1st Affidavit of S.N. Jhunjhunwala.

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remained live on the pleadings. It even went beyond its mutual-termination defence, which it had abandoned at the outset of the evidential phase. According to the uncertainty defence, the disputed contracts were void from the outset. According to the mutual-termination defence, the disputed contracts were mutually terminated in 2009. The prematurity defence posited that the disputed contracts were valid when entered into and remained binding, up to the date of the arbitration and indeed beyond. Agritrade had never before advanced that proposition as part of its case.

66 Agritrade also took the opportunity in its written submissions to deal with the argument that the parol evidence rule precluded it from relying on the price-averaging arrangement to establish either its uncertainty defence or its prematurity defence. It made two submissions on this issue: (i) the parol evidence rule did not apply; (ii) alternatively, if it did apply, an exception to the rule also applied.

67 Agritrade's primary submission on the parol evidence rule was that it was the parties' intention, objectively ascertained, that the disputed contracts should not be complete contracts. Agritrade submitted that there is no rule of law excluding extrinsic evidence solely because a document is said to embody a contract and appears to be complete on its face. Whether that document in fact embodies a complete contract depends on the objectively-ascertained intention of the parties and not on any rule of law. Agritrade therefore invited the tribunal to look at the entire factual matrix, *ie* including the parties' consensus on the price-averaging arrangement, in order to find objectively that they did not intend each disputed contract to embody a complete contract.[62]

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[62] Respondent's Written Submissions [15] – [22], page 1263 to 1266 of 1st Affidavit of S.N. Jhunjhunwala.

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68 Agritrade's alternative submission on the parol evidence rule was that its defence fell within an exception to the rule. Agritrade began this section of its written submissions by setting out all six of "[t]he recognised exceptions to the parol evidence rule" drawn from Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 5th Ed, 2011) at pp 120 – 123:[63]

> (a) Evidence is admissible to show that the contract is not yet in force by reason of an unfulfilled condition precedent.
>
> (b) Unless the contract contains an "entire agreement" clause, evidence is admissible to show that the writing was not intended to be the entire contract between the parties.
>
> (c) Unless the contract contains an "entire agreement" clause, evidence is admissible to prove a collateral contract.
>
> (d) Evidence is admissible to prove custom.
>
> (e) Evidence is admissible to prove the true nature of the transaction.
>
> (f) Evidence is admissible where it is sought to challenge the validity of the contract.

69 Out of these six exceptions to the parol evidence rule, Agritrade chose to advance as part of its case only three:[64]

> 25. It is submitted that the parol evidence rule does not apply in this case because the Respondent can rely on the following exceptions to the parol evidence rule:

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63 Respondent's Written Submissions [24], page 1267 of 1st Affidavit of S.N. Jhunjhunwala.

64 Respondent's Written Submissions [25], page 1268 of 1st Affidavit of S.N.

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> (a) The terms of the [disputed contracts] were not wholly contained or reduced in writing;
>
> (b) The [disputed contracts] are conditional agreements or are invalid contracts;
>
> (c) The evidence is necessary to challenge the validity of the [disputed contracts].

70 Agritrade had a clear opportunity in its written submissions to advance as part of its case the argument that the price-averaging arrangement was a collateral contract within the meaning of the third exception to the parol evidence rule which it listed (see [68(c)] above). It did not take that opportunity.

71 Indeed, it is possible to go further than that neutral statement and say that Agritrade took a considered decision not to advance the collateral contract exception as part of its case. I say that because Agritrade's written submissions advanced only three exceptions to the parol evidence rule drawn from a list of six exceptions which included the collateral contract exception. Agritrade therefore chose to rely on those three exceptions, knowing that the collateral contract exception was also available. That is an implicit rejection of the collateral contract exception. In that sense, Agritrade's rejection of the price-averaging arrangement as a collateral contract for the purposes of the exceptions to the parol evidence rule was entirely consistent with its rejection of the price-averaging arrangement as any sort of a contract when it abandoned its mutual-termination defence.

72 Agritrade thus allowed its first opportunity to advance the collateral contract exception as part of its case to pass it by.

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Reply submissions

73 The parties exchanged written reply submissions in October 2012. JVL objected to Agritrade's attempt to introduce the prematurity defence through its written submissions as a new and unpleaded defence, after the parties had presented their evidence and after they had made their submissions. JVL pointed out that the four-day evidential phase had proceeded on the basis that Agritrade's sole defence was its sole *pleaded* defence, *ie* its uncertainty defence. For that reason, JVL had dealt with only the uncertainty defence in its written submissions. JVL urged the tribunal not to go beyond the parties' pleadings and not to decide their dispute on a point on which the parties had adduced no evidence and made no submissions.[65]

74 Be that as it may, JVL took the opportunity to deal with Agritrade's prematurity defence in its written reply submissions. It reiterated that both Agritrade's uncertainty defence and its prematurity defence were subject to the parol evidence rule. It examined the three exceptions which Agritrade had relied on (see [69] above) and submitted that none of them applied.[66]

75 More specifically, JVL submitted that Agritrade's prematurity defence did not trigger the conditional-contract exception to the parol evidence rule. Agritrade's prematurity defence asserted that the price-averaging arrangement was a condition precedent to Agritrade's obligation to perform each disputed contract. But Agritrade's own case[67] was that, when the parties reached a consensus on the price-averaging arrangement, they did not foresee that the

65 Claimant's Reply Submissions [27], page 1341 of 1st Affidavit of S.N. Jhunjhunwala.

66 Claimant's Reply Submissions, [69] – [92], page 1356 to 1363 of 1st Affidavit of S.N. Jhunjhunwala.

67 Respondent's Written Submissions [38], page 1273 of 1st Affidavit of S.N. Jhunjhunwala.

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Market Price Contracts which they were going to enter into for the purposes of the price-averaging arrangement might themselves remain unperformed; and the parties therefore did not discuss or agree what the parties' position would be in that situation.[68] Agritrade's only basis for asserting a condition precedent to performance was the parties' subsequent conduct, *ie* their conduct *after* they had entered into the Market Price Contracts.[69] In other words, it was Agritrade's own case that the price-averaging arrangement had never been integrated into the parties' bargain comprised in the Market Price Contracts, to be applied if the Market Price Contracts themselves – as opposed to the High Price Contracts – remained unperformed. The disputed contracts were, of course, all Market Price Contracts, not High Price Contracts. If the condition precedent at the heart of the prematurity defence was not integrated into the parties' bargain, Agritrade's recourse to the conditional contract exception was of no avail.

76 JVL dealt in its reply submissions only with the three exceptions to the parol evidence rule which Agritrade had relied upon. Thus, JVL made no submissions as to why the price-averaging arrangement could not be characterised as a collateral contract and thereby come within the collateral contract exception. But there was no reason for JVL to do so. JVL quite rightly dealt with only the three exceptions to the parol evidence rule on which Agritrade had chosen to rely; and quite rightly did not deal with any of the three exceptions on which Agritrade had chosen not to rely. As the tribunal had reminded Mr Bazul (see [52] above), Agritrade bore the burden of choosing and advancing the specific exceptions on which it wished to rely. It

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68 Claimant's Reply Submissions, [86(d)], page 1362 of 1st Affidavit of S.N. Jhunjhunwala.

69 Respondent's Written Submissions [38], page 1273 of 1st Affidavit of S.N. Jhunjhunwala.

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had chosen three specific exceptions to advance as part of its case. JVL quite naturally responded only to the case which Agritrade chose to advance under those three specific exceptions.

77 Agritrade, in its written reply submissions, simply repeated its reliance on the same three exceptions to the parol evidence rule which it had dealt with in its written submissions (see [69] above): [70]

> ii. THE RESPONDENT'S CASE DOES NOT FALL FOUL OF THE PAROL EVIDENCE RULE
>
> 69. In response to paragraph 131 of [JVL's written submissions], [Agritrade] has shown that [its] case does not fall foul of the parol evidence rule. *This is found at paragraphs 15 to 43 of the [Agritrade's written submissions]. As this point has already been fully dealt with in [those submissions], there is no need to repeat them here.*
>
> [emphasis added]

Agritrade still made no attempt to rely on the collateral contract exception.

78 Agritrade thus allowed a second opportunity to advance the collateral contract exception as part of its case to pass it by.

The oral submissions

JVL's oral closing submissions

79 The parties presented oral submissions to the tribunal in November 2012. In the course of those submissions, Mr Pillai addressed orally each of the three exceptions to the parol evidence rule which Agritrade had advanced (see [69] above) and made oral submissions as to why each was inapplicable.[71]

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70 Respondent's Written Reply Submissions dated 8 October 2012, page 1412 to 1463 of 1st Affidavit of S.N. Jhunjhunwala.

71 Transcript of 30 November 2012, page 21 line 10 to 25, page 1475 of 1st Affidavit of S.N. Jhunjhunwala.

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80 Ten minutes before Mr Pillai was to conclude his oral submissions,[72] the first arbitrator pointed out to Mr Pillai that Mr Bazul had set out all six exceptions to the parol evidence rule and observed that one of the exceptions Mr Bazul might rely on was the collateral contract exception.[73] Mr Pillai responded that that exception could not apply because the price-averaging arrangement was not a contract at all, being merely an agreement to agree. This is a critical exchange which I set out in full:[74]

> [FIRST ARBITRATOR]: Sorry. The question is simply, if there is an agreement and they say it's been varied, then as a legal proposition, why does the parol evidence rule prevent that? *Mr Bazul may not have chosen the exactly correct or applicable exception, but he's set out all the exceptions, and it seems to be that one of the exceptions that he might rely on is collateral agreement.*
>
> In other words, here is a piece of paper, we sign this piece of paper, but at the same time you also agree that this piece of paper doesn't mean that it is going to be enforced in the exact way it's stated. *We have a side agreement that there will be some variation of this.*
>
> [SECOND ARBITRATOR]: Exactly.
>
> [FIRST ARBITRATOR]: That's the question. Is there any rule of law that prevents that from being admissible, and we have to find out what exactly was agreed. Unless you say that what was agreed by way of side agreement is so vague an agreement to agree that that part of it is unenforceable.
>
> MR PILLAI: It's not enforceable, exactly, yes.
>
> [FIRST ARBITRATOR]: Then we hear you, and we've understood that.
>
> MR PILLAI: That's the point in their closing submissions, they brought up the second point, which is that the parties have to enter into a fresh agreements (sic) in order, and only if they

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72 Transcript of 30 November 2012, page 35 line 19, page 1482 of 1st Affidavit of S.N. Jhunjhunwala.

73 Transcript of 30 November 2012, page 35 line 25 to page 36 line 20, page 1482 of 1st Affidavit of S.N. Jhunjhunwala.

74 Transcript of 30 November 2012, page 35 line 25 to page 36 line 20, page 1482 of 1st Affidavit of S.N. Jhunjhunwala.

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> refuse to negotiate will they be in breach. Those kinds of agreements are [un]enforceable, so if you conceptualise it as a side agreement, a side agreement which is an agreement to negotiate is unenforceable. So again you will go back to the terms of the original agreement.
>
> The points (sic) about all these submissions is that whatever the scenario, you go back to the original agreement, which is our case, which is an extremely simple case.
>
> [emphasis added]

81 The next important exchange occurred a few minutes later and took place between the first arbitrator and Mr Pillai. It is not necessary to set this second exchange out in full. The first arbitrator asked Mr Pillai whether the price-averaging arrangement could be characterised as an equitable estoppel precluding JVL from enforcing the disputed contracts in accordance with their strict terms unless it first gave Agritrade reasonable notice of its intention to do so; and whether JVL, having given such notice to Agritrade, should now be considered free to enforce the disputed contracts in accordance with its terms. The first arbitrator pointed out that this was neither party's pleaded case "but might be a possible characterisation of what [had] happened".[75] Mr Pillai reiterated that it was not Agritrade's case that JVL was estopped from relying on its strict legal rights, but accepted that that characterisation sounded "logical".[76]

82 These two exchanges are fundamentally different from the earlier exchange on the parol evidence rule (see [52] above). In these later exchanges, the tribunal simply put it to Mr Pillai that Mr Bazul "might" rely on the collateral contract exception or that JVL's conduct "might" be characterised as raising an estoppel which had been terminated by reasonable notice. The

[75] Transcript of 30 November 2012, page 39 lines 4 to 6, page 1484 of 1st Affidavit of S.N. Jhunjhunwala.

[76] Transcript of 30 November 2012, page 37 line 10 to page 39 line 7, page 1483 to 1484 of 1st Affidavit of S.N. Jhunjhunwala.

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conditional "might" used for both points is the language of a hypothetical being floated for discussion then and there, not of a direction being given for the future. In the earlier exchange, however, the tribunal expressly directed the parties to address it on the parol evidence rule and its exceptions.

83 Mr Pillai concluded his oral submission very shortly after these exchanges.

Agritrade's oral closing submissions

84 Mr Bazul then made his oral submissions. The bulk of his submissions either summarised his written submissions or dealt with a particular issue as to how the price-averaging agreement was to apply to a Market Price Contract which had become an Unperformed Market Price Contract, given that it would already have been the subject of a price-averaging exercise. Mr Bazul also dealt with questions from the tribunal on the scope of his prematurity defence. The tribunal was particularly troubled by the fact that this defence contemplated the parties waiting indefinitely for the Unperformed Market Price Contracts to be performed.[77]

85 In the course of Mr Bazul's oral submissions, the first arbitrator put to Mr Bazul the same equitable estoppel point which he had put to Mr Pillai earlier (see [81] above).[78] Mr Bazul's response was that it would be inequitable for JVL to rely on the strict terms of the disputed contracts even after giving reasonable notice of its intention to do so. This, he said, was because JVL had taken advantage of the price-averaging arrangement when the market turned

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77 Transcript of 30 November 2012, page 77 line 13 to 18, page 1503 of 1st Affidavit of S.N. Jhunjhunwala.

78 Transcript of 30 November 2012, page 81 line 15 to page 84 line 3, page 1506 of 1st Affidavit of S.N. Jhunjhunwala.

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against it in 2008 and would be behaving inequitably by attempting to disclaim the price-averaging arrangement when the market had turned in its favour in 2010. The terms in which this exchange commenced are important and I set them out:[79]

> [FIRST ARBITRATOR]: Let me just put another query to you. *I put the same query to Mr Pillai earlier*, so you should give me the benefit of your response as well. Do you remember what I suggested to Mr Pillai: suppose a tribunal takes an alternative view of more or less the same scenario that you are describing, Mr Bazul, in factual terms, and the reason why is because there was an understanding between them that parties would not treat [the disputed contracts] as sacrosanct, and that the terms would be varied by the averaging process which would play itself out, as you say, over a certain period of time.
>
> [emphasis added]

86 This equitable estoppel point was the only point which the first arbitrator put to both Mr Pillai and Mr Bazul in the course of their oral submissions. Significantly, neither the first arbitrator nor the tribunal put the parol evidence rule or any aspect of it, including the collateral contract exception, to Mr Bazul during Mr Bazul's oral submissions. Neither did Mr Bazul take the initiative during his oral submissions to pick up the first arbitrator's point to Mr Pillai and to adopt the collateral contract exception as part of Agritrade's case. Indeed, Mr Bazul did not address the parol evidence rule or any of its exceptions at all in his oral submissions.

87 This is surprising. The exchange between first arbitrator and Mr Pillai (see [80] above) indicated, at the very least, that one member of the tribunal considered that Mr Bazul "might" be able to rely on the collateral contract exception even though it was unpleaded and even though the tribunal had by then received all of the evidence and virtually all of the written and oral

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79 Transcript of 30 November 2012, page 81 line 15 to page 36 line 20, page 1482 of 1st Affidavit of S.N. Jhunjhunwala.

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submissions. An observer might have expected Mr Bazul to grab the argument with both hands and inform the tribunal that he wished to adopt and advance it as his own. Yet he did not do that.

88 Agritrade thus allowed a third opportunity to advance the collateral contract exception as part of its case to pass it by.

JVL's oral reply submissions

89 In his oral reply submissions, Mr Pillai reiterated his position that Agritrade's prematurity defence had not been pleaded, was brought up after the close of evidence and therefore ought to be disregarded by the tribunal. But he conceded that he had dealt with the prematurity defence in his reply written submissions.[80]

Direction from the tribunal

90 At the conclusion of the oral submissions, the tribunal informed the parties that it would give them a final opportunity to address in written submissions the points which the tribunal had raised that day with counsel. Somewhat ironically, given what was to transpire, the tribunal said that it wanted to avoid a situation where a party was left with the impression that the tribunal had decided against it on an issue on which it was not given a chance to submit, or that the tribunal had precluded a party from arguing points it had never thought of.[81] This exchange between the tribunal and counsel is important and I set it out in full:[82]

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80 Transcript of 30 November 2012, page 85 line 18 to page 86 line 1, page 1507 of 1st Affidavit of S.N. Jhunjhunwala.

81 Transcript of 30 November 2012, page 100 line 9 to page 102 at line 12, page 1514 to 1515 of 1st Affidavit of S.N. Jhunjhunwala.

82 Transcript of 30 November 2012, page 100 line 9 to page 102 at line 12, page 1514

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> [PRESIDING ARBITRATOR]: All right.
>
> I think that we have come to the end of this. In the course of these closing submissions, this session, the tribunal had raised a couple of points. I think we'll give you a chance to put them in written submissions, if you like, but not exceeding 10 pages – I don't want another 20 or 30 pages – *of the points which you want to cover, which you have not. I don't want to give you the impression, then we decide on something which we have never given you a chance to answer.*
>
> MR PILLAI: I think the question was to my learned friend.
>
> [PRESIDING ARBITRATOR]: I leave it entirely up to you. If you feel that there's nothing more you need to reply, there's no need --
>
> MR PILLAI: I would want to reply to him. That's the thing. So if he can go first and then I will reply.
>
> [SECOND ARBITRATOR]: With the opportunity for him to respond. It cannot be one way.
>
> MR BAZUL: I think it's fair.
>
> MR PILLAI: Do you want to set a timeline?
>
> MR BAZUL: Can I ask for two weeks? The reason why I say two weeks is because I'm travelling on --
>
> [PRESIDING ARBITRATOR]: For the exchange, or yours first?
>
> MR PILLAI: No, his first, my response.
>
> MR BAZUL: I'm okay with that.
>
> …
>
> [FIRST ARBITRATOR]: Please also answer the question that I posed to both parties.
>
> [PRESIDING ARBITRATOR]: *Have a look at what we have asked, and answer, because I don't want you to go away with the impression that we precluded you from arguing points which you never thought of.*
>
> [emphasis added]

91 Significantly, the tribunal did not, in this exchange, direct the parties to deal specifically with any of the points which it had raised with either counsel

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and page 1515 of 1st Affidavit of S.N. Jhunjhunwala.

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in the course of the oral submissions. In the penultimate sentence in this exchange, the first arbitrator did ask Mr Pillai and Mr Bazul to answer the question which he had posed to both parties. This is not a reference to the first arbitrator's question about the collateral contract exception. The first arbitrator had posed that question only to Mr Pillai, and not to Mr Bazul (see [80] above). The first arbitrator is instead referring to his question about equitable estoppel (see [81] and [85] above). As I have pointed out (see [86] above), this is the only question which he put to both counsel at that hearing.

92 In this exchange, the tribunal was expressing its concern that one or more of the points which it had raised in the course of both counsel's oral submissions, and which were not the subject of the parties' submissions, might be an issue on one of the critical paths to its ultimate decision. These points included not only the collateral contract point and the equitable estoppel point but also a number of points raised with Mr Bazul about his prematurity defence and his case as to how the price-averaging arrangement would apply to an Unperformed Market Price Contract.

93 Mr Pillai was concerned that he should not have to deal with any of the tribunal's points unless Agritrade adopted one or more of those points as part of its own case. So he asked the tribunal to permit JVL to respond to Agritrade's final written submissions rather than requiring JVL to take the lead in presenting those submissions or to exchange those submissions simultaneously with Agritrade.

The final written submissions

94 In its final written submissions, Agritrade responded to selected points which the tribunal had raised in the course of oral submissions. It made three

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broad points: (i) when a Market Price Contract became an Unperformed Market Price Contract, the price stipulated on the face of the contract was superseded by the average price arrived at as a result of the earlier price-averaging exercise carried out in relation to that contract, *ie* when it was still a Market Price Contract and before it became an Unperformed Market Price Contract;[83] (ii) its prematurity defence did not depart from its pleaded case;[84] and (iii) JVL had brought the arbitration prematurely because a reasonable time had not yet elapsed to carry out the price-averaging exercise necessary for the disputed contracts to be performed.[85]

95 Agritrade's final written submissions made no attempt to advance the collateral contract exception. Instead, when it came to the parol evidence rule, Agritrade merely echoed its previous reliance on the three other exceptions:[86]

> 7. The Claimant wrongly relies on the parol evidence rule to shut the evidence relating to the employment of the price averaging exercise. *The Respondent has already addressed the application of the parol evidence rule in … [Agritrade's written reply submissions].* As such, it is submitted that the tribunal can only make a finding that the [disputed contracts] are valid contracts if the contemporaneous evidence show that the parties had intended the [disputed contracts] to be performed without undergoing a price averaging exercise.
>
> [emphasis added]

96 Agritrade thus allowed a fourth opportunity to advance the collateral contract exception as part of its case to pass it by.

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83 Respondent's Final Written Submissions [9] – [44], page 1519 to 1524 of 1st Affidavit of S.N. Jhunjhunwala.

84 Respondent's Final Written Submissions [45] – [52], page 1525 to 1526 of 1st Affidavit of S.N. Jhunjhunwala.

85 Respondent's Final Written Submissions [53] – [60], page 1526 to 1527 of 1st Affidavit of S.N. Jhunjhunwala.

86 Respondent's Final Written Submissions [7], page 1519 of 1st Affidavit of S.N. Jhunjhunwala.

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97 JVL produced its final written submissions in February 2013. JVL limited itself to responding to the three points raised in Agritrade's final written submissions (see [94] above).[87]

98 JVL did not touch on the parol evidence rule in its final written submissions, let alone on any of its exceptions, including the collateral contract exception. This is not surprising. JVL defined the scope of its final written submissions by commencing with a statement that those submissions were made in reply to Agritrade's final written submissions.[88] Agritrade, who bore the burden on this issue, had made no attempt to advance the collateral contract exception as part of its case, even in its final written submissions.

Further written submissions

99 In July 2013, three months before it issued its award, the tribunal wrote to both parties.[89] The tribunal pointed out, with reference to certain paragraphs in each party's written submissions, that each party relied for its case on the principle in *Walford v Miles* [1992] 2 AC 128 – *ie* that an agreement to negotiate is unenforceable – but did so for a different purpose and from a different perspective. The tribunal invited the parties to make further written submissions on the principle within four days.

100 Both parties put in brief submissions on this point within the time stipulated.[90] Both parties' submissions dealt with the principle from *Walford v*

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87 Claimant's Written Submissions [11] – [18], page 1531 to 1532 of 1st Affidavit of S.N. Jhunjhunwala.

88 Claimant's Final Written Submissions [1], page 1528 of 1st Affidavit of S.N. Jhunjhunwala.

89 1st Affidavit of S.N. Jhunjhunwala, page 1546.

90 Pages 1548 and 1553 of 1st Affidavit of S.N. Jhunjhunwala.

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Miles in relation to the disputed contracts, *ie* whether the disputed contracts were (or were not) merely agreements to negotiate. Neither party made any submissions on whether the price-averaging arrangement was (or was not) a mere agreement to negotiate. This is not surprising: the issue of whether the price-averaging arrangement was a contract had ceased to be an issue before the tribunal when Agritrade withdrew its abandonment defence (see [49] above). It was therefore wholly immaterial to the issues before the tribunal whether the principle in *Walford v Miles* rendered the price-averaging arrangement a mere agreement to negotiate and therefore too uncertain to be a contract.

101 Agritrade could have taken the opportunity, in these submissions, to make an additional submission as to the effect in law of the principle in *Walford v Miles* on the price-averaging arrangement. JVL had, in response to the first arbitrator's question on the collateral contract exception (see [80] above), rejected the collateral contract exception on the grounds that the price-averaging agreement was merely an agreement to agree. If Agritrade had now taken the opportunity to reject that rejection, so to speak, it could be said that Agritrade had raised the collateral contract exception as part of its case, albeit obliquely and at a very late stage. But it did not do that.

102 Agritrade thus allowed a fifth opportunity to advance the collateral contract exception as part of its case to pass it by.

The position before the tribunal

103 After all the evidence and submissions were in, the position before the tribunal was as follows, if one were to leave aside the technicalities of pleading. The ultimate issue before the tribunal was whether Agritrade had

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breached one or more of the disputed contracts. That ultimate issue raised two subsidiary issues for the tribunal: (i) Agritrade's uncertainty defence; and (ii) Agritrade's prematurity defence. The uncertainty defence was pleaded; the prematurity defence was raised only in Agritrade's written submissions.

104 Each of Agritrade's two defences relied on the price-averaging arrangement. They each therefore gave rise to a further subsidiary issue: whether the price-averaging arrangement was within the scope of the parol evidence rule. This issue, although it was neither formally pleaded nor informally advanced by either side as part of its case, was properly before the tribunal because the tribunal had directed both parties on the second day of the evidential phase to deal with this issue (see [52] above). The parties accordingly had every opportunity to make written and oral submissions on the applicability of the parol evidence rule and its exceptions.

105 The tribunal's direction to parties to grapple with the parol evidence rule, and its specific direction to Agritrade to grapple with the exceptions to the rule, gave rise to a final subsidiary issue: which, if any, exception to the parol evidence rule did the price-averaging arrangement fall within. On that, the burden of proof lay on Agritrade. That burden of proof required Agritrade to establish on the facts and the law how the price-averaging arrangement came within a given exception. But it also put an anterior burden on Agritrade: the burden to identify the exception on which it intended to rely. Agritrade discharged this burden by selecting three out of the six established exceptions to rely upon (see [69] above). At no time during the arbitration did Agritrade rely on the collateral contract exception. Only those three exceptions, therefore, were before the tribunal.

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106 After the tribunal had floated the collateral contract exception in the course of Mr Pillai's oral closing submissions (see [80] above), Agritrade had four clear opportunities to adopt and advance it as part of its case. Agritrade never did so. Whether the price-averaging arrangement was a collateral contract and therefore within that exception was not an issue which either party placed before the tribunal. It was also not an issue which the tribunal had specifically directed the parties to deal with, as it did in connection with the parol evidence rule itself (see [52] above) and the equitable estoppel point (see [90] above).

The final award

107 The tribunal delivered its final award in October 2013. All three arbitrators agreed that the ultimate issue before them turned on whether the price-averaging arrangement was a collateral contract. The tribunal came to differing conclusions on this dispositive issue, and therefore split two to one on the ultimate issue of liability.

108 The majority, comprising the presiding arbitrator and the second arbitrator, dismissed JVL's claim. They held that the price-averaging arrangement amounted to a collateral contract which was in law capable of varying the parties' performance obligation under the disputed contracts notwithstanding the parol evidence rule.

109 The first arbitrator dissented. He would have awarded substantial damages to JVL. He held that the price-averaging arrangement was too uncertain to amount to a contract, and therefore could not be a collateral contract for the purposes of the collateral-contract exception to the parol evidence rule.

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List of issues

110 At the beginning of the award, the tribunal set out a list of eight issues which were before it for determination. Of those eight issues, only the following four issues are relevant for present purposes:[91]

(a) Does the Respondent's prematurity case deviate from its pleaded case?

(b) Are the disputed contracts void for uncertainty?

(c) Does the parol evidence rule preclude Agritrade from relying on the price-averaging arrangement?

(d) Was performance of the disputed contracts subject to the price-averaging arrangement? If so, to what extent and with what consequences?

Majority decision

First issue – deviation from pleaded case

111 On the first issue, the majority found that Agritrade's prematurity case was indeed unpleaded but held that it raised a defence which was the same or similar to its pleaded uncertainty defence, *ie* that the disputed contracts "were subject to the price averaging arrangement being carried out by the parties and until this price averaging arrangement had been carried out these contracts were not due for performance".[92]

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91 Award, page 30 [9.2], page 98 of 1st Affidavit of S.N. Jhunjhunwala.

92 Award [10.6], page 102 of 1st Affidavit of S.N. Jhunjhunwala.

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112 In any event, the tribunal held, the question raised by Agritrade's prematurity defence was really the natural consequence of the tribunal's finding on Agritrade's uncertainty defence. If the tribunal were to decide that the disputed contracts were sufficiently certain to be valid, it would inevitably have to go on and consider what the parties' positions would be with respect to the performance of the contracts. In particular, the tribunal would have to decide: (i) whether performance of the contracts was subject to the price-averaging arrangement; and (ii) if so, whether Agritrade had breached the contracts.[93]

113 Additionally, the majority held, the parties had made their submissions to the tribunal on Agritrade's prematurity defence. JVL had dealt with it in its reply written submissions, in its oral submissions and in its final written submissions. Thus JVL was not prejudiced by Agritrade's failure formally to plead the prematurity defence.[94]

114 For these reasons, the majority allowed Agritrade's prematurity defence to stand for the tribunal's determination.

Second issue – the uncertainty defence

115 On the second issue, the majority rejected Agritrade's uncertainty defence as "misconceived". Each disputed contract was valid and binding even if performance was to be deferred and even if performance was to be subject to the price-averaging arrangement.[95]

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93 Award [10.7], page 102 of 1st Affidavit of S.N. Jhunjhunwala.

94 Award [10.9], page 103 of 1st Affidavit of S.N. Jhunjhunwala.

95 Award [11.2], page 104 of 1st Affidavit of S.N. Jhunjhunwala.

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Third issue – parol evidence rule

116 On the third issue, the majority held that Agritrade could rely on the price-averaging arrangement under the collateral contract exception[96] to the parol evidence rule:[97]

> …the Tribunal finds that clearly the intention of the Parties was that the agreement of price averaging arrangement orally made in late August 2008 was to facilitate performance of the High Price Contract and subsequently it was also the intention of the Parties to continue applying it to facilitate the performance of the Unperformed Market Price Contracts. The Tribunal finds that the oral agreement of price averaging arrangement as made between the Parties governs the performance of High Price Contracts and subsequently Market price Contracts. In the opinion of the Tribunal, there is no issue with respect to the admissibility of such agreement in this case. *The price averaging arrangement (though orally made) is what is known or described as a collateral contract.* It does not add to or alter the terms of the High Price Contracts and the Market Price Contracts. *At common law, admission of evidence of a collateral contract is an exception to the parol evidence rule.*
>
> [emphasis added]

117 The majority held that the parties duly facilitated the performance of all of the High Price Contracts and the Market Price Contracts (save only in respect of the disputed contracts) by complying with their obligations under the price-averaging arrangement as a collateral contract:[98]

> The fact remains that throughout this period … right up to June 2010, all the Unperformed Market Price Contracts, with the exception of the [disputed contracts], were performed by the Parties carrying out the price averaging arrangement. It should be noted that the price averaging arrangement was a collateral contract made between the Parties to facilitate the performance of High Price Contracts and later the Unperformed Market Price Contracts (including the [disputed

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96 Award [13.13] – [13.14], page 116 of 1st Affidavit of S.N. Jhunjhunwala.

97 Award [13.20], page 121 of 1st Affidavit of S.N. Jhunjhunwala.

98 Award [16.4], page 141 of 1st Affidavit of S.N. Jhunjhunwala.

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> contracts]). In effect, it governed the performance of these sale contracts.

Fourth issue – effect of the price-averaging arrangement

118 On the fourth issue, the majority accepted that: (i) the disputed contracts were not to be performed as standalone contracts but were to be performed only subject to the price-averaging arrangement;[99] (ii) JVL's own witness, Mr Poddar, had accepted this to be true;[100] and (iii) the reason Agritrade had not performed its obligations under these contracts was because the parties could not agree on the terms necessary (see [13] – [15] above) to carry out price-averaging exercises for them.[101]

The majority's conclusion

119 For the foregoing reasons, the majority held that Agritrade was not in breach of the disputed contracts.[102] On the majority's analysis, it was JVL who had repudiated the disputed contracts by issuing a notice of default and buying-in palm oil against Agritrade (see [22] above) even though the parties had not yet applied the price-averaging arrangement to the disputed contracts.[103] Agritrade had accepted that repudiation by its response to JVL's notice of default (see [21] above). That acceptance had brought both parties' obligations under the disputed contracts to an end.[104]

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99 Award [15.1], page 130 of 1st Affidavit of S.N. Jhunjhunwala.

100 Award [15.3], page 134 of 1st Affidavit of S.N. Jhunjhunwala.

101 Award [15.5], page 135 of 1st Affidavit of S.N. Jhunjhunwala.

102 Award [17.8], page 146 of 1st Affidavit of S.N. Jhunjhunwala.

103 Award [17.8], page 146 of 1st Affidavit of S.N. Jhunjhunwala.

104 Award [17.9], page 147 of 1st Affidavit of S.N. Jhunjhunwala.

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Minority decision

120 In his dissenting award, the first arbitrator agreed with the majority that: (i) Agritrade's uncertainty defence failed;[105] (ii) that the disputed contracts were not intended to be performed as standalone contracts but only subject to the price-averaging arrangement;[106] and (iii) that Agritrade was entitled to rely on the price-averaging arrangement as governing the performance of the disputed contracts if it fell within the collateral contract exception to the parol evidence rule.[107]

121 The first arbitrator, however, held that the price-averaging arrangement was not a contract because its critical commercial terms were not agreed with sufficient certainty. These critical commercial terms were: (i) the ratio in which the two relevant prices were to be averaged to derive the unit price for a given cargo; (ii) the volume of each cargo; and (iii) the date for each cargo to be shipped. Further: (i) there was no agreement as to how far into the future the parties were to be obliged to continue applying the price-averaging arrangement to their dealings and (ii) there was no objective mechanism to break any deadlock if the parties failed to agree on these critical commercial terms while applying the price-averaging arrangement.[108] Too uncertain to be a contract, the price-averaging arrangement was a non-starter as a collateral contract.

122 He held, however, that the price-averaging arrangement did take effect as an equitable estoppel. That estoppel suspended JVL's right to rely on its

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105 Award [18.2], page 147 of 1st Affidavit of S.N. Jhunjhunwala.

106 Award [18.2], page 147 of 1st Affidavit of S.N. Jhunjhunwala.

107 Award [18.3], page 147 of 1st Affidavit of S.N. Jhunjhunwala.

108 Award [18.4] to [18.6], page 147 to 148 of 1st Affidavit of S.N. Jhunjhunwala.

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strict legal rights under the disputed contracts[109] until it had given reasonable notice to Agritrade of its intention to do so.[110] JVL's notice of default gave the necessary notice.[111] The preclusive effect of the estoppel was thereby terminated, and Agritrade came under an obligation once again to perform the contracts.

123 For the foregoing reasons, the first arbitrator held that Agritrade was in breach of contract. He would accordingly have awarded substantial damages to JVL.[112]

JVL's application to set aside the award

Grounds for setting aside

124 JVL applied in January 2014 to set aside the tribunal's award. JVL was represented before me by Mr Andre Yeap SC. Agritrade was represented by Mr Kelly Yap.

125 JVL relied on three principal grounds to argue that the award should be set aside: (i) JVL was unable to present its case to the tribunal or there was a breach of the rules of natural justice in connection with the making of the tribunal's award by which JVL's rights had been prejudiced; (ii) the award contained decisions on matters which were beyond the scope of arbitration or the tribunal failed to decide on matters which were submitted to arbitration; and (iii) the tribunal displayed apparent bias towards JVL.

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109 Award [18.10], page 149 of 1st Affidavit of S.N. Jhunjhunwala.

110 Award [18.12], page 150 of 1st Affidavit of S.N. Jhunjhunwala.

111 Award [18.16], page 150 of 1st Affidavit of S.N. Jhunjhunwala.

112 Award [18.24], page 158 of 1st Affidavit of S.N. Jhunjhunwala.

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126 The core of JVL's submission was that the tribunal decided JVL's claim against JVL on a point, *ie* the collateral contract point, which Agritrade had never advanced. As a result, JVL was deprived of the opportunity of presenting its case on the following three issues: [113]

(a) Whether the price-averaging arrangement was a collateral contract;

(b) Whether the price-averaging arrangement, even as a collateral contract, was intended to govern the *performance* of the disputed contracts as opposed to their *validity*; and

(c) Whether JVL was in repudiatory breach of the disputed contracts on the grounds found by the majority.

Setting aside proceedings suspended

127 In May 2014, after two rounds of oral submissions and several sets of written submissions by the parties, I found there to be substance in JVL's submissions. Instead of setting aside the award, however, I asked Mr Kelly Yap whether he wished to invite me to exercise my power under Art 34(4) of the UNCITRAL Model Law on International Commercial Arbitration (set out in First Schedule, International Arbitration Act (Cap 143A, 2002 Rev Ed) (the "the Act") ("the Model Law") to suspend these setting-aside proceedings for a period of time in order to give the tribunal an opportunity to resume the arbitral proceedings and take action to eliminate the grounds advanced by JVL for setting the award aside. Mr Yap invited me to do so.[114]

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113 Transcript of 30 May 2014, page 91 of the 3rd Affidavit of S.N. Jhunjhunwala.

114 Transcript of 30 May 2014, page 91 of the 3rd Affidavit of S.N. Jhunjhunwala.

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128 I accordingly suspended these setting aside proceedings for six months to give the tribunal an opportunity to consider whether it was necessary or desirable, and if so to what extent, to receive further evidence or submissions on the three issues which JVL had identified (see [126] above).

Events during the suspension

129 For reasons best known only to JVL, it waited for five out of the six months of the suspension to elapse before bringing my order to the tribunal's attention.[115] Even then, it did so only upon Agritrade's prompting.[116]

130 By its letter sent to the tribunal in September 2014, JVL informed the tribunal of my order and the intended purpose. But instead of asking the tribunal for direction on how it wished to be addressed on whether to receive further evidence or submissions on the three issues (see [126] above), JVL somewhat peremptorily – and I must say, optimistically – asked the tribunal to enter a revised award in JVL's favour. JVL gave the following four reasons: (i) the tribunal had unanimously rejected Agritrade's uncertainty defence; (ii) that was the only defence which Agritrade had pleaded; (iii) Agritrade had never sought an opportunity to plead any other defence; and (iv) it was now far too late for Agritrade to seek that opportunity.[117]

131 Given how little time then remained until the suspension expired in November 2014, the tribunal directed the parties to address it in writing on whether it should receive further evidence or submissions on the three issues (see [126] above).[118]

115 Page 111 of 3rd Affidavit of S.N. Jhunjhunwala.

116 Page 109 of 3rd Affidavit of S.N. Jhunjhunwala.

117 Page 111 of 3rd Affidavit of S.N. Jhunjhunwala.

118 Page 146 of 3rd Affidavit of S.N. Jhunjhunwala.

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132 The parties lodged their written submissions in October 2014. JVL advanced two principal points in its submissions:

(a) The tribunal had unanimously rejected the only defence which Agritrade had advanced. Therefore, JVL was *prima facie* entitled to an award in its favour.[119]

(b) In the alternative, the tribunal should require Agritrade to amend its pleadings not only to plead the prematurity defence but also to plead its case on how and why the price-averaging arrangement was, on the facts and the law, a collateral contract.[120] JVL's position was that until Agritrade stated its case on these issues, neither JVL nor the tribunal could form a view on whether to receive further evidence or submissions on the three issues (see [126] above).[121]

133 Agritrade lodged its written submissions also in October 2014. In it, Agritrade made three points:

(a) That JVL had had ample opportunity to lead evidence and to make submissions on whether the price-averaging arrangement was a collateral contract[122] and on the prematurity defence;[123] and had never asked for an opportunity to adduce further evidence or make further

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119 Claimant's Written Submissions dated 7 October 2014 at paragraph 13 to 17, page 164 to 165 of 3rd Affidavit of S.N. Jhunjhunwala.

120 Claimant's Written Submissions dated 7 October 2014 at paragraph 19 and 20, page 165 of 3rd Affidavit of S.N. Jhunjhunwala.

121 Claimant's Written Submissions dated 7 October 2014 at paragraph 18, page 165 of 3rd Affidavit of S.N. Jhunjhunwala.

122 Respondent's Written Submissions dated 7 October 2014 at paragraph 17, page 638 of 3rd Affidavit of S.N. Jhunjhunwala.

123 Respondent's Written Submissions dated 7 October 2014 at paragraph 12, page 639 of 3rd Affidavit of S.N. Jhunjhunwala.

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submissions on whether the price averaging arrangement was a collateral contract and therefore binding;[124]

(b) That JVL had in fact made submissions on whether the price-averaging arrangement affected the *performance* of the disputed contracts as opposed to their *validity*;[125] and

(c) That the tribunal had asked JVL to consider and make submissions on whether the notices of default complied with the terms of the disputed contracts because they failed to make reference to the price-averaging arrangement.[126]

The tribunal issues an addendum

134 The tribunal considered the parties' submissions and issued an addendum to its award in November 2014, within the period of suspension which I had ordered. The addendum was the unanimous decision of all three members of the tribunal.

135 In its addendum, the tribunal made three broad points. First, it rejected as "clearly unsustainable" JVL's request for an award in its favour.[127] Agritrade had advanced its prematurity defence in its written submissions. JVL had dealt with the prematurity defence in its written and oral submissions. The tribunal had in its award considered whether JVL would suffer any

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124 Respondent's Written Submissions dated 7 October 2014 at paragraph 17, page 641 of 3rd Affidavit of S.N. Jhunjhunwala.

125 Respondent's Written Submissions dated 7 October 2014 at paragraphs 25 and 26, page 644 of 3rd Affidavit of S.N. Jhunjhunwala.

126 Respondent's Written Submissions dated 7 October 2014 at paragraph 32, page 646 of 3rd Affidavit of S.N. Jhunjhunwala.

127 Addendum to the Award [47].

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prejudice if the tribunal were to consider the prematurity defence and had concluded that JVL would not.[128]

136 Second, the tribunal pointed out that both parties had pleaded[129] and led evidence on[130] the price-averaging arrangement. After the tribunal had brought the parol evidence rule to the parties' attention during the evidential phase, both parties had taken the opportunity to deal with the rule in both rounds of written submissions which followed.[131] In the course of the oral closing submissions, the tribunal drew the collateral contract exception to JVL's attention and allowed the parties a final opportunity to make written submissions. Despite that, JVL made no submissions on the collateral contract exception in its final written submissions.[132]

137 Third, the tribunal expressed the view that there was nothing new or esoteric about the tribunal's characterisation of the price-averaging arrangement as a collateral contract which required separate or specific pleading. In the tribunal's words:[133]

> The term "collateral contract" is a description or characterisation which the Tribunal gave to the price-averaging arrangement. It is not a new contract different from the price-averaging arrangement.

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128 Addendum to the Award [47].

129 Addendum to the Award [38].

130 Addendum to the Award [39].

131 Addendum to the Award [41].

132 Addendum to the Award [43].

133 Addendum to the Award [45].

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138 The tribunal therefore concluded its addendum as follows:

> 53. For the reasons given above, the Tribunal does not consider it necessary or desirable to receive further evidence or submissions on the three issues.
>
> 54. Tribunal's answers to the three issues raised by the Order are as follows:
>
> a. The price-averaging arrangement found by the Majority of the Tribunal, based on the evidence adduced before it, was a collateral oral contract, binding as a matter of law. The Majority re-affirms its decision as set out in the Award ….
>
> b. The Tribunal's answer to issue (b) [*ie* whether the "price averaging arrangement", even as an oral collateral contract, governed the performance of the disputed contracts, as opposed to their validity] is in the affirmative …; ….
>
> c. The Majority found that the Claimant was in repudiatory breach of the [disputed contracts] and the repudiation was accepted by the Respondent…. The Majority reaffirms its finding.

139 It is the second and third of these points that I have, with respect, difficulty with. I analyse these difficulties at [179] – [180] and [222] – [225] below.

The setting-aside application resumes

140 Once my suspension of the application expired in November 2014, the hearing of JVL's setting aside application resumed before me. In due course, the parties made additional written submissions and attended before me for oral submissions. It is at the conclusion of these oral submissions that I set aside the award.

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The collateral contract exception

141 I now turn to consider in turn JVL's arguments on the setting aside application. I begin with JVL's case on breach of natural justice.

142 JVL's setting-aside application on the grounds of a breach of natural justice is brought under s 24(b) of the Act:

> **Court may set aside award**
>
> **24.** Notwithstanding Article 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if—
>
> **...**
>
> (b) A breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

143 A party seeking to challenge an arbitration award under s 24(b) must show: (a) which rule of natural justice was breached; (b) how it was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced its rights: see *John Holland Pty Ltd (formerly known as John Holland Construction & Engineering Pty Ltd) v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443 at [18], approved by the Court of Appeal in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [29].

144 The rule of natural justice which JVL alleges the tribunal breached is the rule which obliges the tribunal to grant it a fair hearing. To succeed in its setting aside application, therefore, JVL has to establish that: (i) it did not have a fair hearing on either the collateral contract exception or the prematurity defence; (ii) that breach was connected to the making of the award; and (iii) that breach caused it prejudice. I will take each of the three elements in

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turn in respect of each of the two defences. I begin with the collateral contract exception.

Fair hearing and the opportunity to present one's case

145 Article 18 of the Model Law provides that each party "shall be given a *full* opportunity of presenting its case" (emphasis added). This confers no more and no less on a party than a right to have a *reasonable* opportunity to present its case (*ADG and another v ADI and another matter* [2014] 3 SLR 481 at [104]).

146 There are two aspects to a party's reasonable opportunity to present its case: a positive aspect and a responsive aspect. The positive aspect encompasses the opportunity to present the evidence and advance the propositions of law on which it positively relies to establish its claim or defence, as the case may be. The responsive aspect encompasses the opportunity to present the evidence and advance the propositions of law necessary to respond to the case made against it. It is the responsive aspect of the opportunity to present its case which JVL alleges the tribunal denied it.

147 The responsive aspect of presenting a party's case has itself two subsidiary aspects to it. The first is having notice of the case to which one is expected to respond. The other is being permitted actually to present the evidence and advance the propositions of law necessary to respond to it. A tribunal will therefore deny a party a reasonable opportunity to respond to the case against it if it either: (i) requires the party to respond to an element of the opposing party's case which has been advanced without reasonable prior notice; or (ii) curtails unreasonably a party's attempt to present the evidence and advance the propositions of law which are reasonably necessary to

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respond to an element of the opposing party's case. But there is a third situation in which a tribunal will deny a party a reasonable opportunity to present its responsive case: when the tribunal adopts a chain of reasoning in its award which it has not given the complaining party a reasonable opportunity to address.

148 It is the third aspect of the opportunity to present a responsive case which JVL alleges it was denied by a tribunal in connection with the collateral contract exception. It is the first aspect which JVL alleges it was denied by the tribunal in connection with the prematurity defence.

The responsive aspect of an opportunity to present one's case

149 The dividing line between permissible robustness in arbitral reasoning and impermissibly denying a party a reasonable opportunity to present its responsive case is a fine one. It is true that the courts must guard against unmeritorious attempts by disappointed parties to set aside unimpeachable awards. But it is also true that, although the grounds on which a court may set aside an award are few in number and narrow in scope, they are fundamental in nature. The authorities show that whether a particular setting-aside application falls on one side of the dividing line or the other turns on whether there is a sufficient nexus between the chain of reasoning which the tribunal adopts and the case which the parties themselves have chosen to advance.

150 It goes without saying that a particular chain of reasoning will be open to a tribunal if it arises from the party's express pleadings. Significantly, an issue raised in a party's pleadings remains in play throughout the arbitration unless is expressly withdrawn, no matter how weakly the party may actually advance it. In *AUF v AUG and other matters* [2016] 1 SLR 859, a tribunal

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constituted under the Arbitration Act (Cap 10, 1985 Rev Ed) awarded damages to an owner against a contractor by reference to the diminution in value caused by defects in the owner's building rather than by reference to the cost of rectifying the defects. Although the owner had pleaded diminution in value as an alternative measure of its loss, the contractor alleged that the owner had effectively withdrawn that alternative measure from the tribunal by the manner in which it had presented its case. The contractor therefore submitted that the tribunal had denied the contractor natural justice by relying on diminution in value as the basis of its award (at [92]).

151 Belinda Ang J held that the claimant had never in fact unequivocally abandoned its case advancing the diminution in value measure (at [97]). Further, the tribunal had sought and received submissions from both parties on that alternative measure. As such, there was no basis established to set aside the award (at [100]).

152 A particular chain of reasoning will also be open to a tribunal if it is raised, not expressly, but by reasonable implication in a party's pleadings. In *Soh Beng Tee*, a tribunal decided that a five-day extension of time granted to a main contractor to complete a project was unreasonably short. But instead of going on to make a further finding as to the specific number of additional days necessary to make the extension reasonable, the tribunal decided that the employer's acts of prevention had set the main contractor's time entirely at large. The employer applied to set aside the award on the ground, among others, that the issue of whether time was at large as a result of the employer's acts of prevention was not one which had been submitted to the tribunal or canvassed before it.

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153 The Court of Appeal rejected the employer's application for three principal reasons. First, the main contractors' pleadings had, by reasonable implication, put the issue of whether time was at large as a result of the employer's acts of prevention in play and alive in the arbitration (at [38]). The main contractor had asserted expressly in its pleadings that time had been set at large. Although this pleading arose in a different context (at [31]) and relied on acts other than those which the tribunal had relied upon for its decision (at [32]), the employer had in response pleaded expressly that time had not been set at large *on any grounds whatsoever* (at [34]). It was also the case that the factual bases for the tribunal's finding that there were acts of prevention by the employer "were in play and fully alive throughout the proceedings". The tribunal's decision that time had been set at large was merely an inference from that factual finding and was well within its fact-finding powers (at [67]). Second, whether the consequence of the acts of prevention should be a finite or an indefinite extension of time were opposite sides of the same coin: they shaded into each other (at [68]). Finally, a finding that acts of prevention had set time at large was a foreseeable outcome in disputes of this nature, *ie* in disputes between an employer and a main contractor (at [69]).

154 Similarly, a particular chain of reasoning will be open to a tribunal even if it features nowhere in a party's pleadings but it is in some other way brought to the opposing party's actual notice. In *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 ("*Kempinski*") a hotel manager commenced arbitration against a hotel owner asserting a breach of a hotel management contract and claiming either damages or specific performance as relief. Four years after arbitration had been commenced and three years after pleadings had closed, the owner discovered that the manager had entered into a new management contract with

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a third party. The owner now advanced the argument that the manager's right to damages and specific performance was extinguished the moment it entered into the new management contract. The owner did so without amending its pleadings to rely on the new management contract and its legal effect on the manager's claim as an issue in the arbitration. The tribunal accepted the owner's unpleaded argument and issued a series of awards holding eventually that the manager's claim wholly failed. The manager applied to the High Court to set aside the awards. The High Court judge set aside the tribunal's award, holding that the tribunal had acted without jurisdiction because the owner had not amended its pleadings to rely on the new issue.

155 The Court of Appeal allowed the owner's appeal, holding that the manager had had sufficient actual notice of the issue despite the owner's failure formally to plead it. In particular, the owner had advanced the issue as part of its case in correspondence with the tribunal. The tribunal had thereafter specifically directed both parties to address the issue in one procedural conference and in four emails. As the Court of Appeal said (at [50] – [51]):

> 50 … After [the owner] discovered that [the manager] had entered into the [n]ew [m]anagement [c]ontract, it raised the issue with the Arbitrator in a letter dated 28 March 2007 from its solicitors, and this resulted in an exchange of communications between the parties and the Arbitrator on: (a) 24 May 2007 (letter from [the manager's] solicitors to the Arbitrator); (b) 2 July 2007 (letter from [the owner's] then solicitors to the Arbitrator); and (c) 4 September 2007 (letter from [the manager's] solicitors to the Arbitrator). The Arbitrator also informed the parties of the issues which he wanted them to address – in particular, the legal effect of the [n]ew [m]anagement [c]ontract – on the following occasions: (a) at the April 2007 Directions Conference (see [16] above); and (b) in his e-mails to the parties dated, respectively, 11 July 2007, 14 September 2007, 14 December 2007 and 20 February 2008. Finally, written submissions and expert opinions on the legal effect of the [n]ew [m]anagement [c]ontract were tendered by both parties. Vis-à-vis the written submissions, [the owner] and [the manager] filed their first

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> round of written submissions on 26 October 2007; thereafter, [the manager] and the [owner] tendered their second round of submissions on 1 February 2008 and 5 February 2008 respectively. As for the expert opinions, [the manager] expert, Prof Darus, submitted eight sets of expert opinion (one on 25 April 2008 and seven on 7 May 2008), while [the owner's] expert, Mr Fred Tumbuan ("Mr Tumbuan"), submitted his expert opinion on 29 April 2008.
>
> 51 Given the extensive correspondence, written submissions and expert opinions that were exchanged vis-à-vis the legal effect of the [n]ew [m]anagement [c]ontract, we are of the view that [the manager] had ample notice of [the owner's] case on this particular point. That [the owner] did not amend its pleadings to specifically plead the [n]ew [m]anagement [c]ontract and its legal effect was, in our view, immaterial. …

156 Finally, a particular chain of reasoning will be open to a tribunal if the links in the chain flow reasonably from the arguments actually advanced by either party or are related to those arguments. In *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM*"), a ship purchaser commenced arbitration against a ship seller seeking the refund of the deposit it had paid under their contract. One of the issues in the arbitration was whether the seller's breach of a particular term of their contract was a repudiatory breach entitling the purchaser to terminate the contract. The tribunal held that the term in question was not a condition, as submitted by the purchaser, but was instead a collateral warranty. The tribunal accordingly held that breach of the term did not entitle the purchaser to treat the seller as having repudiated the contract. The purchaser applied to set aside the award, submitting that neither party had argued before the arbitrator that the term in question was a collateral warranty.

157 Chan Seng Onn J upheld the award on the grounds that the seller had advanced in the arbitration the argument that the term in question was either a warranty or an innominate term which had the effect of a warranty (at [68]).

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But even if that had not been the case, Chan Seng Onn J would have still upheld that award. He set out the applicable principle as follows (at [63]):

> … 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 the 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 straitjacketed 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 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.***
>
> [emphasis in the original in italics; emphasis added in bold and italics]

158 He then applied this principle as an alternative basis for rejecting the purchaser's submission (at [70]):

> … The finding that [the term] was a collateral warranty was not only reasonably connected to the arguments raised by both parties; it was a reasonable follow-through from [the tribunal's] finding that [the term] was not a condition.

159 In summary, therefore, a tribunal denies a party a reasonable opportunity to present its responsive case if it follows a chain of reasoning which has no nexus to the case advanced by the parties, unless the parties have been put on notice in some other way that they are expected to address that chain. Thus, without attempting to be prescriptive, a particular chain of reasoning will be open to a tribunal in any one of the following circumstances: (i) if it arises from the party's express pleadings; (ii) if it is raised by

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reasonable implication by a party's pleadings; (iii) if it does not feature in a party's pleadings but is in some other way brought to the opposing party's actual notice; or (iv) if the links in the chain flow reasonably from the arguments actually advanced by either party or are related to those arguments.

160 An alternative way of looking at the question of a nexus between the tribunal's chain of reasoning and the parties' cases is to consider whether a reasonable party to the arbitration could objectively have foreseen the tribunal's chain of reasoning. Whichever approach is taken, however, the overriding concern is not whether a tribunal has complied with arid technicality but whether it has achieved substantive fairness. As the Court of Appeal said in *Soh Beng Tee* (at [65]):

> (d) The delicate balance between ensuring the integrity of the arbitral process and ensuring that the rules of natural justice are complied with in the arbitral process is preserved by strictly adhering to only the narrow scope and basis for challenging an arbitral award that has been expressly acknowledged under the [Arbitration Act] and the [International Arbitration Act]. In so far as the right to be heard is concerned, the failure of an arbitrator to refer every point for decision to the parties for submissions is not invariably a valid ground for challenge. Only in instances such as where the impugned decision reveals a dramatic departure from the submissions, or involves an arbitrator receiving extraneous evidence, or adopts a view wholly at odds with the established evidence adduced by the parties, or arrives at a conclusion unequivocally rejected by the parties as being trivial or irrelevant, might it be appropriate for a court to intervene. In short, there must be a real basis for alleging that the arbitrator has conducted the arbitral process either irrationally or capriciously. To echo the language employed in *Rotoaira* …, ***the overriding burden on the applicant is to show that a reasonable litigant in his shoes could not have foreseen the possibility of reasoning of the type revealed in the award.*** It is only in these very limited circumstances that the arbitrator's decision might be considered unfair.
>
> (e) It is almost invariably the case that parties propose diametrically opposite solutions to resolve a dispute. They may

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> expect the arbitrator to select one of these alternative positions. The arbitrator, however, is not bound to adopt an either/or approach. He is perfectly entitled to embrace a middle path (even without apprising the parties of his provisional thinking or analysis) so long as it is based on evidence that is before him. Similarly, ***an arbitrator is entitled – indeed, it is his obligation – to come to his own conclusions or inferences from the primary facts placed before him. In this context, he is not expected to inexorably accept the conclusions being urged upon him by the parties. Neither is he expected to consult the parties on his thinking process before finalising his award unless it involves a dramatic departure from what has been presented to him.***
>
> [emphasis in italics in the original; emphasis in bold and italics added]

161 The Court of Appeal preceded this passage with a warning that a tribunal which exercises unreasonable initiative in its chain of reasoning is liable to have its award set aside (at [65]):

> (a) Parties to arbitration have, in general, a right to be heard effectively on every issue that may be relevant to the resolution of a dispute. The overriding concern … is fairness. The best rule of thumb to adopt is to treat the parties equally and allow them reasonable opportunities to present their cases as well as to respond. ***An arbitrator should not base his decision(s) on matters not submitted or argued before him. In other words, an arbitrator should not make bricks without straw. Arbitrators who exercise unreasonable initiative without the parties' involvement may attract serious and sustainable challenges.***

162 It appears to me that the tribunal's chain of reasoning in the award on the collateral contract exception does mean that JVL did not have a reasonable opportunity to present its case on that issue. First, Agritrade never advanced the collateral contract exception as part of its case, whether formally on the pleadings or even informally through its submissions. Second, the tribunal never directed JVL to address the collateral contract exception.

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Agritrade never advanced the collateral contract exception

163 The tribunal was quite right that Agritrade had the burden of advancing the collateral contract exception. This is because persuading the tribunal to take the price-averaging arrangement into consideration was completely immaterial to JVL's case. Its case was founded solely on the disputed contracts, on Agritrade's unambiguous obligation to sell and deliver palm oil to JVL on the face of those contracts and on Agritrade's undisputed failure to do so. Indeed, JVL never once mentioned the price-averaging arrangement in its statement of claim.[134] It had no need to do so.

164 Agritrade was the only party that needed to rely on the price-averaging arrangement to establish its case. The price-averaging arrangement was crucial to both its uncertainty defence and to its prematurity defence. That is why, when the tribunal drew the parol evidence rule to both parties' attention, it left Agritrade in no doubt that Agritrade bore the burden both of invoking an exception to the rule and of adducing the evidence necessary to come within that exception (see [52] above).

165 Despite this, at no time did Agritrade invoke the collateral contract exception or seek to adduce any evidence to come within it. Agritrade did not invoke the collateral contract exception in its pleadings. That is not fatal to Agritrade's case in itself. The parol evidence rule was itself in play not because of JVL's pleadings but because of the tribunal's express direction (see [52] above).

166 What is fatal to Agritrade's case, however, is that at no time did it even informally advance the collateral contract exception as part of its case, despite

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134 Statement of Claim, page 266 to 354 of 1st Affidavit of S.N. Jhunjhunwala.

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bearing the burden on this issue. I have recounted (at [72], [78], [88], [96] and [102] above) the five opportunities which Agritrade had to invoke the collateral contract exception even informally: in its written submissions, in its reply written submissions, during its oral closing submissions, in its final written submissions and in its further written submissions. It allowed all of these opportunities to pass it by.

167 Not only did Agritrade not advance the collateral contract exception as part of its case, the case which it did advance implicitly rejected the collateral contract exception (see [71] above). For that reason, it is impossible to say that the collateral contract exception arose by reasonable implication from Agritrade's uncertainty defence or its prematurity defence – the latter being the only case which Agritrade did advance on the parol evidence rule – or that it flowed naturally from either defence. The collateral contract exception was entirely inconsistent with Agritrade's defence.

168 Agritrade's failure to advance the collateral contract exception as part of its case precludes the tribunal from adopting that as part of its chain of reasoning unless it directed JVL specifically to deal with it. This arises, not from arid technicality, but from the fundamental nature of arbitration.

Arbitration is fundamentally adversarial

169 The fundamental nature of arbitration is adversarial. It is true that s 12(3) of the Act specifically empowers a tribunal governed by that Act, unless the parties have agreed otherwise, to adopt inquisitorial processes. But the mere fact that the Act considers it necessary expressly to empower a tribunal to proceed inquisitorially shows that the starting point – at least in Singapore – is that arbitration is adversarial.

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170 In adversarial proceedings, it is the parties who select the issues which the adjudicator is to decide. The archetype of adversarial proceedings is litigation in a common law system such as ours. As Dyson LJ (as he then was) said in the English Court of Appeal's decision in *Al-Medenni v Mars UK Limited* [2005] EWCA Civ 1041 ("*Al-Medenni*") at [21]:

> … It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. *The function of the judge is to adjudicate on those issues alone.* The parties may have their own reasons for limiting the issues or presenting them in a certain way. *The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness.*
>
> [emphasis added]

171 This principle was reiterated very recently by the Court of Appeal in *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422:

> 34 The hallmark of an adversarial system of civil litigation like ours is that plaintiffs and defendants alike are required by procedural rules to set the boundaries of their disputes and to fight their battles within these boundaries. In a civil trial, this is achieved primarily through the pleadings, which are written statements setting out the relevant facts, or allegations of fact, and the applicable points of law in support of their respective claims, counterclaims, defences and replies. …
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> …
>
> 37 Equally important to the principle of fairness, pleadings also serve to uphold the rules of natural justice (*Sheagar s/o TM Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524 ("*Sheagar*") at [94]). *Parties are expected to keep to their pleadings because it is only* fair and just *that they do so – to permit otherwise is to have a trial by ambush. Every*

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> *litigant is entitled as a matter of procedural fairness to be informed of his opponent's case in advance and to challenge his veracity in cross-examination at the trial.* As pithily stated by the Australian High Court in *Lee v The Queen* (1998) 195 CLR 594 at [32]: *"Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial."* …
>
> 38 Thus, the general rule is that parties are bound by their pleadings and the court is precluded from deciding on a matter that the parties themselves have decided not to put into issue. …
>
> [emphasis added]

172 In litigation, therefore, it is the parties' prerogative to set the boundaries of their dispute and to select the issues which the court is to determine. That is so no matter how ineptly one party may have formulated its case, no matter how strongly a judge may be tempted to reformulate that party's case for it and no matter how unattractive a judge may find the outcome of resisting that temptation.

173 This restriction exists as a fundamental aspect of achieving justice, not as a trap for the unwary. The restriction facilitates certainty, rectitude of decision and fairness in dispute resolution. Once a judge is permitted to go beyond the issues which the parties have selected for his decision, there can be no certainty as to how far beyond those issues he will go. A judge who selects an issue to decide on his own may deprive one of the parties – or even both – of the opportunity to adduce evidence or to make arguments on that issue. That undermines both fairness and rectitude of decision, not only on that specific issue but also on the ultimate issue. Further, a party who loses on an issue raised only by the judge – even if that party has been able to address that issue fully – will feel with some justification that he has been defeated by the judge rather than by his adversary.

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174 Although arbitration differs from litigation in many fundamental respects, these arguments are equally applicable to arbitration. Indeed, there is an additional conceptual argument as to why the choice of issues for decision in arbitration must rest with the parties. Unlike litigation, which is founded on the state's coercive power, arbitration is founded entirely upon the parties' consent. A tribunal which decides an issue which neither party has consented for it to decide runs the risk not only of breaching the rules of natural justice, but also of acting without jurisdiction.

175 An arbitral tribunal, like a judge, has a duty to confine itself to the issues selected by the parties for determination. The Court of Appeal confirmed this in *Kempinski*. As the Court of Appeal said at [36]:

> Although there is an important difference between arbitration and litigation in the sense that arbitration is consensual in nature whereas litigation is not, the basic principles applicable to determine the jurisdiction of the arbitrator or the court to decide a dispute raised by the parties are generally the same. In arbitration, the parties can determine the scope of the arbitration; so can the parties in litigation *vis-à-vis* the issues to be tried …

176 To support this principle, the Court of Appeal cited with approval Dyson LJ's dictum from *Al-Medenni* which I have set out (at [170] above). The Court of Appeal then continued (at [37] – [38]):

> 37. Thus, if A sues B for damages for breach of contract and B joins issue with A, the court cannot dismiss the claim on the ground that there is no contract unless that ground is raised by way of an amended defence (allowed by the court) at any time before the conclusion of the trial …. Even where a new issue is raised by the court of its own motion as a result of evidence adduced during the trial, the defence should, for the sake of good order, be amended so that the plaintiff may file an amended reply and, if necessary call rebuttal evidence on the new issue. This is an established process to ensure fairness to the party affected by the new issue. …

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> 38 The established principles in this area of the law are clear. As Lord Normand succinctly stated in *Esso Petroleum Co Ltd v Southport Corporation* [1956] AC 218 at 238-239:
>
> > The function of pleadings is *to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them.* …
> >
> > …
> >
> > … To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.
>
> Similarly, in *Loveridge, Loveridge v Healey* [2004] EWCA Civ 173, Lord Phillips of Worth Matravers MR commented at [23]:
>
> > It is on the basis of the pleadings that the parties decide what evidence they will need to place before the court and what preparations are necessary before the trial. Where one party advances a case that is inconsistent with his pleadings, it often happens that the other party takes no point on this. Where the departure from the pleadings causes no prejudice, or where for some other reason it is obvious that the court, if asked, will give permission to amend the pleading, the other party may be sensible to take no pleading point. *Where, however, departure from a pleading will cause prejudice, it is in the interests of justice that the other party should be entitled to insist that this is not permitted unless the pleading is appropriately amended.* That then introduces, in its proper context, the issue of whether or not the party in question should be permitted to advance a case which has not hitherto been pleaded.
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> [emphasis added]

Although the Court of Appeal spoke in this passage only of litigation, it is clear from the context that its view was that the same principle applies – at least conceptually – in arbitration.

177 I add the qualifier "conceptually" for two reasons. First, the cases which I have analysed (at [149] – [162] above) show that the approach in

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arbitration to the rules of procedure, and in particular to the rules of pleading, is a pragmatic approach which looks to substance over form and fairness over technicality. Although that is also true in litigation, there may be a perception that it is not true to the same extent. Second, and more importantly, a tribunal has the statutory power to adopt inquisitorial processes (see [169] above). That is a power wholly unavailable to the court.

178 It is this statutory power which legitimises the tribunal's decision in this case to raise the parol evidence rule of its own accord. To that extent, and on that issue, the tribunal proceeded inquisitorially. The important point, however, is that the tribunal at the same time expressly directed both parties to address the tribunal on the rule and on its exceptions. For that reason, if the tribunal had found Agritrade liable to JVL for breach of contract on the ground that the parol evidence rule precluded it from considering the price-averaging arrangement, Agritrade could not be heard to complain that it had been denied a fair hearing because JVL had never pleaded reliance on the parol evidence rule and had never, until the tribunal raised it, advanced the parol evidence rule as part of its case. Agritrade would have been on notice, by the tribunal's express direction, that reliance on the parol evidence rule was a chain of reasoning which it had to address.

The tribunal did not direct JVL to address the collateral contract exception

179 In this case, however, not only did Agritrade never advance the collateral contract exception as part of its case, the tribunal never directed the parties to deal with the collateral contract exception.

180 In the exchange reproduced (at [80] above), the first arbitrator informed Mr Pillai that Mr Bazul had set out all the exceptions to the parol

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evidence rule in his written submissions and that one exception to the parol evidence rule he might rely on was the collateral contract exception. As I have pointed out (at [82] above), this exchange was couched in the language of hypothesis for comment rather than that of thesis for proof (or disproof). Further, for the reasons I have set out above, the tribunal's closing exchange directed the parties specifically to respond only to the equitable estoppel point (see [90] – [93] above). In any event, even if this exchange was intended as a direction to the parties to deal with the collateral contract exception, it was insufficiently clear. That is especially so, when one considers that Agritrade's case was not merely silent on the collateral contract exception but had implicitly rejected it as part of its case and had failed to adopt it after the tribunal had floated it as a hypothetical towards the end of Mr Pillai's submissions (see [80] above).

AKN v ALC

181 The case of *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN*") provides a useful analogy to the present case. In *AKN*, the purchasers of certain assets of an insolvent company under an asset purchase agreement commenced arbitration against the company's liquidator, the company's shareholders and its secured creditors. The purchasers claimed that the respondents in the arbitration breached the asset purchase agreement by failing to ensure that the assets sold were free from liens of any kind. As a result, the purchaser claimed damages for a loss of *actual* profits which it claimed to be able to prove. The arbitral tribunal agreed with the purchasers. However, it awarded the purchasers US$80m as damages, not for the loss of *actual* profits, but for the loss of an *opportunity* to earn profits.

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182 The respondents in the arbitration applied to set aside the award. One ground of complaint was that the tribunal had breached the rules of natural justice in failing to give the liquidator and the secured creditors an opportunity to address the tribunal on whether the purchaser was entitled to damages for the loss of an *opportunity* to earn profits as opposed to damages for a loss of *actual* profits. It was the tribunal, and not the purchaser, who raised the possibility of characterising the purchaser's claim as a claim for damages for the loss of an opportunity to earn profits. The tribunal raised this possibility only on the last day of the 20-day arbitral hearing. When it did so, the tribunal noted that the secured creditors' expert had not addressed the issue. It also suggested that if it were to proceed on a loss of opportunity analysis, it would need the parties' assistance to determine the magnitude of the opportunity lost. The parties made no written submissions on the issue. As the Court of Appeal noted (at [75]), the extent of the parties' "submissions" on this point was a brief exchange between the tribunal and counsel for the purchasers. In that exchange, counsel stated that "it would be open to the tribunal to analyse [the issue] from a chance perspective" and accepted the tribunal's suggestion that the loss of an opportunity analysis may be analogous to a doctrine of the applicable foreign law (at [69]).

183 In its award, the tribunal found as a fact that the purchasers had lost a 55% chance of making profits, "without *any* apparent analysis or consideration over and above its 'slightly better than even' approximation, and without any submissions having been sought or made on the quantum of the chance lost" [emphasis in original] (*AKN* at [76]). The Court of Appeal also observed that the tribunal never gave an opportunity to any of the respondents in the arbitration to adduce further evidence on the matter. The Court of

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Appeal rejected the purchasers analogy with *Kempinski*, and held (at [78] – [79]):

> 78 In our judgment, the situation presented in the current appeals is completely different and the Purchasers' reliance on *Kempinski* is therefore unfounded. During the arbitration, the Secured Creditors and the Liquidator did not have ample notice of the "loss of opportunity" claim. It was raised at the eleventh hour. Not only was the tribunal apparently uncertain of and ill-equipped to deal with the quantum of the opportunity allegedly lost, it also did not request further arguments on the point.
>
> 79. In the circumstances, not only did the Secured Creditors and the Liquidator lack ample notice of the "loss of opportunity" claim, the tribunal was also never furnished with extensive submissions or expert evidence on the "loss of opportunity" point. This was despite the fact that the tribunal, as it had indicated to the parties, was alive to the need for such submissions and evidence. The analogy with *Kempinski* therefore completely fails.

184 In my view, the facts of *AKN* and the Court of Appeal's findings provide a useful analogy for the present case. In both cases, the tribunal raised an issue of its own accord at the eleventh hour and in passing. In both cases, that issue turned out in the award to be dispositive. And in both cases, the tribunal did so without giving the parties the right to present evidence or submissions on that dispositive issue and without directing the parties to address the issue.

The tribunal impermissibly relieved Agritrade of its entire burden

185 In my view, the majority's decision unilaterally to find that the price-averaging arrangement was a collateral contract, and therefore within that exception to the parol evidence rule, not only relieved Agritrade of the burden of advancing the collateral contract exception as part of its case, but also discharged Agritrade's legal and evidential burdens of proof on this dispositive issue.

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186 I adopt the Court of Appeal's recent explanation of the concept of the burden of proof in *SCT Technologies Pte Ltd v Western Copper Co Ltd* [2016] 1 SLR 1471 ("*SCT Technologies*") at [16] – [18]:

> 16 The concept of burden of proof may be spoken of in two distinct senses which, to avoid any confusion in the analysis which follows, we would clarify from the outset.
>
> 17 First, the concept may be used in the context of referring to ***the* legal *burden of proof, which is "properly speaking, a burden of proof, for it describes the obligation to persuade the trier of fact that, in view of the evidence, the fact in dispute arises"*** (see *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR 855 ("*Britestone*") at [58]). Central to determining where the burden lies in a civil suit is the state of the parties' pleadings. It is in the pleadings that one finds the material facts that each party asserts to establish its claim or defence (as the case may be) and, as is trite law, he who asserts must prove – this is a rule which is consistent with the general principle underlying ss 103 and 105 of the Evidence Act (Cap 97, 1997 Rev Ed) (see the decision of this court in *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 at [31]). Once it is established who bears the legal burden of proof, it will remain fixed on the party who bears it throughout the course of the trial, never shifting regardless of the evidence that is led.
>
> 18 This leads us to the second sense in which the concept of burden of proof is commonly used, which is in the *evidential* sense. Essentially, ***the evidential burden of proof refers to "the need of the party to adduce evidence to discharge his legal burden (or the need of the opposing party to adduce evidence to prevent the proving party from discharging his legal burden)"*** (see Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 5th Ed, 2015) ("*Evidence and the Litigation Process*") at para 12.007). From this description alone, it is clear that, unlike the legal burden of proof, the evidential burden can shift from one party to the other depending on the evidence which is adduced at trial by either side. …
>
> [emphasis in the original in italics; emphasis added in bold and italics]

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187 The tribunal's directions to Mr Bazul on the parol evidence rule (see [52] above) are entirely consistent with the Court of Appeal's analysis in *SCT Technologies*. The burden was on Agritrade to (i) invoke an exception to the parol evidence rule; and (ii) adduce evidence to prove to the tribunal that the exception was applicable to the price-averaging arrangement. Agritrade pointed to the price-averaging arrangement as the factual basis for its defence but never pointed to the collateral contract exception as the legal basis on which the tribunal could take into consideration the price-averaging arrangement despite the parol evidence rule. By invoking the collateral contract exception itself, all three members of the tribunal relieved Agritrade of the burden of invoking an exception to the parol evidence rule. By going further to find sufficient evidence to establish that that exception applied, the majority relieved Agritrade of the burden of establishing an issue which ultimately proved dispositive.

188 For all the foregoing reasons, therefore, I find that there was a breach of natural justice in the making of the award. The majority exercised "unreasonable initiative" bearing in mind the fundamentally adversarial nature of arbitration and bearing in mind even the tribunal's power to proceed inquisitorially under s 12(3) of the Act.

189 The next point I have to consider is whether the breach of natural justice was connected to the making of the award.

Whether the breach was connected to the award

190 There can be little doubt that the collateral contract point was connected to the making of the award. It was determinative of the ultimate issue before the tribunal, *ie* Agritrade's liability to JVL for breach of contract.

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191 All three members of the tribunal gave short shrift to Agritrade's only pleaded defence, *ie* the defence of uncertainty, with the majority expressly finding it to be misconceived.[135] Further, although the tribunal accepted that Agritrade's prematurity defence was properly before it, the majority made no finding that the price-averaging arrangement was a condition precedent to Agritrade's obligation to perform the disputed contracts and therefore within the condition precedent exception to the parol evidence rule. Indeed, the tribunal could hardly have made such a finding, given that Agritrade's own case was that the price-averaging arrangement was not integrated into the parties' bargain comprised in the Market Price Contracts, to be applied in the event of non-performance of the Market Price Contracts themselves (see [75] above). But the tribunal did hold unanimously that the issue of whether the price-averaging arrangement was a collateral contract was properly before it and go on to decide that issue, albeit in different ways.

192 The majority's finding that the price-averaging arrangement was a collateral contract was dispositive of the arbitration. Once the majority had arrived at that finding, the parol evidence rule no longer prevented them from holding that the price-averaging arrangement governed the parties' performance of the disputed contracts or from holding, further, that because no price-averaging exercise had been carried out in respect of the disputed contracts, Agritrade was not liable to JVL in damages. In this connection, the majority's acceptance of Agritrade's contention "that the performance of the [disputed contracts] was not due because no price averaging exercise had been carried out by the Parties for these contracts"[136] is not a finding that Agritrade had established that the price-averaging arrangement came within the

135 Award, [11.2], page 104 of 1st Affidavit of S.N. Jhunjhunwala.

136 Award [17.7] – [17.8], page 146 of 1st Affidavit of S.N. Jhunjhunwala.

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condition precedent exception to the parol evidence rule. It is the tribunal's conclusion that, on the facts, Agritrade has established, on the facts, that its performance is not yet due, but only because, on the law, the tribunal has relied on the collateral contract exception to the parol evidence rule to take the price-averaging arrangement into account.

193 Section 24(b) of the Act requires an applicant to establish not only that a breach of natural justice connected to the making of the award took place but also that the breach caused it prejudice. The next point I have to consider, therefore, is whether the breach caused JVL prejudice.

Prejudice

194 The question of prejudice turns on whether, as a result of the breach of natural justice, the arbitral tribunal was denied the benefit of arguments or evidence that *could*, not would, reasonably have made a difference to the tribunal. The Court of Appeal so held in *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 ("*L W Infrastructure*") at [54]:

> 54 … it is important to bear in mind that it is never in the interest of the court, much less its role, to assume the function of the arbitral tribunal. To say that the court must be satisfied that a different result would definitely ensue before prejudice can be said to have been demonstrated would be incorrect in principle because it would require the court to put itself in the position of the arbitrator and to consider the merits of the issue with the benefit of materials that had not in the event been placed before the arbitrator. Seen in this light, it becomes evident that *the real inquiry is whether the breach of natural justice was merely technical and inconsequential or whether as a result of the breach, the arbitrator was denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to his deliberations. Put another way, the issue is whether the material* could reasonably *have made a difference to the arbitrator; rather than whether it* would necessarily *have*

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> *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]).
>
> [emphasis added]

195 In my view, JVL did suffer prejudice when it was not accorded a reasonable opportunity to present evidence and advance submissions on the issue of whether the price-averaging arrangement constituted a collateral contract within the collateral contract exception to the parol evidence rule. That finding required the tribunal to undertake a factual and legal analysis in order to ascertain whether the indicia of a collateral contract were present.

196 These indicia include the basic legal requirements for a contract: an intention to create legal relations, an offer in promissory language, an unequivocal acceptance of that offer, the presence of consideration and sufficient certainty of terms. In *Lemon Grass Pte Ltd v Peranakan Place Complex Pte Ltd* [2002] 2 SLR(R) 50 ("*Lemon Grass*"), Belinda Ang JC (as she then was) set out these requirements in greater detail (at [116] – [124]):

> 116 A collateral contract is an agreement distinct from the main contract. *A court must therefore find all the usual legal requirements of a contract having been fulfilled with respect to the collateral agreement before it can be enforced.*
>
> 117 What this means is that the statement purporting to be the contractual promise in such a collateral contract must be promissory in nature or effect rather than representational: *De Lasalle v Guildford* [1901] 2 KB 215; [1900-1903] All ER Rep 495; *Wells (Merstham) Ltd v Buckland Sand and Silica Ltd* [1965] 2 QB 170; [1964] 1 All ER 41; *Esso Petroleum Co Ltd v Mardon* [1976] QB 801 at 826. The plaintiffs must establish the agreement of the parties to its terms. Thus, *to succeed in a claim founded on a collateral contract, the plaintiffs have to prove certainty of the terms.*

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118 *It is for the party seeking to rely upon the collateral contract who has to bear the burden of establishing that both parties intended to create a legally-binding contract*: Ralph Gibson LJ in *Kleinwort Benson Ltd v Malaysia Mining Corp Bhd* [1989] 1 All ER 785 at 796.

119 They must also establish consideration, which in the case of a collateral contract is easy to prove. All that is required is the promisee (the plaintiffs) entering or promising to enter into a principal contract with the promisor (the defendants). As stated, this consideration was not pleaded.

120 The plaintiffs did not address in closing submissions a key issue, which is, even if Mr Ong said what he did (and I found that he did not), what was the effect in law of those statements? Did they amount to a collateral contract regarding access to the ground-floor toilets through the adjacent premises leased to Delifrance?

121 *Nowhere in closing submissions was it put forward that what Mr Ong allegedly said were contractual in character or effect, an essential requirement to establishing the existence of a collateral contract.* In fact, the plaintiffs had essentially argued that the alleged statements were representations and nothing more.

…

123 In any event, it would have been difficult in my view for the plaintiffs to establish the existence of a collateral contract even on the assumption that the alleged statements as to right of access and right of way were uttered. *A tenancy like all contracts requires certainty of terms. A factor, which does suggest that the agreement cannot be properly construed as having intended to create a collateral agreement, is the vagueness as to the duration of the alleged right of way.* The duration was not from a statement made by Mr Ong but came about from Mr Lapper's understanding of the conversations.

124 This is a landlord-tenant relationship. In this context, the alleged collateral contract would be a business contract. Such a contract must be viewed commercially, and it would be a palpable absurdity to consider such a contract granting a personal right of use for as long as the plaintiffs are tenants. *In terms of duration, this is difficult to accept* as the right involves passing and repassing over property leased to another tenant whose interest in terms of period of occupation did not coincide, as was the case here.

[emphasis added]

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Applying the law to the facts before her in *Lemon Grass*, Belinda Ang JC found that the plaintiff had failed to establish a collateral contract with the defendant.

197 In the present case, the majority held that the price-averaging arrangement constituted a collateral contract entered into between Agritrade and JVL[137] and therefore fell within an exception to the parol evidence rule. The majority begins this section of the award by describing the factual background of the price-averaging arrangement. The majority then proceeds as follows:[138]

> 13.20 Against this factual background, the Tribunal finds that clearly the intention of the Parties was that the agreement of price averaging arrangement orally made in late August 2008 was to facilitate performance of the High Price Contracts and subsequently it was also the intention of the Parties to continue applying it to facilitate the performance of the Unperformed Market Price Contracts. The Tribunal finds that the oral agreement of price averaging arrangement as made between the Parties governs the performance of High Price Contracts and subsequently the Unperformed Market Price Contracts. *In the opinion of the Tribunal, there is no issue with respect to the admissibility of such agreement in this case. The price averaging arrangement (though orally made) is what is known or described as a collateral contract. It does not add to or alter the terms of the High Price Contracts and the Market Price Contracts. At common law, admission of evidence of a collateral contract is an exception to the parol evidence rule.*
>
> [emphasis added]

198 There is no indication that the majority considered whether the evidence before it showed that the price-averaging arrangement satisfied the criteria to constitute a collateral contract. The majority simply stated that the parties intended to apply the price-averaging arrangement to facilitate the performance of the Unperformed Market Price Contracts, and concluded that

137 Paragraph 13.20 of the Award.

138 Award, [13.20], page 121 of 1st Affidavit of S.N. Jhunjhunwala.

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the price-averaging arrangement is "what is known or described as a collateral contract".

199 The first arbitrator, in his dissent, held that the price-averaging arrangement did not constitute a collateral contract.[139] He came to this conclusion because it "did not have the necessary attributes to form a valid contract and was therefore incapable of being an enforceable collateral contract as envisaged by the Majority Decision".

200 It is wholly unnecessary, and indeed inappropriate, for me to express a view on whether the price-averaging agreement does indeed satisfy the criteria for a collateral contract. It suffices to say that the analysis necessary to conclude that the price-averaging arrangement is a collateral contract is completely distinct from any analysis which the tribunal had to carry out to determine the issues which formed a part of Agritrade's case expressly or by necessary implication. Put another way, whether a particular arrangement satisfies the criteria to be a collateral contract is a question which transcends a finding that that arrangement existed in point of fact. There is no doubt that, in point of fact, the parties arrived at a consensus to apply the price-averaging arrangement to their future dealings. But to make the finding that that particular arrangement constitutes a collateral contract requires submissions, evidence and analysis directed specifically towards ascertaining whether the criteria for a collateral contract are fulfilled.

201 But, in the present case, Agritrade withdrew from the tribunal the issue of whether the price-averaging arrangement was any sort of a contract even before the evidential phase began. Further, Agritrade never advanced as part

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139 Award, page 147 at [18.1] to page 148 at [18.8], page 147 to 148 of 1st Affidavit of S.N. Jhunjhunwala.

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of its case the argument that the price-averaging arrangement was a collateral contract. Indeed, as I have noted, its case implicitly rejected that argument. The shape of Agritrade's case from the moment the evidential phase started meant that JVL had no need, and therefore no reasonable opportunity, to adduce evidence on whether the price-averaging arrangement fulfilled the criteria to be a collateral contract, to test Agritrade's evidence on that issue or to make submissions on that issue.

202 I am therefore unable to say that there is no prospect whatsoever that this evidence and these submissions, if presented, would have made a difference to the tribunal. Indeed, the very fact that the first arbitrator came to the opposite conclusion on the limited evidence which was before the tribunal, and without the benefit of any real submissions, suggests very strongly that JVL suffered prejudice in the *LW Infrastructure* sense in the present case.

The addendum to the award

203 I now turn to consider the addendum to its award which the tribunal issued while JVL's setting aside proceedings were suspended. I set out in full the portion of the addendum dealing with and dismissing JVL's submissions:

> 40. At [5] of the Claimant's submissions, the Claimant gave a summary of what it submits as the bases for the Claimant's application, and it is relevant to refer to the following paragraphs:
>
> "…
>
> *(e) In the award, the Tribunal dismissed the Respondent's Pleaded Case.*
>
> *(f) However, despite it not having been pleaded, the Tribunal allowed the introduction of the Respondent's alternative case and the Majority of the Tribunal found, inter alia, that the "price averaging arrangement" was an oral collateral contract between the parties that governed the performance of the [disputed contracts];*

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> *(g) Not only was the argument that the "price averaging arrangement" was an oral collateral contract never pleaded, it was never even raised by the Respondent at any time during the Arbitration, whether in evidence or submissions;*
>
> *(h) Further to the above, after unilaterally making the finding that the "price averaging arrangement" was a binding oral collateral agreement, the majority went on to hold that the [disputed contracts] were meant to be performed in accordance with the "price averaging arrangement" and because no price averaging exercise had been carried out, the Respondent was not in breach of the said contracts;"*

41. These submissions of the Claimant merit the following observations. First, these submissions do not reflect accurately what actually transpired at the hearing before the Tribunal. Second, the Claimant appears somewhat confused by the term "collateral contract" which the Tribunal characterises or describes the price averaging arrangement. ***How the price averaging arrangement was characterised or described as a "collateral contract" arose in this way. In the course of the main hearing on 15 August 2012, the Tribunal raised an issue which was not pleaded by both Parties in their respective pleadings; nor was it raised in the respective opening submissions of both Parties, namely: whether in the face of the [disputed contracts], which are written contracts, the price averaging arrangement, being an oral contract, falls foul of the rule against admission of parol evidence.*** There was a somewhat long exchange between counsel and the Tribunal that took place: see N/E: 15.08.12: p 2 line 1 to p 4 line 21:

[extract from the Transcript of 15 August 2012 that I have set out at [52] above]

42. ***Both Parties in their written closing submissions and the responsive written closing submissions dealt with this issue [concerning the applicability of the parol evidence rule].*** Subsequently, at the Hearing of Oral Submissions (on 30 November 2012), the following relevant exchanges took place between a member of the Tribunal and counsel for the Claimant (see N/E: p 35 line 22 to p 36 line 19):

[extract from the Transcript of 30 November 2012 that I have set out at [80] above]

43. So at the Hearing of Oral Submissions, the term "collateral contract" was raised by the Tribunal and it was

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> even explained to the Claimant's counsel as to what a collateral contract is, that is, it is a side agreement. Subsequently, both Parties submitted final written closing submissions and these were summarised at [13.2] to [13.11] of the Award. ***It is noted that the Claimant made no submissions on the point of collateral contract in its final written closing submission.***
>
> 44. This issue on the rule against the admission of parol evidence was dealt with by the Tribunal at [13.12] to [13.21] of the Award. At [13.20] the Tribunal by majority said:
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> > *"… In the opinion of the Tribunal, there is no issue with respect to the admissibility of such agreement in this case. The price averaging arrangement (though orally made) is what is known or described as a collateral contract. It does not add to or alter the terms of the High Price Contracts and the Market Price Contracts. At common law, admission of evidence of a collateral contract is an exception to the parol evidence rule."*
>
> The Minority agrees with the majority that at common law admission of evidence of a collateral contract is an exception to the parol evidence rule: see footnote 2 at 13.12 of the Award.
>
> 45. At [5(g)] of the Claimant's submissions, the Claimant seems to suggest that the price averaging arrangement as a collateral contract is something new or esoteric and different from the price averaging arrangement, and has to be pleaded separately. With respect, the Claimant is confused. ***The term "collateral contract" is a description or characterisation which the tribunal gave to the price averaging arrangement.*** It is not a new contract different from the price averaging arrangement.
>
> [emphasis in the original in italics; emphasis added in bold and italics]

204 With great diffidence, I find myself unable to agree with the tribunal.

205 First, I observe that the majority accepts (at [45] of the addendum) that it described or characterised the price-averaging arrangement as a collateral contract. But until the tribunal delivered its award, that description or

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characterisation had never been advocated by either party or, indeed, by the tribunal itself.

206 Second, the majority points out (at [43] of the addendum) that it raised the collateral contract exception during the oral closing submissions and that JVL made no arguments on the issue in its final written submissions. But as I have explained, the first arbitrator raised the collateral contract exception as a hypothetical and not as an issue for JVL to address. Further, as the tribunal itself informed Agritrade, the onus of invoking an exception to the parol evidence rule lay on Agritrade, not on JVL. So while it is true that JVL made no submissions on the collateral contract exception in its final written submission, it cannot be faulted for taking that position. The arbitration was adversarial. In the absence of a direction from the tribunal to deal with the point, JVL was entitled to make its submissions only on the case which Agritrade actually advanced against it.

Agritrade's responses

207 Agritrade submits that JVL had ample opportunity to and did in fact make submissions on the collateral contract exception.[140] Agritrade refers to:

(a) JVL's written submissions where JVL argued that none of the exceptions to the parol evidence rule applied (see [62] above);[141]

(b) The oral submissions where JVL's "counsel dealt with [the collateral contract exception] when he said that such a collateral contract was unenforceable";[142]

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140 Defendant's Written Submissions dated 23 April 2014 at [68] – [75].

141 Defendant's Written Submissions dated 23 April 2014 at [70].

142 Defendant's Written Submissions dated 23 April 2014 at [73].

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(c) JVL's reply where JVL pleaded that "the agreement reached regarding the averaging of the High Price Contracts and the Low Market Price Contracts had no impact on the validity or performance of the [disputed contracts]";[143] and

(d) JVL's reply submissions and JVL's final written submissions where JVL submitted that the price-averaging arrangement "was at most a mere agreement to negotiate that is unenforceable".[144]

208 In my view, none of the instances that Agritrade refers to assists its case.

209 It is true that JVL included the following sentence in its written submissions: "The Claimant submits that none of the exceptions to the parole [*sic*] evidence rule applies to our case." That sentence does not establish that JVL suffered no prejudice by reason of the tribunal's decision to rely on the collateral contract exception as a dispositive issue. That sentence must be read in context. JVL made no submissions at all in its written submissions on any of the exceptions to the rule. That is because the burden rested on Agritrade to invoke the particular exception on which it intended to rely. At the time JVL made this submission, Agritrade had not yet identified the three specific exceptions which it would go on to invoke in its own written submission exchanged that day. JVL was not, by this one sentence, taking on the burden of proving that all six exceptions to the parol evidence rule were inapplicable.

210 Further, I do not think that too much weight should be placed on Mr Pillai's exchange with the first arbitrator during oral closing submissions on

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143 Defendant's Written Submissions dated 23 April 2014 at [74(a)].

144 Defendant's Written Submissions dated 23 April 2014 at [74(b)].

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30 November 2012. I have already observed that this amounted to no more than the tribunal floating a hypothetical for Mr Pillai's response. JVL had no reason to believe, at this juncture, that the collateral contract exception was in play, either by reason of the case which Agritrade was advancing or by reason of a direction from the tribunal.[145] Indeed, JVL had every reason to believe that Agritrade had taken a considered decision to eschew the collateral contract exception in its closing submissions.

211 The statement in JVL's reply[146] that "the agreement reached regarding the averaging of the High Price Contracts and the Low Market Price Contracts had no impact on the validity or performance of the [disputed contracts]" does not assist Agritrade. This pleading is a rejection of Agritrade's uncertainty defence. It has nothing to do with the parol evidence rule or its exceptions.

212 The same point can be made about JVL's submission, in its reply submissions and its final submissions, that the price-averaging arrangement was at most an agreement to negotiate.[147] This submission was again directed to Agritrade's uncertainty defence and the binding nature of the disputed contracts. It is not a submission that the price-averaging arrangement lacks the certainty necessary to constitute a contract and therefore a collateral contract. Agritrade quotes this submission out of context when it asserts that it constituted JVL's case on the collateral contract exception.

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145 Respondent's Written Submissions dated 20 September 2012 at [15] – [43], page 1263 to 1274 of 1st Affidavit of S.N. Jhunjhunwala; Respondent's Written Reply Submissions dated 8 October 2012 at [69], page 1443 of 1st Affidavit of S.N. Jhunjhunwala.

146 Reply, paragraph 6.

147 Reply Closing Submissions dated 8 October 2012 at paragraph 49 to 53 and Final Written Submissions dated 8 February 2013 at paragraph 21 to 24.

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213 Agritrade further submits that "the fact that the Plaintiff chose to restrict its submissions and failed to consider a collateral contract as an exception to the parol evidence rule does not preclude the Tribunal from making a determination that, at common law, admission of evidence of a collateral contract is an exception to the parol evidence rule".[148] The tribunal made a similar remark in the Addendum. I have dealt with this at paragraphs [185] – [188] above. The burden was on Agritrade to invoke the collateral contract exception. It was not for JVL to rebut that in anticipation of Agritrade doing so or in the absence of a specific direction from the tribunal.

Conclusion

214 *Soh Beng Tee* is merely the latest in "an established line of cases that vividly illustrates the principle that arbitrators or judges should not surprise the parties with their own ideas" (*Soh Beng Tee* at [44]). As Sir Michael J Mustill & Steward C Boyd say in their leading work *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed, 1989) at p 312:

> *If the arbitrator decides the case on a point which he has invented for himself, he creates surprise and deprives the parties of their right to address full arguments on the case which they have to answer.* Similarly, if he receives evidence outside the course of the oral hearing, he breaks the rule that a party is entitled to know about and test the evidence led against him.
>
> [emphasis added]

215 The majority's decision to treat in its award the question of whether the price-averaging arrangement was a collateral contract within that exception to the parol evidence rule as being dispositive of JVL's claim had no sufficient nexus to the case advanced by JVL. It created surprise. The tribunal's chain of reasoning deprived JVL of its right to present evidence and address

148 Defendant's Written Submissions dated 23 April 2014 at [75].

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submissions on that question. That question was a distinct legal question resting on quite different factual foundations from the purely factual question of whether there was in point of fact an arrangement between the parties to average prices.

JVL's remaining submissions

216 I now consider JVL's remaining three submissions on why the award should be set aside. I do not find them persuasive. I shall briefly explain my reasons.

Failure to plead the prematurity defence

217 Agritrade raised its prematurity defence for the first time in its written submissions, after the close of the evidential phase. It never amended its pleadings to incorporate the prematurity defence. Despite this, the majority accepted the prematurity defence as part of Agritrade's case.[149] They did so for the reasons I have summarised at [111] to [114] above.

218 JVL argues that the tribunal breached the rules of natural justice by allowing Agritrade to introduce the prematurity defence.[150] JVL submits that the prematurity defence gave rise to "a completely new set of issues and disputes" which it was given no opportunity to address.

219 The tribunal considered and rejected JVL's complaint about the prematurity defence:

> 47. In the opinion of the Tribunal, these submissions of the Claimant are clearly unsustainable. The Tribunal at [10.1] and [10.2] of the Award considered the [uncertainty defence]

149 Award, [10.9], page 103 of 1st Affidavit of S.N. Jhunjhunwala.

150 Plaintiff's Written Submissions dated 22 April 2014 at [7.1.3].

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> and the [prematurity defence], and at [10.5] accepted that the [prematurity defence] was not pleaded in the [defence]. That being the position, the Tribunal at [10.8] went on to consider whether the Claimant had been prejudiced by the absence of plea of the [prematurity defence]. On this point, the Tribunal found at [10.9] that the Parties had argued the [prematurity defence]. In particular, the Claimant argued and disputed the [prematurity defence] in (i) its responsive written submissions, (ii) the oral submissions before the Tribunal at the Hearing of Oral Submissions (on 30 November 2012), and (iii) its final written submissions where the Claimant had the last word. In the opinion of the Tribunal, the [prematurity defence] was extensively and fully argued before the Tribunal, although it was not pleaded. The Tribunal unanimously held that the Claimant had not been prejudiced by the absence of plea of the [prematurity defence]. Relying on the Court of Appeal's decision in *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 at [51], the Tribunal was disposed to allow the [prematurity defence] to stand and treat it as part of the case of the Respondent.

220 It is undoubtedly correct as a point of procedure that Agritrade should have amended its pleadings to include its prematurity defence. I also have difficulty with the tribunal's finding that: (i) the prematurity defence was the same defence or a similar defence to its uncertainty defence; and (ii) that it was simply the consequence that flowed from rejecting Agritrade's uncertainty defence. But upon consideration of the overall circumstances, JVL suffered no prejudice by reason of the tribunal's decision to permit Agritrade to advance the prematurity defence. I say this for three reasons. First, JVL addressed the prematurity defence in its subsequent submissions, both written and oral. Indeed, Mr Pillai accepted in the oral submissions that JVL had responded to the prematurity defence in its reply submissions.[151] Second, the prematurity defence rested on the same factual foundations as the uncertainty defence, *ie* the price-averaging arrangement. Unlike the collateral contract exception, dealing with the prematurity defence on the law did not involve

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151 Transcript of 30 November 2012, page 85 line 24 to page 86 line 1, page 1507 of 1st Affidavit of S.N. Jhunjhunwala.

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new questions of fact which had never before been in issue. Third, the tribunal's acceptance of the factual statement at the heart of the prematurity defence – that Agritrade's performance obligation under the disputed contracts was not yet due because no price-averaging exercise had been carried out – was simply the consequence of its dispositive finding that the price-averaging arrangement was within the collateral contract exception to the parol evidence rule. It is not a finding that Agritrade has succeeded in its prematurity defence as a free-standing defence.

221 I therefore reject JVL's submission that the tribunal's award should be set aside by reason of its decision to accept the prematurity defence as part of Agritrade's case in the arbitration.

Jurisdiction

222 JVL argues[152] that the tribunal exceeded its jurisdiction when the majority found the price-averaging arrangement to be a collateral contract and then went on to make findings on the price-averaging arrangement, including a finding that JVL was in repudiatory breach of it. On the majority's own premise, the price-averaging arrangement was not only a contract, but was a contract distinct from the disputed contracts. Yet, the price-averaging arrangement contained no arbitration agreement. The tribunal's jurisdiction over the parties was founded only in the arbitration clauses in the disputed contracts. Accordingly, JVL submits, by finding that the price-averaging arrangement was a collateral contract, the tribunal dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration.[153]

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152 Plaintiff's Written Submissions dated 22 April 2014 at page 54 to 57.

153 Plaintiff's Written Submissions dated 22 April 2014 at [6.2.5].

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223 I do not accept JVL's submission. The majority made no finding on the price-averaging arrangement other than that it amounted to a collateral contract. The sole purpose of that finding was to give the majority a legal basis for taking the price-averaging arrangement into consideration in order to conclude that Agritrade's performance obligations under the disputed contracts were not yet due. That finding did not, therefore, go beyond the scope of the parties' dispute on the disputed contracts which JVL had referred to the arbitrators under the notice of arbitration.

224 The point can be tested in this way. Assume that Agritrade had invoked the collateral contract exception to the parol evidence rule. Assume further that the tribunal had received additional evidence and submissions on whether the parties had an intention to create legal relations when they agreed to average prices, whether that agreement had been expressed in promissory language, whether that agreement had been supported by consideration and whether the terms of that agreement were sufficiently certain. If JVL's submission were correct, none of that would have legitimised the majority's finding that the price-averaging arrangement was a collateral contract. It would still be a finding made by the tribunal without jurisdiction. That cannot be correct.

225 In making its finding that the price-averaging arrangement was a collateral contract, the majority did not purport to resolve any dispute under the price-averaging arrangement as a collateral contract. Although it did hold that JVL was in repudiatory breach of the price-averaging arrangement, that finding was unnecessary for its decision on the ultimate issue before it, which was Agritrade's liability to JVL for breach of the disputed contracts. It would have been different if, for example, the tribunal had purported to award

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damages to Agritrade for JVL's breach of the price-averaging arrangement. But that is not what the tribunal did.

Apparent bias

226 JVL submits that the tribunal's award should be set aside because the majority displayed apparent bias towards JVL. To support this submission, JVL points to what it described as the tribunal's "uncritical acceptance" of the evidence of one of Agritrade's witnesses[154] and the majority's decision to allow Agritrade to introduce the prematurity defence even though it was not pleaded.[155]

227 To Mr Yeap's credit, he did not press this submission. I reject it. There is no basis to allege, let alone to find, that any of the three eminent arbitrators constituting the tribunal displayed even a scintilla of apparent bias.

Conclusion

228 For the reasons given above, I allowed JVL's application and set aside the award. I also ordered Agritrade to pay JVL costs of and incidental to the proceedings, such costs to be taxed on the standard basis if not agreed.

Vinodh Coomaraswamy
Judge

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154 Plaintiff's Written Submissions dated 22 April 2014 at [8.11].

155 Plaintiff's Written Submissions dated 22 April 2014 at [8.2.1].

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Andre Yeap, SC (instructed) (Rajah & Tann Singapore LLP), Prakash Pillai and Koh Junxiang (Clasis LLC) for the plaintiff; Kelly Yap and Kelly Toh (Oon & Bazul LLP) for the defendant.

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