IN THE SINGAPORE INTERNATIONAL COMMERCIA COURT
OF THE REPUBLIC OF SINGAPORE

[2021] SGHC(I) 5

Originating Summons 3 of 2021

Between

CKG

… *Plaintiff*

And

CKH

… *Defendant*

JUDGMENT

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

TABLE OF CONTENTS

INTRODUCTION **1**

COURT'S APPROACH TO AN APPLICATION TO SET ASIDE AN AWARD **5**

FACTUAL BACKGROUND **7**

THE PLAINTIFF'S APPLICATION TO THE TRIBUNAL FOR AN ADDITIONAL AWARD. 13

THE PRINCIPAL DEBT ISSUE **18**

THE FREIGHT INTEREST ISSUE **30**

SUSPENSION OF THE SETTING ASIDE PROCEEDINGS **31**

SUBSEQUENT DEVELOPMENT **34**

CONCLUSION **36**

Version No 2: 23 Jul 2021 (14:26 hrs)

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

CKG
v
CKH

[2021] SGHC(I) 5

Singapore International Commercial Court — Originating Summons 3 of 2021
Jeremy Lionel Cooke IJ
8 June 2021

18 June 2021 Judgment reserved.

Jeremy Lionel Cooke IJ:

Introduction

1 By an Originating Summons dated 25 November 2020, the plaintiff, which was the Respondent in the arbitration to which the Originating Summons relates ("the Arbitration"), sought the setting aside of paragraphs 491–492 and 519–524, together with the dispositive section ("the Dispositive Section"), or parts of it, of a Final Arbitral Award dated 21 August 2020, corrected by two Memoranda of Corrections to the Final Award dated 2 October 2020 and 5 November 2020 ("the Award") in which the arbitral tribunal ("the Tribunal") found that the plaintiff was liable to the defendant in damages amounting to US$8,512,789.88 and IDR15,126,969,785 whilst the defendant was liable in damages to the plaintiff in the lesser sum of IDR29,918,809,545.86. Interest was awarded on the sums in question and the plaintiff was ordered to pay the defendant's costs and the defendant's costs of the Arbitration. The application

is made on the basis that the Tribunal failed to consider and take into account a debt owed by the defendant to the plaintiff in relation to freight and taxes for logs already supplied ("the Principal Debt") which, it is said, when put into the equation constituted by the claims, set-offs and cross claims asserted by the parties, would have resulted in a net sum being owed by the defendant to the plaintiff, and which would then have impacted on the interest and costs figures set out in the paragraphs of the Award to which reference has been made. The plaintiff also submits that, not only did the Tribunal fail to determine the amount of the Principal Debt ("the Principal Debt Issue") but it also failed to decide an issue as to the rate of interest to be awarded on the plaintiff's counterclaim for freight due after 21 December 2011("the Freight Interest Issue").

2 The basis of the application for the setting aside of the Award is that the Tribunal failed to exercise the authority that the parties had granted to it pursuant to Article 34(2)(a)(iii) of the UNCITRAL Model Law on International Arbitration ("the Model Law") read with section 3 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") (which provides that the Model Law shall have the force of law in Singapore) and/or that a breach of natural justice occurred in connection with the making of the Award by which the rights of the plaintiff had been prejudiced, in breach of section 24(*b*) of the IAA. It is said that the Tribunal failed to consider the issues (namely the Principal Debt Issue and the Freight Interest Issue) which had been submitted to it for determination *infra petita* under Art 34(2)(a)(iii) of the Model Law and/or went against the agreed position of the parties, which also constituted a breach of natural justice.

3 The terms of Article 34 of the Model Law, so far as relevant, read thus:

Version No 2: 23 Jul 2021 (14:26 hrs)

> (2) An arbitral award may be set aside by the court specified in article 6 only if:
>
> > (*a*) the party making the application furnishes proof that:
> >
> > > .....
> > >
> > > (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;
> >
> > …
>
> (4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal and opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

4 Section 24(*b*) of the IAA reads thus:

> **24**. Notwithstanding Article 34 (1) of the Model Law, the General Division of 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.

5 The defendant's position is that the application is in substance a disguised appeal against the substantive findings of the Tribunal which the court should not countenance:

> (a) The defendant also submits that the Principal Debt Issue was raised by the plaintiff only as a defence to the defendant's claim for the

Version No 2: 23 Jul 2021 (14:26 hrs)

breach of outstanding log supply obligations, as part of the Debt-to-Log Conversion which enabled the plaintiff, in defined circumstances (which on the Tribunal's finding, did not apply here), to set off the Principal Debt against its obligations to supply logs, on an agreed Debt-to-Log Conversion ratio. The basis of the Debt-to-Log Conversion and the parties' respective rights for the supply of logs and payment were set out in the agreed Minutes of a Meeting on 8 April 2011 ("the 8 April Meeting Minutes"), signed by the parties and which was accepted as an enforceable agreement between them.

(b) The defendant contended that the Principal Debt issue was not raised as a defence to any claim for damages for undersupply of logs as opposed to a defence on the Debt-to-Log Conversion. There was no pleaded counterclaim for the Principal Debt, which in itself was said to be a requirement for a set-off. The defendant submitted that in those circumstances, it was not possible for the Tribunal to consider whether there could be an equitable set-off of the Principal Debt against damages for breach of the supply obligation and that therefore there was no failure by the Tribunal to consider an issue and no breach of natural justice.

(c) The defendant further submits that there was no sufficient evidence to support the Principal Debt and that, as the defence would have failed, there was no prejudice to the plaintiff in the matter not being decided.

(d) The Freight Interest Issue was determined by the Tribunal with a grant of interest, albeit not at the contractual rate, which was the plaintiff's primary case, but at the alternative rate which it sought.

Version No 2: 23 Jul 2021 (14:26 hrs)

Court's approach to an application to set aside an award

6 The parties referred to a number of authorities, but there was no real difference in the submissions as to the principles to be applied in an application of this kind, although there was a difference of emphasis, as might be expected.

7 The authorities are clear in saying that there is no room for the court to interfere with an award on the basis of mistakes made by the arbitrators, whether in determining issues of law or in their function as finders of fact. When parties agree to go to arbitration, they accept, for better or worse, the appointed tribunal and the limitations to the right of challenge that are imposed by the particular law or rules which govern the arbitration in question. The policy which the court adopts is one of minimal curial intervention, and an essentially pro-arbitration approach which reads awards without seeking to construe them as a statute or adopting an overly technical stance, with a view to according them the finality that an arbitration is intended to bring about: see *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [125], *Soh Beng Tee & Co Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [91].

8 It is common ground that, where a party challenges an award on the ground of a breach of natural justice, four questions arise, namely: which rule of natural justice was breached; how that rule was breached; the connection between the breach and the making of the award; and how the breach prejudiced the challenging party's rights: *Soh Beng Tee* at [29] affirming *John Holland Pty Ltd v Toyo Engineering Corp* [2001] 1 SLR(R) 443. Counsel for the defendant emphasised the need for "actual or real prejudice" as a result of any apparent breach as meaning that it "must, at the very least, have actually altered the final outcome of the arbitral proceedings in some meaningful way" (*Soh Beng Tee* at

Version No 2: 23 Jul 2021 (14:26 hrs)

[91]). Serious errors of law and/or fact do not of themselves amount to a breach of the rules of natural justice.

9 Whereas Article 34(2)(a)(iii) of the Model Law refers to awards which deal with matters outside the scope of the arbitration, it is also common ground that a tribunal is bound to consider all the issues that are raised by the parties in the reference. To fail to consider an important issue that has been pleaded is a breach of natural justice because, in such a case, the arbitrator would not bring his or her mind to bear on an important aspect of the dispute before the tribunal (*AKN v ALC* [2015] 3 SLR 488 ("*AKN*") at [46]). In *CRW Joint Operation v PT Perusahan Gas Negara (Persero) TBK* [2011] 4 SLR 305 ("*CRW*"), the Singapore Court of Appeal expressly stated that a failure on the part of a tribunal to decide matters submitted to it, was a failure to exercise the authority that the parties had granted and could therefore be a breach of Article 34(2)(a)(iii). This does not mean a failure by an arbitral tribunal to deal with *every* issue referred it will render the award liable to be set aside. The significance of the issue that was not decided has to be considered in relation to the award as a whole and the question of prejudice to the complaining party.

10 The defendant emphasised the reference made by the Singapore Court of Appeal in *AKN* to the need for a consideration of the *pleaded* issues as an essential feature of the rule of natural justice enshrined in the Latin adage, *audi alteram partem*. The primary places in which to ascertain what was in issue are the pleadings and the list of issues. Whilst the Court of Appeal in *AKN* stated that it would usually be a matter of inference, rather than of explicit indication, that the arbitrators had wholly omitted an important issue, that inference, if it was to be drawn, must be shown to be clear and virtually inescapable. It is clear, however, that there is no requirement for an issue to be pleaded as such, if there plainly is an issue which has been raised before the tribunal, and which the

Version No 2: 23 Jul 2021 (14:26 hrs)

tribunal ought to resolve in order to do justice between the parties. Where natural justice is concerned, each party must have the opportunity to put its case and have it determined by the chosen tribunal with the other party given a full opportunity to meet it. In the Singapore Court of Appeal decision in *BLC and others v BLB and another* [2014] 4 SLR 79, the court considered the pleadings, the lists of issues and the parties' written submissions in order to determine what was truly in issue between the parties, and it may be necessary to look at the way in which the case is put in opening and closing oral submissions also.

11 In my judgement, it is clear that the court must look at the conduct of the reference as a whole in order to determine whether the arbitrators have or have not considered an important issue placed before them. If a party seeks to put forward a case which it did not make before the tribunal, but, on seeing the result, wished it had made, that would be a misuse of the right of challenge because there would be no breach of the rules of natural justice at all. If, however, there was an issue which was common ground between the parties and was therefore not the subject of express pleading, but which the tribunal ignored, forgot or overlooked, there would be a breach of natural justice in the arbitrators' failure to take it into account, if it was material in the overall context of the arbitration.

12 It is common ground that the application of Article 34(2) of the Model Law and the application of section 24(*b*) of the IAA leads to the same result.

Factual background

13 The dispute which led to the Arbitration concerned an agreement for the defendant to sell all of its interests in certain timber concessions in Indonesia to the plaintiff in exchange for US$8m and a three-year supply of round logs for

Version No 2: 23 Jul 2021 (14:26 hrs)

use in the defendant's plywood factory. On 18 September 2009, the parties concluded a Master Agreement which annexed four documents, including, *inter alia*, the Round Logs Supply Memorandum of Agreement ("the MOA") and a Reconciliation and Settlement Deed dated 18 December 2009. The MOA provided that the plaintiff should supply specified quantities of round logs on a Free-on-Board basis alongside jetties in Sumatra and for the defendant to bear all local, national or other taxes, including but not limited to, *Provisi Sumber Daya Hutan* ("PSDH") and *Dana Reboisasai* ("DR") which were initially payable by the plaintiff at the point of logging or export. The Reconciliation Deed was intended to compromise several existing obligations owed by the parties and their failures prior to entry into the Master Agreement. The terms of the Reconciliation Deed required the parties to pay various sums to each other and for the plaintiff to deliver logs to the defendant (distinct from the obligations in the MOA), such logs being termed the "Barter Trade Logs" and "Infrastructure Logs".

14 The most important document upon which much of the dispute centred was the signed and agreed Meeting Minutes of 8 April 2011 ("the 8 April Meeting Minutes"). The Tribunal referred to this as an enforceable agreement. The terms are as follows:[i]

> (a) The defendant was to repay the plaintiff the "sum of IDR 75 Billion for its outstanding debt (PSDH/DR, Freight) and future shipment's PSDH/DR and freight", as set out in Clause 1 of the 8 April Meeting Minutes. This debt arose from the obligations the defendant owed under the MOA and was to be repaid in five monthly instalments which ranged from IDR10bn to IDR20bn per month. The payment deadlines were set at the end of each month, from April 2011 to August 2011 respectively (the "Clause 1 Payment Deadlines");

Version No 2: 23 Jul 2021 (14:26 hrs)

(b) The defendant's repayment of those five instalments would be "closely monitored". The defendant was to pay interest of "2% net per month" for any failure to repay and/or late repayment of the monthly instalments; the charges were to be "cumulative until all amounts due is fully paid".

(c) Clause 3 of the 8 April Meeting Minutes also stated that starting from 1 September 2011, the defendant is "fully committed to pay on time and without any delay to settle all outstanding debt arises [sic]". The same 2% net interest rate was to accrue on any shortfall.

(d) The plaintiff and/or its affiliates reserved the right to exercise a contractual set-off by 15 November 2011 via a mechanism set out in Clause 4 of the 8 April Meeting Minutes:

> - To cease round logs shipment; [the defendant] and its affiliates will fully indemnify [the plaintiff] … and its affiliates for not delivering any outstanding Round logs as stated in the Master Agreement and Memorandum of Agreement Round logs Supply dated 18 September 2009 and Reconciliation and Settlement Deed in December 2009.
> - To reduce round logs volume commitments by all [the defendant]'s outstanding debts. The roundlog volume reduction will be derived from dividing the outstanding debt by IDR320,000/m3 ["***the Debt-to-Log Conversion***"]).
> - Both parties will attempt to settle all or any outstanding matters in an amicable manner.
>
> [emphasis in bold italics added]

15 It can be seen from this that the defendant agreed to pay the plaintiff the sum of IDR75bn (approximately US$5.17m) in respect of outstanding debt (PSDH/DR and freight) for shipments already made and for PSDH/DR and freight on shipments to be made. Provision was made for payment in five

Version No 2: 23 Jul 2021 (14:26 hrs)

instalments between 30 April 2011 and 30 August 2011 with a specified rate of interest for late payment. Further provision as to the interest rate was made for the plaintiff's protection if, by 15 November 2011, there was still a shortfall in payments made. At that point the plaintiff had the option to cease further shipments, or to reduce the volume of shipments by reference to the amount of outstanding debt in a "Debt-to-Log" Conversion, as *per* the mechanism under Clause 4. During the relevant period, between April and 15 November 2011, as found by the Tribunal, there was both a shortfall in the supply of logs by the plaintiff and a failure on the part of the defendant to make the agreed payments. It was on 20 December 2011 that the plaintiff wrote to the defendant informing the latter that it had fulfilled and discharged its log delivery obligations under the MOA and was invoking its right under the Debt-to-Log Conversion to convert the outstanding sums (which is the Principal Debt referred to at [1]) owed by the defendant to it to discharge its outstanding log supply obligations, whether owed prior to or after 15 November 2011. In other words, the plaintiff was drawing a line under the obligations owed by each party to the other.

16 For present purposes, the key issue which was determined by the Tribunal appears at paragraph 339–383 of the Award. There, the Arbitrators determined that the plaintiff's obligations to supply round logs under the MOA remained unaltered until 15 November 2011, so that it was in breach in failing to supply the agreed quantity of logs in that period. The Debt-to-Log Conversion right could not be exercised before that. In the same period, the Tribunal found that the defendant was in breach in failing to make the monthly payments as set out in the 8 April Meeting Minutes. It also found that any failure to make those payments would result in the imposition of the cumulative interest charge of 2% net per month. Any failure after 1 September 2011 to pay sums in respect of log deliveries thereafter would also attract the same interest charge.

Version No 2: 23 Jul 2021 (14:26 hrs)

17 The Tribunal held that an attempt to settle all or any outstanding matters in an amicable manner in accordance with the last part of Clause 4 was a pre-requisite of the exercise of any of the options given to the plaintiff in that clause. Thus, the plaintiff was obliged to continue making deliveries of logs under the MOA until 15 November 2011 and thereafter, until attempts at reasonable settlement had failed. Ongoing shipments were found to be a commercial requirement for the defendant to earn the revenue it needed to pay sums owing to the plaintiff. Thus, the plaintiff could not unilaterally invoke Clause 4 of the 8 April Meeting Minutes to reduce or cease log supply before 15 November 2011, regardless of whether or not the defendant met its payment obligations; nor could it reduce or cease supply on 15 November 2011 without having first attempted negotiations relating to the defendant's outstanding debt. In consequence, the plaintiff breached Clause 4 of the MOA by terminating round log supply after 15 November 2011, without attempting an amicable settlement, and was not entitled to lower its log supply commitment under the MOA commensurate with the defendant's outstanding debt for PSDH/DR and freight charges by an *ex post facto* exercise of the Debt-to-Log Conversion under the 8 April Meeting Minutes. In acting as it did, the plaintiff repudiated the MOA. Having so decided, at paragraph 383, the Tribunal stated that it did not need to address the defendant's argument that the plaintiff should have set off debts it owed to the defendant in its Debt-to-Log calculations before ceasing log supply. The Tribunal never again referred to the Principal Debt in the context of the claims made by the defendant against the plaintiff.

18 Notwithstanding all that is said by the defendant to the contrary to this court, the evidence establishes that it was effectively common ground between the parties in the arbitration that, at the time of the 8 April Meeting Minutes, the sum which was owing in respect of past debt for freight, PSDH/DR and other

Version No 2: 23 Jul 2021 (14:26 hrs)

taxes, was of the order of IDR50bn, and as at mid November 2011 was somewhat higher than that (the Principal Debt). The Tribunal also noted at para 247 of its Award that the defendant submitted that the total outstanding PSDH/DR debt as at 8 April was approximately IDR50bn. It also appears from the evidence adduced to the Tribunal by the expert appointed by the plaintiff that some 52% of the sum owing consisted of freight rather than PSDH/DR. It was always common ground and a fundamental premise of all the parties' arguments relating to the construction of the 8 April Meeting Minutes that there was a significant sum owing in respect of past debts due under the MOA. The existence of these debts was the premise upon which the plaintiff argued that it could set off that debt against its obligations to supply logs on the basis of the Debt-to-Log Conversion rate, and the defendant's case that the plaintiff could not.

19 Although there were multiple other issues between the parties in relation to Barter Trade Logs and Infrastructure Logs, the Debt-to-Log Conversion set-off is where the argument was focused in relation to the parties' claims in relation to MOA short delivery of logs and non-payment. No further mention was made of the Principal Debt by the Tribunal in calculating the final net sums due to the parties on their respective claims, defences and counterclaims in quantifying the damages.

20 The Tribunal determined all the other disputes between the parties, including a number of counterclaims made by the plaintiff. In discussing all of the plaintiff's counterclaims, including the three successful counterclaims for PNT/ Forestry Tax paid on behalf of the defendant, a netting-off balance under the Reconciliation Deed, unpaid freight charges under Clause 9 of the Reconciliation Deed and Clause 7 of the MOA, the Tribunal referred at paragraph 499 of the Award to the plaintiff's primary claim for the compound

Version No 2: 23 Jul 2021 (14:26 hrs)

interest of 2% per month under Clause 3 of the 8 April Meeting Minutes, as well as its alternative claim for simple interest at 5.33%.The Tribunal at paragraph 511 stated that it did not find the Clause 3 rate to be appropriate to the first two of those counterclaims and instead applied the same rate as used for the defendant's successful claims of 5.33% *per annum*. The Tribunal there said nothing about the claim for interest on the successful counterclaim for freight charges.

21 In relation to that successful claim for freight charges after December 2011 in relation to the delivery of other logs (which the Tribunal treated as logs delivered under the MOA), the Tribunal also awarded the plaintiff simple interest at the rate of 5.33% *per annum*, rather than the contractual rate of 2% *per month*. No reasoning was given in respect of the decision on interest due on the freight charges, as opposed to the rate of interest on sums due under the other two counterclaims, but an Award was made of interest in the Dispositive Section as part of a composite paragraph dealing with interest on all three successful counterclaims.[ii]

The plaintiff's application to the Tribunal for an additional award.

22 Following the issue of the Award, the plaintiff requested the Tribunal to make an additional award pursuant to Rule 29.3 of the Arbitration Rules of the Singapore International Arbitration Centre(5th ed, 2013) ("the SIAC Rules") ("the Request"). The plaintiff sought an award in respect of:

(a) the Principal Debt of IDR50bn or US$4.4m (which were equivalent at the relevant rate of exchange at the time);

(b) the contractual interest on the Principal Debt from the date of each breach by the defendant in making payment in accordance with

Version No 2: 23 Jul 2021 (14:26 hrs)

Clause 1 of the 8 April Meeting Minutes up to the date of full payment; and

(c) the contractual interest on the counterclaim for freight charges incurred after 2011 to the date of full payment by the defendant.

23 In making that application, the plaintiff relied on many of the features upon which it relied in its application to this court. It highlighted that the Tribunal had determined that mutually outstanding contractual obligations were owed between the plaintiff and the defendant as recorded in the 8 April Meeting Minutes.

24 It pointed to the Tribunal's finding at paragraph 348 of the Award that the outstanding debt as at 8 April 2011 was not IDR75bn but approximately IDR50bn and at paragraph 349 of the Award, and that contractual interest ran on that debt at a net rate of 2% per month. It drew attention to the absence of any dispute by the defendant of the mutual obligations or as to the existence of the Principal Debt.

25 The only point of difference between the parties at the hearing was how the Principal Debt fell to be taken into account in relation to the plaintiff's log supply obligations, which the Tribunal had decided by holding that the Debt-to-Log Conversion was not operable prior to 15 November 2011 and prior to an attempt at amicable settlement.

26 The underlying premise of the Principal Debt had never been in issue, although the exact quantum was not agreed, and issue of evidence arose in relation to it.

Version No 2: 23 Jul 2021 (14:26 hrs)

27 There were only two possible situations. Either the Debt-to-Log Conversion would operate on a global basis to compromise all the plaintiff's log supply obligations whether before or after 15 November 2011 or, if it did not so operate, then the Principal Debt fell to be taken into account, with its accrued interest under Clause 2 of the 8 April Meeting Minutes, against damages or compensation payable for undersupply as at 15 November 2011. The Tribunal had failed to take the Principal Debt into account at all, having decided against the plaintiff on the operability of the Debt-to-Log Conversion and thereby also failed to take into account the interest accruing thereon.

28 In its response, the defendant took essentially two points. The first was that there was no pleaded counterclaim for the Principal Debt, in the event that the Debt-to-Log Conversion was rejected by the Tribunal, nor was the matter addressed as such by the experts. The second point taken was that the defendant did not concede that the taxes and freight which constituted the Principal Debt were payable and that the plaintiff had not proved that it had made payment for the taxes.

29 The Tribunal's response dated 5 November 2020 ("the Decision on the Additional Award Application") is illuminating. It denied the request for an additional award. The Tribunal first referred to Rule 29.3 of the SIAC Rules which, it stated, was based on Article 33(3) of the Model Law and which provided that a party could, "by written notice, request the Tribunal to make an additional award as to claims presented in the arbitral proceedings but not dealt with in the award." The Tribunal then provided brief reasons for its refusal:[iii]

> First, the Tribunal finds that the Respondent made no "claim" in this arbitration for the Principal Debt as required by Rule 29.3. Although the Respondent did raise the issue of its entitlement to the Principal Debt for pre-December 2011 taxes and freight as a defence to the claimant's claim for failure of log

Version No 2: 23 Jul 2021 (14:26 hrs)

> supply obligations, ***and sought a set off against any damages awarded in substitution of log supply to the Claimant***, the Respondent did not plead a Counterclaim for the Principal Debt. This contrasts with the Respondent's pleaded counterclaim for post–2011 taxes and freight. In this respect, the Request is more in the nature of an appeal of the Tribunal's merits decisions that an application for an additional award on a claim not dealt with in the Award.
>
> Second, even if the Respondent were deemed to have made a claim for the Principal Debt for the purposes of Rule 29.3, the record contains no evidence that the Respondent made the necessary underlying payments, subject to reimbursement from the Claimant. In connection with the counterclaim that the respondent had played in connection with post–2011 taxes, the Tribunal found in paragraph 506 of the Award that "Pacific Fibre has offered no more than circumstantial evidence of its own payment of those taxes" and hence denied the relevant counterclaim.
>
> As the respondent has not justified its request for an additional award of the Principal Debt, there consequently can be no justification for an additional award of interest on the Principal Debt, contractual or otherwise.
>
> [emphasis in bold italics added]

30 In relation to the Freight Interest Issue, the Tribunal declined the request, stating that this counterclaim has been dealt with in paragraph 512 of the Award.

31 For the Principal Debt Issue, whilst the first reason given requires closer consideration, the crucial point that is made relates to the distinction drawn between a "claim" and a "defence". Whether or not this is too narrow a construction of the Rules is something I need not decide. A party may however claim a set-off by way of defence, without making a "claim", "counterclaim" or "cross-claim". The Tribunal effectively decided that it had no jurisdiction under the SIAC Rules because no "claim" had been made by the plaintiff in respect of the Principal Debt.

32 Regardless of that, when the first reason is examined, it is clear that the Tribunal accepted that the Respondent (the plaintiff) did raise its entitlement to

Version No 2: 23 Jul 2021 (14:26 hrs)

the Principal Debt for pre-December 2011 taxes and freight in two ways: first, as a defence to the defendant's claim for failure to supply logs (the Debt-to-Log Conversion defence); secondly, as a defence to any damages claim for failure to supply logs.[iv] The way the wording is framed, as emphasised at [29] above, shows that the Tribunal were aware, at the time of this letter of 5 November 2020 that the set-off was not limited to the Debt-to-Log Conversion but was put forward as a set-off of against any damages awarded "in substitution of log supply". The Tribunal was there saying that the Principal Debt had been put up as a set-off against any damages owing in respect of failure to supply the logs due under the MOA.

33 The first reason for rejection was therefore based on the distinction between a defence and a counterclaim and not on the basis that the issue had not been raised before it. On this basis it was said that it was not an application for an additional award on a claim which the Tribunal had failed to determine, but was more in the nature of an appeal against the merits decision of the Tribunal which had not allowed that set-off. The Tribunal, however, did not grapple with the fact that it had not dealt with the claimed set-off of the Principal Debt against the award of damages, which it made in respect of the plaintiff's failure to supply logs, in any part of the Award, despite acknowledging that the issue was before it.

34 It is perhaps, as the plaintiff submits, significant that, having rejected the Request on the basis that it fell outside the powers of the Tribunal under Rule 29.3, because there had been no pleaded counterclaim for the sum in question, the Tribunal went on to cast doubt upon the figure claimed upon which it had made no prior finding and which it equated with a claim for post-2011 taxes, which fell into a different category where the evidence is concerned. The point was irrelevant to its refusal, which was on the basis of lack of jurisdiction, and

Version No 2: 23 Jul 2021 (14:26 hrs)

inappropriate as an answer to the Request which was made on the basis that the Tribunal had failed to determine the point. As the plaintiff pointed out, the Principal Debt was evidenced by the 8 April Meeting Minutes themselves, by both parties' experts in the Arbitration,[v] details of which appear below and was admitted, subject to some qualification, by the defendant on a number of occasions.

35 In short, the stance put forward by the Tribunal itself showed that the Tribunal had failed to deal with an issue which had been put before it and sought to justify that failure by relying on its own construction of the SIAC Rules and referring to evidence in relation to other charges.

36 Whether or not the Tribunal was right in its narrow construction of the SIAC Rules, the question which arises for the court is different in the context of an alleged breach of natural justice and a failure to deal with an issue. The characterisation of the issue as a "set-off", a "defence", a "cross-claim" or a "counterclaim" is nothing to the point. The question is whether there was an issue which the Tribunal should have determined and, by failing to do so, prejudiced a party in so doing.

The Principal Debt Issue

37 The primary case made by the defendant is that the issue which is now raised was not one which was put before the Tribunal at all. The defendant submitted that the only issue put before the Tribunal in relation to the Principal Debt was the Debt-to-Log Conversion and nothing else. It is true to say that the alternative claim to set-off, if the claimed Debt-to-Log Conversion was ineffective, is not to be found as such in the pleadings. There is no pleaded alternative case of legal or equitable set-off of the Principal Debt against any

Version No 2: 23 Jul 2021 (14:26 hrs)

damages claim. The Tribunal, in its Decision on the Additional Award Application, rightly accepted, however, that it was an issue before it. It was implicit in the parties' recognition from the start, as appears from the defendant's statement of claim, the parties' opening and closing statements to the Tribunal and the expert evidence, that there was a significant sum to be taken into account in respect of the Principal Debt in one way or another, either as a defence against the plaintiff's obligation to supply logs, or as a set-off against the damages. It was also plain that the Principal Debt was accruing interest as long as it remained unpaid.

38 The point taken by the defendant and the Tribunal that there was no pleaded claim or counterclaim for the Principal Debt is ultimately immaterial, even though the pleadings and list of issues constitute the primary location to identify, on an objective basis, what issues were before the Tribunal. If the Principal Debt was accepted by all as owing, even if the exact amount was in dispute, it fell to be taken into account. If it was put forward as a defence in the nature of a legal set-off of mutual debts or an equitable set-off arising out of the same transaction, or series of transactions where it would be manifestly unjust not take it into account, there was an issue which the Tribunal should have resolved. It is trite law that a set-off operates as a defence and does not need to be pleaded as a claim or a counterclaim, even if it is usual to plead a cross-claim as both a set off and a counterclaim, particularly if it exceeds the sums claimed by the other party. Even if not so advanced, where the Tribunal was dealing with a balance of account between the parties, all sums owing in one direction or the other, which were in play in the arbitration, had to be taken into account in order to arrive at a net sum. If, as is the case here, the inevitable result of the Tribunal's decision that the Debt-to-Log Conversion did not operate to reduce the plaintiff's obligation to supply logs, was that the Principal Debt remained due

Version No 2: 23 Jul 2021 (14:26 hrs)

and owing with interest accruing, the Tribunal was bound to take the financial implications of its own decision into account when calculating damages and other sums due between the parties.

39 There is, in fact, a real oddity here because the effect of the Tribunal's decision, as was pointed out to it both in oral submissions and in the expert evidence was that the defendant would be worse off if the Debt-to-Log Conversion reduction was legally ineffective, than it would be if it was effective. The reason for this is that if the Principal Debt, or any part of it, was set off against a delivery obligation on the basis of the Debt-to-Log Conversion, that would stop interest running at the contractual rate of 2% per month. On the Tribunal's construction of the 8 April Meeting Minutes, the Principal Debt continued to run in parallel to the plaintiff's failures to deliver, with a high rate of interest accruing on the former, whilst the damages suffered from non-delivery gave rise to a significantly smaller figure.

40 The plaintiff placed some limited reliance on the Agreed List of Issues for the Merits Hearing:[vi]

> (a) Under Section A entitled "Log Delivery Claims", the question of construction of the 8 April Meeting Minutes arises in a number of sub-paragraphs. The reference at subparagraph (e) as to the amount of debt (for taxes and freight) owing by the defendant to the plaintiff as of 8 April, 15 November and/or 19 December 2011 and the applicable rate of interest on such debt. I find that this is part and parcel of the Debt-to-Log Conversion issue and therefore does not assist the plaintiff in its submissions.

Version No 2: 23 Jul 2021 (14:26 hrs)

(b) Under Section G which is entitled "Respondent's Counterclaims", the following appears:

> 14. How much PSDH/DR taxes remain owed by the Claimant to the Respondent?
>
> 15. Whether the Claimant is contractually obliged to reimburse the Respondent for PNT Forestry Tax/Levies? If so: –
>
> a. What is the quantum of PNT that is due to the Respondent;
>
> b. If not yet set off under the 8 April MM, what is the quantum that remains owed by the Claimant to the Respondent?
>
> 16. How much unpaid Freight Charges, if not yet set off under the 8 April MM, remain owed by the Claimant to the Respondent?
>
> …
>
> 18. For the above outstanding amounts:
>
> a. Should the interest rate of 2% per month (as stated in the 8 Apr MM) apply?
>
> b. If so, should the interest rate be calculated on a simple or compound basis?

41 The Agreed List of Issues at section G, at first blush, would appear to refer to matters other than the Principal Debt and, particularly the three counterclaims advanced as such by the plaintiff. The reference in Issues 15 and 16 to "if not yet set off under the 8 April MM" however gives pause for thought because it is hard to see how they could be so set off under that agreement, whereas the Principal Debt could. Nonetheless, paragraph 493 of the Award refers to these issues solely in the context of the plaintiff's counterclaims.

42 In the defendant's Statement of Claim dated 6 April 2015, at para 93(b), in referring to the IDR75bn figure in the 8 April Meeting Minutes, the defendant accepted that of that sum, IDR44,196,126,043 for the PSDH/DR and freight was

Version No 2: 23 Jul 2021 (14:26 hrs)

owing in respect of shipments already made as at 31 March 2011, the rest being a projection of sums which would become owing in the future if log deliveries were made as anticipated. That there was a substantial sum owing was not in issue, but it would vary as further deliveries and payments were made.

43 In Annex 1 to the plaintiff's written submissions to this court, the plaintiff sets out references to the Principal Debt in its Response to the Notice of Arbitration, in its Statement of Defence and Counterclaim and in its Reply to the Defence to Counterclaim. It asserted its right to set off its obligation to make log deliveries on the basis of the Debt-to-Log Conversion. The figure for the Principal Debt was said to be IDR62.5bn as of 15 November 2011 in the first two documents and IDR67.6bn in the third.

44 It was not until the defendant's Reply to Statement of Defence and Defence to Counterclaim dated 22 February 2019 that the defendant first put forward its arguments that the Debt-to-Log Conversion was inapplicable as it had not been rightfully invoked, and also disputed the quantum of the Principal Debt. At no time however did it raise any dispute about the existence of the Principal Debt, which it had acknowledged in the 8 April Meeting Minutes, save as to the exact quantum and the evidence for it. The defendant never argued that the Principal Debt and accruing interest thereon was only repayable if there had been a valid exercise of the Debt-to-Log Conversion set off. It never contended that the Principal Debt and interest thereon disappeared if the plaintiff sought to exercise its supply related remedies under Clause 4 of the 8 April Meeting Minutes. In arguing that the plaintiff was not entitled to exercise the Debt-to-Log Conversion, it was inherent in the submission that the defendant remained liable for the Principal Debt, whatever its quantum actually was. At paragraph 118 of its Reply to Statement of Defence, the defendant expressly stated that it was "to bear the PSDH/DR actually incurred by the Respondent on logs that

Version No 2: 23 Jul 2021 (14:26 hrs)

were delivered to it" pursuant to the MOA, whilst maintaining that the Debt-to-Log Conversion had been wrongly exercised by the plaintiff.

45 When the matter is seen in this light, the absence of any pleaded counterclaim or even pleaded set-off is understandable. The defendant had conceded that sums were due in respect of the Principal Debt and interest thereon and the evidence proceeded on that basis. The plaintiff had sought to exercise its Debt-to-Log Conversion in order to cancel out all sums owed to it, and was content to proceed on that basis without pursuing a claim for the larger amount which would have been due to it had it not chosen to exercise that right. As explained by the plaintiff, it was not looking to make any further profit from the accrual of a high rate of interest on a cumulative basis by treating the Principal Debt as an independent obligation, which would necessarily follow if the Debt-to-Log Conversion was inappropriate. In consequence it never pleaded any counterclaim in respect of the Principal Debt and interest thereon.

46 In the Experts' Reports, calculations appear which show that the parties were proceeding on this basis. This holds good both for the defendant's expert and the plaintiff's expert and their Joint Expert Statement. In the latter, dated 30 April 2019, at paragraph 2.7, a table appears setting out the expert's respective views on the amount of the Principal Debt, exclusive of interest, assuming that there was no valid Debt-to-Log Conversion, whereas at paragraph 2.11 appears a table setting out their conclusions if the plaintiff was entitled to invoke the Debt-to-Log Conversion. For the former, where the plaintiff was treated as not entitled to exercise the valid Debt-to-Log Conversion, the defendant's expert came up with figures of US$4.2m–$4.5m, depending upon whether or not the defendant succeeded in its claim that defective logs had been delivered. The plaintiff's expert's equivalent figures were US$4.2m–$4.4m. At Slide 22 of the defendant's expert's presentation to the Tribunal, he again set out the

Version No 2: 23 Jul 2021 (14:26 hrs)

outstanding debt as US$4.2m "if the Respondent is not entitled to invoke the debt-to-log conversion". Furthermore, in his expert report, the defendant's expert gave credit of some US$4.2m in respect of the Principal Debt against the claims made by the defendant. In the plaintiff's expert presentation, slides again showed the Principal Debt on the two alternative bases of the defendant's claims for both "Debt-to-Log Conversion" and "no Debt-to-Log Conversion".

47 In the plaintiff's Counsel's opening presentation at Slides 4 and 47, reference is again made to the position if no conversion is allowed and to the liability for the Principal Debt and compound interest which would result. In the slides, the plaintiff's counsel referred to the consequence of the defendant's case as being that it would still owe the plaintiff "IDR 66.4 billion as debt [the Principal Debt] + 2% compounded interest". In its Written Opening Statement, the plaintiff made it clear that the defendant had accepted that the Principal Debt was owing by saying at paragraph 13 that "the Claimant does not dispute that a debt is owed to the Respondent. The respective experts also agree on the quantum of debt accrued by December 2011 (within a small margin)". There was no demur from the defendant. At paragraph 15, the plaintiff stated that its past undersupply and future supply obligations as of 19 December 2011 were dwarfed by the outstanding debt owed to it but, by virtue of the 8 April Meeting Minutes set-off, these obligations were completely extinguished with excess to spare.

48 In its oral opening, Counsel for the plaintiff submitted that the Principal Debt remained due and owing if the Debt-to-Log Conversion was found to be inoperative and that the defendant would ironically be in a worse position if it was correct in its arguments that the conversion was not validly invoked.[vii] That could only be the case if the Principal Debt and accruing interest was an extant liability. In his slides and in his oral evidence, the plaintiff's expert referred to

Version No 2: 23 Jul 2021 (14:26 hrs)

a figure of US$17.2m as the total of the Principal Debt plus accrued interest as at 3 May 2019 if no Debt-to-Log Conversion was allowed.

49 At no point did the defendant challenge these observations, save for the plaintiff's entitlement to exercise the Debt-to-Log Conversion. In the defendant's Written Opening Statement, at paragraph 26, the defendant submitted that the plaintiff's failure to compensate for any undersupply of logs on a quarterly basis between January 2010 and 15 November 2011 had to be "taken into consideration in computing any outstanding debt owing" to the plaintiff for its invocation of Clause 4 of the 8 April Meeting Minutes, thus recognising the fact that the Principal Debt had to be taken into account in one way or another. In the defendant's Counsel's oral opening, she specifically stated that the defendant's expert had made a calculation as to the amount of taxes and freight that was owed at 8 April 2011 and had arrived at a figure of approximately IDR50bn, not IDR75bn as set out in the 8 April Meeting Minutes, which covered future shipments also.[viii]

50 In the oral closing statements made by Counsel for the defendant, she not only conceded the existence of the Principal Debt, but provided no reason why it should not be set off against any damages claimed by the defendant. When asked specifically whether IDR75bn had been incurred by the plaintiff, she stated that, based on the experts' calculation as at 8 April 2011, the debt was IDR$50bn and, as at mid-November, it was IDR53bn which included deliveries made between April and November with taxes that were effectively paid thereon. [ix]

51 At para 35 of the defendant's written post hearing submissions, the plaintiff stated that if it was wrong in invoking its rights under Clause 4 of the 8 April Meeting Minutes, the defendant would instead be exposed to the full

Version No 2: 23 Jul 2021 (14:26 hrs)

extent of the 2% monthly interest set out in Clauses 2 and 3 of those minutes which would continue to run. As at 3 May 2019, if PNT Forestry Taxwere included this would amount to US$24.2m. The point was made that the defendant had nothing to say about this during the course of the hearing and indeed had nothing to say about it in its post hearing brief either. At paragraphs 54–55 of those post hearing submissions, the defendant maintained its argument in respect of the Debt-to-Log Conversion, saying it would not make commercial sense for the defendant to agree that the plaintiff could reduce its log volume commitments due to outstanding payments when there were other payments due in the other direction. All of this, it submitted, should have been part of the amicable settlement to be discussed between the parties under clause 4(c) of the 8 April Meeting Minutes. It thus recognised the validity of the Principal Debt in making its argument that negotiation was required.

52 Whilst it is clear that there was no pleaded counterclaim for the Principal Debt, it was pleaded as a debt by way of defence in relation to the failure to meet the plaintiff's log supply obligations and, given the way in which the arbitration proceeded is stating no more than the obvious to say that, as a monetary debt, it could plainly operate as a set-off to any damages which the Tribunal found as owing for such failure, if it did not operate to reduce the actual liability to deliver logs on the basis of the Debt-to-Log Conversion ratio. It would be hard to imagine a closer connection between the Principal Debt and the claim for damages for failure to supply under the MOA, and also for the claims in respect of the Barter Trade logs and Infrastructure logs which all arose out of the same series of interconnected transactions. The reason why it was not pleaded as a counterclaim was that it was at all times accepted by the defendant that it had to be taken into account and credit given for it. The plaintiff's case was that it was entitled to do what it did, and was not looking to make an

Version No 2: 23 Jul 2021 (14:26 hrs)

additional claim over and above the set-off of the Principal Debt against its liabilities to the defendant, whatever they might turn out to be. The possibility that the Tribunal might reject its exercise of the Debt-to-Log Conversion was countenanced by the parties and by the experts and credit allowed for the Principal Debt and interest accruing thereon in that context, which the Tribunal overlooked when it came to write its Award some 15 months after the Hearing.

53 Regardless of that, the documents show that not only was the matter was the subject of discussion and debate before the Tribunal, but that the Tribunal expressly accepted the defendant's submission that the figure of IDR75bn in the 8 April Meeting Minutes represented past debt already due to the tune of approximately IDR50bn as well as sums which would fall due on future shipments.[x] It went on to find, at para 353 of the Award, that the defendant failed to meet its payment obligations under Clause 1 of the 8 April Meeting Minutes, and at para 378 that no payments were made at all after November 2011.

54 In discussing the Debt-to-Log Conversion question, the Tribunal itself made the point at paras 342 and 349 of the Award that the plaintiff had a remedy for breach by the defendant in failing to pay the sums it had agreed to pay, because the defendant remained liable for them with accruing cumulative interest at a high rate until full payment, regardless of any right to cease shipment of logs proportionately on the basis of the Debt-to-Log Conversion ratio. It was the Tribunal which decided that the plaintiff was not entitled to exercise that right to reduce shipments proportionately, and that the defendant's obligation to pay the instalments and the plaintiff's obligation to deliver logs ran in parallel with one another until 15 November 2011 and attempts at amicable settlement thereafter. The inexorable concomitant of the finding that there was no entitlement to reduce deliveries of logs on the basis of Debt-to-Log Conversion ratio, was that the defendant remained indebted to the plaintiff

Version No 2: 23 Jul 2021 (14:26 hrs)

in the full amount of the Principal Debt as it stood from time to time, with accruing interest, less any payments made. As the Tribunal has found, both parties were in breach of their respective obligations to deliver logs and to pay sums due. By that point, the only reduction in the Principal Debt owed by the defendant to the plaintiff had come about from the occasional payment which had been made by the defendant before November 2011. Accrued debts owing to the plaintiff at the time of what the acceptance by the defendant of what the Tribunal held to be the plaintiff's repudiatory conduct, self-evidently had to be taken into account.

55 Yet the one element which the Tribunal overlooked in coming to its conclusions on money owing in each direction was this common ground between the parties, and the Tribunal's very own finding, that a sum which had not been exactly quantified, but was of the order of IDR50bn was owed by the defendant to the plaintiff. The Tribunal made no finding as to the exact amount because it appears to have considered it unnecessary to do so as a result of its rejection of the applicability of the Debt-to-Log Conversion to justify short delivery of round logs. It is, with respect to the Tribunal, self-evident, nonetheless, that if sums are agreed to be owing in one direction, they must be taken into account when awarding damages in the other direction if the Tribunal is looking for the net balance owing between the parties and all are part and parcel of the same arbitration. Resolving the Debt-to-Log Conversion issue did not do away with the Principal Debt which had to be quantified and accounted for as between the parties, as both parties and their experts accepted, subject to the Tribunal finding the exact amount due.

56 The defendant had a full opportunity to deal with the point advanced and accepted that there was, subject to qualifications as to evidence of payment, a sum due by way of Principal Debt. Exactly the same points arise for proof of

Version No 2: 23 Jul 2021 (14:26 hrs)

the credit to be given here, as arose in calculating the purported Debt-to-Log Conversion, since the same sums formed the basis of the Principal Debt, the only difference being the accruing interest.

57 Further, if it is asked whether the defendant could have had any complaint if the Tribunal had given credit for the Principal Debt against sums awarded by way of damages for non-delivery or short delivery, the answer would be a resounding "no". That was the parties' mutual expectation.

58 It may be because the Tribunal did not produce its Award until 15 months after the evidentiary hearing that this obvious point escaped it. When this was pointed out to it in the Request, the Tribunal offered no adequate explanation for its failure, agreeing that the Principal Debt was raised by the plaintiff "as a defence to the Claim for failure of log supply obligations" and that it "sought a set off against any damages awarded in substitution of log supply". It rejected the Request on the basis of a lack of jurisdiction whilst adding, both irrelevantly and inaccurately, that the same evidence for the post-2011 taxes applied to the sums claimed as the "Principal Debt".

59 It is clear to me that the Tribunal did fail to take into account an issue which was before it, namely the existence and quantum of the Principal Debt and accruing interest, which was common ground between the parties, and which it accepted at the time of the hearing should be taken into account.

60 It is also clear that the breach caused substantial prejudice to the plaintiff because the Award failed to deal with a significant issue which could affect the sums owing between the parties and the incidence of liability for costs of the Arbitration in consequence.

Version No 2: 23 Jul 2021 (14:26 hrs)

61 This failure constituted a breach of the rules of natural justice for which setting aside is *prima facie* the appropriate remedy, both under the IAA and under Article 34(2)(a)(iii) of the Model Law. The question arises however as to whether or not this court should suspend the setting aside in order to remit the matter to the Tribunal for it to determine the quantum of the Principal Debt which falls to be taken into account.

The Freight Interest Issue

62 Whether right or wrong, contractually justifiable or unjustifiable, reasoned or unreasoned, I am unable to see how it can be said that the Tribunal failed to deal with the issue of interest due on the Freight Interest payments counterclaim, because the Award did refer to this claim. It may or may not be inferred that the same limited reasoning as that given for the other successful counterclaims in paragraphs 511–512 applied here. The Tribunal, wrongly in responding to the Request referred to paragraph 512 as an award of simple interest at 5.33% on this counterclaim when, read in the context of the immediately preceding paragraph it could only be taken as referring to the other two successful counterclaims. Such interest was to run only from the date of the Statement of Defence and Counterclaim (30 October 2018) to the date of the Award and then at the same rate on the Award.

63 The plaintiff submits that the Tribunal failed to determine the issue as to which of its two contentions applied to the award of interest-– its primary submission of compound interest under the 8 April Meeting Minutes or its alternative submission of simple interest. By making an unreasoned award in the Dispositive Section only in relation to this, as part of a composite award with the other successful counterclaims, it could not be taken as impliedly rejecting the plaintiff's primary submission. Whilst there was, and is, room for

Version No 2: 23 Jul 2021 (14:26 hrs)

argument that a different rate of interest should apply to the freight charges which were incurred post 1 September 2011 and which were to be treated, in accordance with the Tribunal's findings, as MOA deliveries (whereas the other sums related to earlier periods and different agreements, at least in part), the Tribunal lumped the counterclaims together in awarding interest in the Dispositive Section. It cannot be inferred that the Tribunal intended the reasons given in para 511 to apply to this counterclaim, when given in relation to the other two counterclaims (each party drew opposing inferences from that paragraph), but whether it did or not, the Tribunal decided the issue and it cannot be said that it failed to determine it, even if there were no reasons given for that decision and the *ex post facto* justification for the finding in the refusal to make an Additional Award was misplaced.

64 The plaintiff's application to set aside that part of the Award which dealt with the Freight Interest Issue is therefore denied.

Suspension of the setting aside proceedings

65 Under Article 34(4) of the Model Law, the court, when asked to set aside an award may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time in order to give the Tribunal an opportunity to take such action as would eliminate the grounds for setting aside. The parties differed as to the appropriate course for this court to adopt, should it come to the conclusion that there was a breach of the rules of natural justice. The parties each prayed in aid the policy of limited curial intervention as justifying their respective submissions that the court should suspend or not suspend the setting aside. The plaintiff submitted that the court should not exercise this discretion, while the defendant relied on the Court of Appeal's judgment in *Soh Beng Tee* at [92], that where a breach is in respect of an isolated

Version No 2: 23 Jul 2021 (14:26 hrs)

issue, it would not be sensible, appropriate or proportionate to set aside the entire award. In that case, the court found that setting aside the whole Award would force parties to re-arbitrate the entire case, where the arbitrator's failure to hear the party pertained only to one amongst other severable issues the arbitrator has decided.

66 Given the number of issues which the Tribunal has decided which are not the subject of any challenge, in my judgement, the natural solution to adopt, in the ordinary way, would be to suspend the setting aside in order to allow the Tribunal to decide the one issue which it ought to have, but failed to, decide. The plaintiff relied upon a decision of the English court in *Secretary of State for the Home Department v Raytheon Systems Ltd* [2015] 159 Con LR 168 where Akenhead J, applying different statutory rules, decided that it would be invidious and embarrassing for a tribunal to seek to free itself of its previous ideas in order to redetermine the same issues. He decided that this would create undesirable tensions and pressures even for a conscientious tribunal. The question posed by the plaintiff was whether there could be confidence that the Tribunal here could rid itself of its previously expressed views in coming to a conclusion on the quantum of the Principal Debt. The plaintiff suggests that the court should set aside affected parts of the Award, and for those parts of the Award to be determined by a newly constituted tribunal. But this would mean that the newly constituted tribunal would also have to decide on the issue of costs in relation to the rest of the matters heard by the Tribunal, besides determining sums that have a bearing on the balance of sums due after taking account of the rest of the Award that would remain valid.

67 The question which arises here therefore is whether or not this Tribunal of distinguished arbitrators can approach the matter, which it failed to decide, in a balanced and open-minded way in order to determine what, if any, sums are

Version No 2: 23 Jul 2021 (14:26 hrs)

owing by way of Principal Debt and compound interest which should be set off against the damages awarded to the defendant for the plaintiff's non-delivery under the MOA.

68 I would not have any difficulty in deciding that this Tribunal should be allowed to put right the breach of natural justice and decide the matter which it overlooked but for the terms of the Tribunal's response to the Request. It is not the conclusion reached as to its limited jurisdiction which troubles me, but the second reason given for refusing the Request. There it is stated that "the record contains no evidence that the Respondent made the necessary underlying payments, subject to reimbursement from the Claimant". The Tribunal then went on to equate the evidence provided for the post-2011 taxes with that provided for the Principal Debt. It is not for me to direct the Tribunal in any way but it is, in fact, self-evident, by reason of the existence of the 8 April Meeting Minutes alone and the concessions made, quite apart from the Tribunal's own findings, that the evidence is different. Whilst there have always been qualifications to the concessions made by the defendant, the Tribunal must put behind it the views it has expressed in the Decision on the Additional Award Application, if it is to be in a position to decide the Principal Debt Issue in a fair manner and to do justice to both parties.

69 I have come to the conclusion that this Tribunal should be given the opportunity to put matters right and that it can be trusted to do so notwithstanding the views it has previously expressed. All judges and arbitrators are fallible, as all recognise in theory, but many of us have difficulty in recognising our own mistakes. I consider that this Tribunal should be capable of recognising its omission and the imprudence/inaccuracy of the Decision on the Additional Award Application, in order to approach the Principal Debt Issue and the available evidence in an open-minded manner. I do not consider that

Version No 2: 23 Jul 2021 (14:26 hrs)

that the only plausible outcome of a remission will be an affirmation of what was said in the Decision on the Additional Award Application.

70 It is not only the distinction of the Tribunal which leads me to this conclusion, but also the dire consequences of setting aside parts of the Award. The effect of setting aside those parts of the Award which are affected by the failure to determine the Principal Debt Issue would be to require a differently constituted Tribunal not only to decide the Principal Debt Issue itself, but also the issue of the costs of the whole reference, which would likely be affected by the determination of the Principal Debt Issue. That would involve consideration of all the other elements in the Arbitration. Moreover, the status of the existing award with those parts which have not been set aside creates difficulties. There are obvious problems in having an award which is valid, insofar as it is not set aside, with sums owing under it, whilst a differently constituted Tribunal determines a related question which could alter the net balance owing from one party to the other. To adopt that course does not seem to me to be a wise solution, unless one is driven to conclude that the existing Tribunal cannot now do justice between the parties. I am glad to say that I am not driven to that conclusion, and that I consider the right course is to suspend the setting aside proceedings for a period of time to be determined after consultation with the Tribunal, which should be asked how long is needed for it to resume the arbitral proceedings in order to determine the Principal Debt Issue and the consequent effect on the Award as a whole.

Subsequent development

71 Questions of enforcement of the valid parts of the Award are not before me but there was discussion of what the consequences might be of the different options open to the court, including the possibility of setting aside the whole of

Version No 2: 23 Jul 2021 (14:26 hrs)

the Dispositive Section of the Award, which appeared, ultimately to be the plaintiff's primary submission for relief. In making the suspensory order that I am making in order to allow the Tribunal the opportunity to determine the issue which they failed to determine and "eliminate the grounds for setting aside". I have in mind the issue of enforcement about which I asked the parties. The defendant failed to inform the court that it had obtained an *ex parte* order from the Hong Kong courts obtaining leave to enforce the Award on 24 or 25 May 2021, which it served on the plaintiff in the British Virgin Islands on the very day of the hearing.

72 In the current circumstance, if it were a matter for this court, it appears almost inevitable that any enforcement proceedings would be stayed pending the Tribunal's decisions as to whether it would determine the Principal Debt Issue and the interest accruing thereon and any determination of that issue. If the Tribunal were to fail to eliminate the grounds for setting aside, the Award would then fall to be set aside.

73 On discovery of the enforcement proceedings which had been begun and which are apparently being pursued, the plaintiff wrote to the court on 10 June, two days after the hearing of its Originating Summons, to inform it of the steps taken by the defendant. The defendant responded by saying it had no duty to give notice of what it had done pending service of the *ex parte* order on the plaintiff in the British Virgin Islands and that it was "inappropriate" to inform the court of this prior to service also. That latter submission has only to be stated to be rejected when the court had asked about the position on enforcement.

74 The plaintiff has by its most recent letter dated 15 June 2021 sought an order suspending the Award pending this decision of the court and any appeal therefrom. The defendant replied on 16 June 2021 that the order sought by the

Version No 2: 23 Jul 2021 (14:26 hrs)

plaintiff is not within the terms of the Originating Summons for this application. The plaintiff's request raises questions relating to the court's inherent jurisdiction to suspend, which should be determined on a fully argued basis.

75 In the circumstances of the defendant seeking to "steal a march" on the plaintiff before the decision of this court however, it appears to me that the right course is, as the plaintiff ultimately submitted, to say that the whole of the Dispositive Section of the Award will be set aside, unless the grounds for setting aside are eliminated, so that it is obvious to any court before which enforcement is being sought, that the net sums owing from one party to the other are in issue and remain to be determined. The Award, whilst itself, not suspended at this stage, pending further argument, is under challenge by reason of the order the court is now making. It is not for this court to say how other courts in other jurisdictions should act but it can make plain its own view, as the court of supervisory jurisdiction, that enforcement of any part of the order would run counter to the order this court is now making, pending resolution of outstanding matters, whether before this court in resolving the issue of suspending the Award or the Tribunal's elimination of the grounds for setting aside.

Conclusion

76 The plaintiff's application in relation to the Freight Interest Issue therefore fails. The plaintiff's application in relation to the Principal Debt Issue succeeds to the extent that all the Dispositive Section of the Award, as well as those parts specifically affected by the failure to determine the Principal Debt Issue and interest thereon should be set aside, if the Tribunal is unable to eliminate the grounds for setting them aside. The relevant paras are paras 519–524 and Section XII in its entirety.

Version No 2: 23 Jul 2021 (14:26 hrs)

77 The order will be for the setting aside of these proceedings to be suspended for a period of time to be determined by the court, following the consultation by the parties jointly with the Tribunal in order to ascertain what period is needed for the Tribunal to determine the Principal Debt Issue and interest thereon and other matters consequent upon that determination. If, of course, the Tribunal considers that it is unable to approach the Principal Debt Issue in an open minded manner because of the views it has already expressed or considers itself unable to eliminate the grounds for setting aside, no doubt it will inform the parties accordingly and the matter can be brought back before this court for the court to decide what to do in those circumstances.

78 Whilst I have not heard the parties on the issue of costs, which would have been premature prior to the result of the Originating Summons being known, unless there are special circumstances which apply, it appears to me that the plaintiff should be entitled to its costs of the application to this court, notwithstanding its failure on the less important Freight Interest Issue. In essence it has succeeded on the point that really mattered, namely the Principal Debt Issue. I make no final decision on that question because there may be matters of which I am unaware and which I should take into consideration but I express that provisional view in the hope that it may assist the parties.

79 I would be grateful if the parties could liaise with a view to agreeing the Order which follows from the decisions I have made in this judgement.

Jeremy Lionel Cooke
International Judge

Version No 2: 23 Jul 2021 (14:26 hrs)

Paul Tan (Cavenagh Law LLP) (instructed), Ong Tun Wei Danny, Yam Wern Jhien, Lai Tze Ren, Jonathan and Mark Teo Tzeh Hao (Rajah & Tann Singapore LLP) for the plaintiff;
Hee Theng Fong, Toh Wei Yi, Poon Pui Yee and Leong Shan Wei Jaclyn (Harry Elias Partnership LLP) for the defendant.

---

[i] Joint Core Bundle at p 914.
[ii] The Award at Section XII, para (u)–(x).
[iii] 8 April Meeting Minutes, 1st Affidavit of Rodney Yap at p 3107.
[iv] Tribunal's Decision on the Additional Award Application dated 5 November 2020 at p 2.
[v] Joint Statement of Experts, Tab 10 of 1st Affidavit of Rodney Yap, at para 2.7 and 2.11.
[vi] Agreed List of Issues for Merits Hearing, Tab 9 of 1st Affidavit of Rodney Yap.
[vii] Transcript Day 1 (6 May 2019), Tab 15 of 1st Affidavit of Rodney Yap, p 76:22–77:6.
[viii] Transcript Day 1 (6 May 2019), Tab 15 of 1st Affidavit of Rodney Yap, p 50:1–6.
[ix] Transcript Day 5 (10 May 2019), Tab 15 of 1st Affidavit of Rodney Yap, p 11:4–7.
[x] The Award at paras 247 and 348.

Version No 2: 23 Jul 2021 (14:26 hrs)