

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

**[2021] SGHC 60**

Originating Summons No 488 of 2019

Between

BZV

*... Plaintiff*

And

(1) BZW

(2) BZX

*... Defendants*

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**GROUND OF DECISION**

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

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**BZV**  
**v**  
**BZW and another**

**[2021] SGHC 60**

Originating Summons No 488 of 2019  
Vinodh Coomaraswamy J  
8 October, 13 November, 2 December 2019

5 April 2021

**Vinodh Coomaraswamy J:**

**Introduction**

1 The plaintiff and the defendants were claimant and respondents respectively in an arbitration. The arbitration arose from a shipbuilding contract<sup>1</sup> (“the Contract”) between the plaintiff as the vessel’s buyer and the defendants as the vessel’s builders. In the arbitration, the plaintiff advanced two claims against the defendants: (i) a claim alleging that the defendants had delayed in delivering the vessel; and (ii) a claim alleging that the defendants had breached the Contract by delivering the vessel with generators which failed to meet contractual specifications for ingress protection against water.

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<sup>1</sup> Plaintiff’s affidavit at p 321.

2 The defendants denied the plaintiff's claims. They brought a counterclaim seeking, amongst other things, payment for work which they had done on the vessel and which they alleged was outside the scope of the Contract.

3 By an award dated 25 October 2018,<sup>2</sup> read together with an addendum to the award dated 16 January 2019,<sup>3</sup> the tribunal dismissed the plaintiff's claims as well as the defendants' counterclaim.

4 The plaintiff now applies to set aside the award, save only for that part of the award which has dismissed the defendants' counterclaim.<sup>4</sup> The plaintiff brings its application under s 24(b) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the Act") and Art 34(2)(a)(iii) of the Model Law on International Commercial Arbitration ("the Model Law"). The Model Law, of course, has the force of law in Singapore by virtue of s 3(1) of the Act.

5 The defendants have not cross-applied to set aside any part of the award.

6 I have allowed the plaintiff's application and set aside the award in so far as it dismisses the plaintiff's claim. The defendants have appealed against my decision. I now set out the grounds for my decision.

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<sup>2</sup> Plaintiff's affidavit at p 239.

<sup>3</sup> Plaintiff's affidavit at p 1204.

<sup>4</sup> Plaintiff's affidavit at p 4, para 1.5.

### **Preliminary point**

7 Before dealing with the substance of the plaintiff's application, I must deal with a preliminary point raised by the defendants. The gist of the preliminary point is that the plaintiff has filed this application out of time.

### ***The chronology***

8 It is useful at this point to summarise the chronology of events leading to this application. On 30 October 2018, the Secretariat of the Singapore International Arbitration Centre ("SIAC") forwarded the award to the parties.<sup>5</sup> On 27 November 2018, within the thirty-day period stipulated by Art 33(1) of the Model Law, the plaintiff made a request to the tribunal under Art 33(1)(a) for the tribunal to correct the award under Art 33(2).<sup>6</sup> On 16 January 2019, the tribunal disposed of the plaintiff's request by issuing an addendum to the award making some of the requested corrections.<sup>7</sup>

9 On 15 February 2019, the plaintiff made a further request – purportedly under Art 33(1)(b) of the Model Law – for the tribunal to interpret the award in light of the corrections in the addendum.<sup>8</sup> On 9 April 2019, the tribunal issued a written decision rejecting the plaintiff's further request.<sup>9</sup> The tribunal held that the period stipulated in Art 33(1)(b) of the Model Law for the plaintiff to make a request for interpretation had expired on 29 November 2018 and did restart on 16 January 2019 when the tribunal disposed of the plaintiff's request for

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<sup>5</sup> Plaintiff's affidavit at p 1275, para 4; Notes of Argument, 8 Oct 2019 at p 17 line 9.

<sup>6</sup> Plaintiff's affidavit at p 1179, p 1212, para 5, and pp 1213–1214, para 10.

<sup>7</sup> Plaintiff's affidavit at p 21, para 2.9 and p 1203.

<sup>8</sup> Plaintiff's affidavit at p 22, para 2.10, pp 1236 and 1256–1257.

<sup>9</sup> Plaintiff's affidavit at p 21, para 2.9 and p 1267.

correction under Art 33(1)(a).<sup>10</sup> The tribunal accordingly held that the plaintiff's request for interpretation was well out of time and ought never to have been made.<sup>11</sup>

10 On 15 April 2019, within three months of receiving the addendum to the award, the plaintiff filed this originating summons. But it did not at the same time file an affidavit in support of this originating summons. It also did not serve this originating summons on the defendants immediately. The plaintiff filed the affidavit in support only on 30 April 2019. On 24 May 2019, once the defendants' solicitors had confirmed that they had instructions to accept service of process in these proceedings on the defendants' behalf, the plaintiff effected service on the defendants of the originating summon together with the affidavit in support.<sup>12</sup>

### *The procedural regime*

11 Article 34(3) of the Model Law prohibits any "application" to set aside an award from being "made" after three months have elapsed from: (i) the date on which the plaintiff receives the award; or (ii) the date on which the tribunal disposes of any request under Art 33 of the Model Law.

12 The defendants' point – although this is not how they frame it – is that an "application" to set aside an award is "made" within the meaning of Art 34(3) of the Model Law only when *both* the originating summons praying to have the award set aside *and* the affidavit in support of the originating summons are filed. On that basis, the plaintiff "made" this "application" only on 30 April 2019, out

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<sup>10</sup> Plaintiff's affidavit at pp 1278–1279, paras 23–26 and 32.

<sup>11</sup> Plaintiff's affidavit at p 1280, para 31.

<sup>12</sup> Notes of Argument, 8 October 2019 at p 18 lines 27–32.



of time, when it filed its affidavit in support of the originating summons filed on 15 April 2019. The plaintiff's "application" was incomplete when the plaintiff filed the originating summons alone.

13 In response, the plaintiff submits that an "application" is made within the meaning of Art 34(3) of the Model Law when the originating summons is filed.

14 It is common ground that the *travaux préparatoires* of the Model Law show that its drafters deliberately left it to each Model Law jurisdiction to prescribe the procedure for "making" an "application" to set aside an award within the meaning of Art 34(3) of the Model Law<sup>13</sup> (see *ABC Co v XYZ Co Ltd* [2003] 3 SLR(R) 546 ("*ABC*") at [4]).

15 Our procedure for making an application to set aside an award under the Act is prescribed by O 69A r 2 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules"). Order 69A r 2(1)(d) requires every such application to be made by originating summons. Order 69A r 2(4) echoes the statutory time limit in Art 34(3) of the Model Law. Order 69A r 2(4A) then prescribes the contents and the manner of service of the affidavit in support of an originating summons under O 69A r 2(1)(d):

4A The affidavit in support must —

- (a) state the *grounds* in support of the application;
- (b) have exhibited to it a copy of the arbitration agreement or any record of the content of the arbitration agreement, the award and any other document relied on by the plaintiff;
- (c) set out any evidence relied on by the plaintiff; and
- (d) *be served with the originating summons*.

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<sup>13</sup> Defendants' submissions at p 18, para 37; Notes of Argument, 13 November 2019 at p 19 lines 19–22 and p 20 lines 13–16.

[emphasis added]

***Three points arising from O 69A r 2***

16 I make three points arising from the procedural framework in O 69A r 2.

17 First, O 69A r 2 of the Rules does not impose any requirement on a plaintiff who files an originating summons under O 69A r 2(1)(d) also to file an affidavit in support of the originating summons.<sup>14</sup> But the general provision in O 28 r 3(1) requires a plaintiff who intends to adduce evidence in support of *any* originating summons to do so by affidavit. No originating summons under O 69A r 2(1)(d) can proceed, let alone succeed, without an affidavit in support. If nothing else, the affidavit is necessary simply to put the award itself in evidence. It is therefore a practical reality that every originating summons under O 69A r 2(1)(d) must inevitably and will invariably be supported by an affidavit, even if there is nothing in O 69A r 2 which requires it.

18 Second, O 69A r 2 of the Rules does not impose any requirement on a plaintiff who files an originating summons under O 69A r 2(1)(d) as to *when* it must file the affidavit in support of the originating summons. Order 69A r 2 regulates only the contents of the affidavit in support and the time of service by virtue of O 69A r 2(4A). It does not regulate whether or when such an affidavit must be filed.

19 Finally, O 69A r 2 of the Rules does not impose any requirement on a plaintiff who files an originating summons under O 69A r 2(1)(d) as to when it must *serve* the originating summons on the defendant. But the general provision

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<sup>14</sup> Notes of Argument, 8 October 2019 at p 23 lines 19–27, p 24 lines 18–22 and 25–26, and p 25 lines 12–18.

in O 6 r 4(1)(b) read with O 7 r 5 requires a plaintiff to serve an originating summons on the defendant within six or twelve months after the originating summons issues (depending on whether the defendant is to be served within or outside the jurisdiction).

***The parties' cases on the preliminary point***

20 The defendants' case on the preliminary point is as follows. The three-month period prescribed in Art 34(3) of the Model Law and O 69A r 2(4) of the Rules began on 16 January 2019, the date of the addendum, and expired on 16 April 2019. The plaintiff's request under Art 33(1)(b) of the Model Law on 15 February 2019 was not, for the reasons given by the tribunal (see [9] above), a "request ... made under Art 33(1)" within the meaning of Art 34(3). The three-month period did not therefore restart on 9 April 2019, when the tribunal disposed of the plaintiff's further request. Although the plaintiff filed its originating summons under O 69A r 2(1)(d) *before* 16 April 2019, it filed its affidavit in support *after* 16 April 2019. Order 69A r 2(4A)(a) of the Rules requires the plaintiff to state "the grounds in support of the application" to set aside the award. In determining whether the plaintiff has complied with O 69A r 2(4A)(a), the contents of the plaintiff's affidavit in support must be disregarded because it was filed out of time.<sup>15</sup> The plaintiff's originating summons simply recited the legislative provisions on which the plaintiff was relying in this application. That does not suffice to "state the grounds in support" of the application within the meaning of O 69A r 2(4A)(a). The plaintiff's application is therefore out of time under both Art 34(3) and O 69A r 2(4) and also in breach of O 69A r 2(4A)(a). It ought therefore to be dismissed *in limine*.

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<sup>15</sup> Defendants' submissions at p 17, para 35.

21 The plaintiff's case on the preliminary point is as follows. The three-month period prescribed in Art 34(3) of the Model Law and O 69A r 2(4) of the Rule runs from the date on which a party receives an award or the date on which a tribunal disposes of a request under Art 33 of the Model Law. In this case, the tribunal disposed of the plaintiff's request under Art 33(1)(b) of the Model Law only on 9 April 2019.<sup>16</sup> It follows that the three-month period expired only on 9 July 2019. Both the originating summons and the affidavit in support were therefore filed well within the three-month period.

22 The plaintiff submits in the alternative that even if the tribunal and the defendants are correct that the three-month period began on 16 January 2019 and did not restart on 9 April 2019, the plaintiff "made" its "application" to set aside the award when it filed the originating summons under O69A r 2(1)(d) on 15 April 2019, *ie before* 16 April 2019. This was within the three-month period. It does not matter that the plaintiff filed its affidavit in support of the originating summons *after* 16 April 2019. Order 69A does not require the affidavit to be filed within the three-month period.<sup>17</sup> The plaintiff then served the originating summons together with the affidavit on the defendant on 24 May 2019. The plaintiff has therefore complied fully with the *specific* procedure which governs: (i) how an application to set aside an award is to be made under O 69A r 2(1)(d); (ii) what the affidavit in support of the application is to contain under O 69A r 2(4A)(a) to (c); and (iii) how the affidavit in support is to be served under O 69A r 2(4A)(d) of the Rules. The plaintiff has also complied fully with the *general* procedure which governs how an originating summons is to be served under O 6 r 4(1)(b) read with O 7 r 5 of the Rules. The defendants' preliminary point therefore ought to be rejected.

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<sup>16</sup> Notes of Argument, 8 October 2019 at p 17 lines 16–21.

<sup>17</sup> Notes of Argument, 8 October 2019 at p 20 lines 23–30.

23 This summary of the parties' cases shows that three points are not in contention. First, the plaintiff filed this *originating summons* within three months of the tribunal disposing of the plaintiff's request under Art 33(1)(a) of the Model Law on 16 January 2019.<sup>18</sup> Second, the plaintiff filed the *affidavit* in support of this originating summons more than three months after the tribunal disposed of that request. Third, the contents of the plaintiff's affidavit in support complies with the requirements of O 69A r 2(4A) of the Rules.

***The policy underlying the three-month period***

24 I accept that the purpose of the three-month period in Art 34(3) of the Model Law is to impose a strict time limit within which a party can apply to set aside an award.<sup>19</sup> I accept also that underlying this strict time limit is the policy in favour of promoting finality in arbitration and of vindicating the reasonable commercial expectations of parties to an arbitration as to what eventual success in the arbitration entails.

25 I therefore accept the defendants' submission (see [20] above) that a request which purports to be made under Art 33 of the Model Law, but which fails to comply with the requirements of Art 33, is not "a request ... made under Art 33" within the meaning of Art 34(3) of the Model Law. The plaintiff's construction of Art 34(3) would undermine both its purpose and policy. It would allow a party to manipulate the three-month period by repeatedly contriving to make defective requests under Art 33. I therefore accept the defendants' submission that the three-month period began on 16 January 2019 – when the tribunal disposed of the plaintiff's first and only request under Art 33 – and did

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<sup>18</sup> Defendants' submissions at p 15, para 29.

<sup>19</sup> Defendants' submissions at pp 10–11, paras 18–21.

not restart on 9 April 2019. It follows that the three-month period expired on 16 April 2019.

26 The question of whether I can extend the three-month period does not arise. That is simply because the plaintiff does not seek any such extension. In any event, I am prepared to accept, without deciding, that Art 5 of the Model Law is so weighty as to exclude the court's general *substantive* power in paragraph 7 of the First Schedule of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) to extend the three-month period in Art 34(3) of the Model Law (*per* Anselmo Reyes IJ in *BXS v BXT* [2019] 4 SLR 390 at [40]).<sup>20</sup> If that is so, then *a fortiori* Art 5 of the Model Law also excludes the court's general *procedural* power under O 3 r 4(1) of the Rules to extend the three-month period echoed in O 69A r 2(4) of the Rules.

27 All of this, however, takes the defendants only so far on the preliminary point.

***An “application” within the meaning of Art 34(3)***

28 In my view, an “application” to set aside an award is “made” within the meaning of Art 34(3) when an originating summons *alone* is filed under O 69A r 2(1)(d), not when *both* an originating summons is filed under O 69A r 2(1)(d) *and* an affidavit in support of the originating summons which complies with O 69 A r 2(4A) is filed. I say this for four reasons.

***Model Law leaves each jurisdiction to define “application”***

29 First, even the defendants accept that what amounts to an “application” within the meaning of Art 34(3) is a matter outside the scope of the Model

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<sup>20</sup> Defendants' submissions at pp 20–21, para 45.

Law.<sup>21</sup> The drafters of the Model Law acknowledged this and deliberately left it to be governed by the procedural law of each Model Law jurisdiction.

30 The policy of Art 34(3) (see [24] above) is of little assistance, therefore, in resolving the critical issue on the preliminary point. That is because the Model Law has deliberately remitted the critical issue to our domestic procedural law. Having said that, I accept that the policy of Art 34(3) of the Model Law is also the policy of our procedural law as it applies to arbitration-related litigation. That is so both generally and in particular under O 69A (and O 69) of the Rules. I therefore bear this policy in mind in the analysis which follows.

*An originating process is fundamentally different from an affidavit*

31 Second, an originating process – such as an originating summons – carries a special significance in our general procedural law. An originating process is a document of a public character. It emanates from the state, not from the parties. Its purpose is to bring the state’s considerable coercive power to bear on a defendant. Its effect is to compel the defendant to present to the court a formal answer to the plaintiff’s claim, failing which an adjudication will be entered by default in the plaintiff’s favour, as a result of which the defendants’ substantive legal rights will be permanently extinguished, at least at first instance.

32 An affidavit, on the other hand, is a document of a private character. It emanates from the parties and not from the state. Its sole purpose is to record in writing, upon penalty of perjury, the evidence of a witness in a convenient form

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<sup>21</sup> Defendants’ submissions at p 18, para 37; Notes of Argument, 13 November 2019 at p 19 lines 19–22 and p 20 lines 13–16.

for presentation to a court in civil litigation, typically when cross-examination is not available or is not warranted. An affidavit does not bring the state's coercive power to bear on a defendant. The failure to file an affidavit does not, in and of itself, carry the risk of an adjudication on the merits by default.

33 An originating process is therefore fundamentally different from an affidavit and operates on a separate and higher procedural plane. Order 69A r 2(4A) of the Rules observes this fundamental difference by requiring all matters of evidence to be contained in the affidavit and not in the originating summons. It is the affidavit, therefore, which sets out the personal and documentary evidence which the plaintiff intends to rely upon in support of the application.

34 It is for this reason that our system of procedure considers civil litigation to commence when a plaintiff satisfies the procedural prerequisites necessary to cause the court, as the judicial organ of the state, to issue an originating process. As soon as that happens, the court is seised of the underlying *lis*. That is why a limitation period prescribed by the Limitation Act (Cap 163, 1996 Rev Ed) for a particular *lis* stops running as soon as an originating process encompassing that *lis* issues. That act suffices *in itself* to engage the court's jurisdiction to resolve the *lis* and therefore to stop the relevant limitation period. That period does not keep running until the plaintiff puts evidence before the court on which it intends to rely in support of its case on the *lis*.

35 I am aware that the analogy between Art 34(3) of the Model Law and a statutory limitation period under the Limitation Act may be inexact. But the point I make is a conceptual one and one of universal application. As soon as an originating summons issues under O 69A r 2(1)(d), the application commences. Further, the court gains immediate control over the plaintiff and the application. That is so whether or not that originating summons is



accompanied by an affidavit. The court's control includes the power to case manage the application under the express power in O 28 r 10(1) of the Rules and also under the general power in O 34A. This control also includes the power to strike out the application on the merits under O 18 r 19 or to dismiss the application on procedural grounds under O 28 r 10(1) or O 34A r 1(2). For this reason, I consider that the position of an originating process in relation to a statutory limitation period is, in this sense, an apposite analogy to the position of an originating summons under O 69A r 2(1)(d) to the three-month period prescribed by Art 34(3) of the Model Law.

*Order 69A r 2 itself treats the “application” as the originating summons*

36 Third, consistent with this conceptual and procedural framework, O 69A r 2 itself equates the application to set aside an award to the originating summons. It does so in two ways. First, O 69A r 2(1)(d) provides: “Every *application* ... to set aside an award under section 24 of the Act or Art 34(2) of the Model Law ... must be made by *originating summons*” (emphasis added). Second, O 69A r 2(4) provides: “An *application* under *paragraph (1)(d)* above shall not be made ...” (emphasis added). Both of these are mandatory and foundational provisions. They both equate the “application” to the originating summons alone, without any reference to an affidavit in support. This affidavit is governed by, and only by, O 69A r 2(4A) of the Rules. This confirms to me that even the specific procedural law in O 69A r 2 which applies to arbitration-related litigation treats an affidavit in support of an originating summons under O 69A r 2(1)(d) as something distinct from, and ancillary to, the “application” within the meaning of O 69A r 2(1)(d) and O 69A r 2(4). This in turn reinforces my conclusion that an “application” to set aside an award is “made” under our procedural law, and therefore within the meaning of Art 34(3) of the Model Law, when the originating summons is filed.

37 It is true that *ABC* (at [4]) observed that the originating process “must be accompanied by an affidavit”. But that does not undermine my conclusion. In context, and contrary to what the defendants suggest,<sup>22</sup> this observation simply restates the effect of the procedural rule requiring the originating process to be accompanied by an affidavit *at the time of service*, not at the time of filing. This observation does not mean that an “application” within the meaning of Art 34(3) of the Model Law comprises *both* the originating process *and* the affidavit in support.

*The drafting convention in the Rules*

38 Finally, an examination of the Rules shows that the drafting convention adopted is to make express provision whenever the intent is to oblige a party to *file* a summons *together with* an affidavit in support. So too, the drafting convention is to make express provision whenever the intent is to oblige a party to *serve* a summons within a particular number of days after filing. Thus, for example, O 14 r 2(2) provides that:

(2) The summons and the supporting affidavit or affidavits must be filed at the same time, and must be served on the defendant within 3 days from the date of filing.

Order 29 r 10(4) is to the same effect.

39 Both of these provisions, of course, govern an interlocutory summons praying for interlocutory relief, not an originating summons praying for final relief. But an interlocutory summons too emanates from the state and brings the state’s coercive power to bear on the respondent to the summons, albeit to present a response to a claim for interlocutory procedural relief rather than a claim for final substantive relief.

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<sup>22</sup> Defendants’ submissions at p 19, para 39.

40 I therefore consider that there is nothing express or implied in O 69A r 2 of the Rules which requires a plaintiff who invokes the state's coercive power against a defendant under O 69 r 2(1)(d) to file an affidavit in support *at the same time* as the originating summons or to serve the originating summons within a particular number of days after it is issued. Of course, the plaintiff must comply with the general procedural requirement to serve an originating summons while it remains valid for service (see [19] above).

***Effect of this interpretation on the policy underlying Art 34(3)***

41 I do not consider this construction of O 69A r 2 of the Rules to be contrary to the policy of Art 34(3) (see [24] above) or of O 69A (see [30] above). The defendants accept that, even on their construction of O 69A r 2, a plaintiff seeking to set aside an award can file its originating summons and affidavit within the three-month period and then take up to six months to serve the originating summons on a defendant within Singapore or 12 months to serve the originating summons on a defendant outside Singapore. From the perspective of promoting finality in arbitration and vindicating the reasonable commercial expectations of the parties, there is no conceptual difference between the present case and one in which the plaintiff had difficulty serving the defendants (whether within or outside the jurisdiction) until either 30 April 2019 (when the plaintiff was in a position to serve the originating summons on the defendants and the affidavit in support in compliance with O 69A r 2(4A)(d)) or 24 May 2019 (when the plaintiff actually served the originating summons and the affidavit in support on the defendants' solicitors).

42 Further, any potential for abuse which the procedural latitude allowed to a plaintiff on my construction of O 69A r 2 of the Rules is addressed by the court's wide powers of case management of an originating summons, even

before service, whether under O 34A r 5 or under O 28 r 10 of the Rules. The existence of these measures to detect and prevent abuse reinforces my view that my construction is consistent with the Model Law’s deliberate decision to leave it to the procedural law of each jurisdiction to determine when an “application” is “made” within the meaning of Art 34(3).

***“State the grounds in support of the application”***

43 I have held that an “application” to set aside an award is “made” within the meaning of Art 34(3) of the Model Law – and therefore also within the meaning of O 69A r 2(4) of the Rules – when an originating summons is filed under O 69A r 2(1)(d) of the Rules. That finding alone suffices to dispose of the preliminary point in favour of the plaintiff.

44 I therefore need not deal with the defendants’ argument that the plaintiff’s application is defective because the *originating summons* fails to state the grounds in support of the application. The defendants submit that this is a requirement of O 69A r 2(4A)(a).<sup>23</sup> It suffices to note that, contrary to the defendants’ submission,<sup>24</sup> O 69A r 2(4A)(a) of the Rules does not require the “application” to state the grounds in support. Instead, it requires the “affidavit in support” to do so. Therefore, O 69A r 2(4A)(a) does not and was not intended to apply to an originating summons filed under O 69A r 2(1)(d). And the defendants do not suggest that the affidavit which the plaintiff eventually filed in support of this application fails to comply with O 69A r 2(4A) in so far as its *contents* are concerned.

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<sup>23</sup> Defendants’ submissions at pp 12–16, paras 22–33.

<sup>24</sup> Defendants’ submissions at p 19, para 41.

***Conclusion on the preliminary point***

45 In conclusion, I hold that the plaintiff “made” its “application” to set aside this award on 15 April 2019, in compliance with Art 34(3) of the Model Law and O 69A r 2(4) of the Rules. I hold that there is nothing in Art 34(3) or in O 69A r 2 – whether express or arising by implication from a purposive or policy-based construction of both provisions – which renders the plaintiff’s application out of time or which precludes the plaintiff from relying on the grounds set out in the affidavit in support of the originating summons to advance its case on this setting aside application.<sup>25</sup>

46 I also consider that this approach accords with the Model Law’s deliberate decision to leave it to the procedural law of individual Model Law jurisdictions to determine when an “application” under Art 34(3) of the Model Law is “made”. The defendants’ construction of Art 34(3) would mean that a party could comply fully with our procedural law (as the plaintiff has done in this case) and still find its application barred by Art 33(4). The drafters of the Model Law deliberately intended there to be no such variance between the effect of the Model Law and the procedural law of a given Model Law jurisdiction.

47 Having disposed of the defendants’ preliminary point, I now address the parties’ substantive arguments on the setting aside application. I begin with a summary of the relevant law.

**The setting aside application**

48 As I have mentioned (at [4] above), the plaintiff applies to set aside the award on two alternative grounds under the Act. First, the plaintiff relies on

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<sup>25</sup> Defendants’ submissions at p 17, paras 34–45.

s 24(b) of the Act to argue that the tribunal breached natural justice in dismissing its claim. Second, the plaintiff relies on Art 34(2)(a)(iii) of the Model Law to argue that the tribunal dealt with matters beyond the scope of the parties' submission to arbitration in dismissing its claim.

***Section 24(b) of the Act***

49 I shall deal first with the plaintiff's case under s 24(b) of the Act. That section permits the court to set aside an award if "a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced". Accordingly, to succeed in setting aside an award under s 24(b) of the Act, a plaintiff must establish the following elements (*John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443 ("John Holland") at [18]):

- (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 the plaintiff's rights.

***The first and second John Holland elements***

50 On the first *John Holland* element, the plaintiff submits that the tribunal breached the fair hearing rule. The fair hearing rule requires each party to be given adequate notice of the case it must meet in the arbitration and a fair opportunity to be heard on that case (see *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [43]).

51 On the second *John Holland* element, the plaintiff advances up to six grounds as to how the tribunal breached the fair hearing rule. For present purposes, I will analyse only the two grounds which I have accepted: (i) that the tribunal adopted a chain of reasoning which had no nexus to the parties' cases; and (ii) that the tribunal failed to apply its mind to an essential issue arising from the parties' arguments.

***The applicable principles of law***

52 The principles of law which I must apply to determine the plaintiff's application on these two grounds are not seriously contested. They can be summarised as follows:

- (a) The grounds for setting aside an award are to be construed and applied bearing in mind the policy of minimal curial intervention in arbitration (*Soh Beng Tee* at [65(c)]).
- (b) An application to set aside an award is not a pretext for the losing party to appeal on the merits against the tribunal's award (*TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM Division*") at [2]).
- (c) A court hearing a setting-aside application will not strive to find fault with the tribunal or to find errors in the award (*Soh Beng Tee* at [65(f)]; *TMM Division* at [45]).
- (d) A court will set aside an award only if the breach of natural justice is "demonstrably clear on the face of the record without the need to pore over thousands of pages of facts and submissions" (*TMM Division* at [125]).

(e) The fundamental touchstone of the fair hearing rule is naturally the concept of “fairness”. But there are two sides to fairness. It is, of course, unfair to the losing party if the tribunal did not give it a fair hearing. But it is equally unfair to the successful party if it is deprived of the fruits of its success on an arid or technical challenge mounted *ex post facto* (*Soh Beng Tee* at [65(a)] and [65(b)]; *TMM Division* at [2] and [125]). The court will therefore read the award generously in order to remedy only meaningful breaches of natural justice which have caused actual prejudice (*Soh Beng Tee* at [65(f)]).

(f) A breach of the fair hearing rule can arise from the tribunal’s failure to apply its mind to the essential issues arising from the parties’ arguments. The court will give the tribunal “fair latitude” to determine what is and is not an essential issue (*TMM Division* at [72] and [74]) and also when reading the award to determine whether the tribunal failed to apply its mind to the essential issues.

(g) The fact that a tribunal’s decision is inexplicable is only one factor which goes towards establishing that the tribunal failed to apply its mind to the essential issues arising from the parties’ arguments (*TMM Division* at [89]). If a fair reading of the award shows that the tribunal did apply its mind to the essential issues “but failed to comprehend the submissions or comprehended them erroneously, and thereby came to a decision which may fall to be characterised as inexplicable”, that will be simply an error of fact or law and the award will not be set aside (*TMM Division* at [90]–[91]; *BLC v BLB* [2014] 4 SLR 79 at [100]).

(h) So too, the fact that an award fails to address one of the parties’ arguments expressly does not, in itself, mean that the tribunal failed to



apply its mind to that argument. There may be a valid alternative explanation for the failure (*ASG v ASH* [2016] 5 SLR 54 at [92]).

(i) An award will therefore not be set aside on the ground that the tribunal failed to apply its mind to an essential issue arising from the parties' arguments unless the failure is a clear and virtually inescapable inference from the award (*AKN v ALC* [2015] 3 SLR 488 at [46]).

(j) A breach of the fair hearing rule can also arise from the chain of reasoning which the tribunal adopts in its award. To comply with the fair hearing rule, the tribunal's chain of reasoning must be: (i) one which the parties had reasonable notice that the tribunal could adopt; and (ii) one which has a sufficient nexus to the parties' arguments (*JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 ("*JVL Agro*") at [149]).

(k) A party has reasonable notice of a particular chain of reasoning (and of the issues forming the links in that chain) if: (i) it arose from the parties' pleadings; (ii) it arose by reasonable implication from their pleadings; (iii) it is unpleaded but arose in some other way in the arbitration and was reasonably brought to the party's actual notice; or (iv) it flows reasonably from the arguments actually advanced by either party or is related to those arguments (*JVL Agro* at [150], [152], [154] and [156]).

(l) To set aside an award on the basis of a defect in the chain of reasoning, a party must establish that the tribunal conducted itself either irrationally or capriciously such that "a reasonable litigant in his shoes could not have foreseen the possibility of reasoning of the type revealed in the award". A tribunal's failure to hear from the challenging party on

every single link in its chain of reasoning is therefore not in itself a breach of natural justice. It is also not in itself a breach of natural justice for the tribunal's chain of reasoning to adopt a middle path between the parties' diametrically opposed cases, whether on the appropriate inferences to be drawn from the primary facts, on the state or effect of the law or on the application of the law to the facts. Adopting a chain of reasoning, or a particular issue as a link in that chain, will be a breach of natural justice only if it represents a dramatic departure from the parties' cases, is wholly at odds with the established evidence or arrives at a conclusion unequivocally rejected by both parties as being trivial or irrelevant (*Soh Beng Tee* at [65(d)] and [65(e)]; *TMM Division* at [125]).

53 In order to apply these principles to this application, it is necessary first to set out the background facts, including the principal provisions of the Contract.

### **The background facts of the parties' dispute**

#### ***The defendants agree to build a vessel for the plaintiff***

54 The parties entered into the Contract in November 2012. The Contract is a detailed one, running to 21 articles over 59 pages.

55 The Contract contains six sets of provisions which are relevant for present purposes.

56 First, the defendants undertook to construct, equip and deliver a vessel to the plaintiff no later than 31 May 2014.<sup>26</sup> That date was subsequently

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<sup>26</sup> Plaintiff's affidavit at p 266, Award at para 127, p 324 and 351, cl 8.1.1.

extended by agreement. I shall refer to the contractually stipulated date for delivery of the vessel at any given time as “the Delivery Date”.

57 Second, the Contract incorporates eight annexes. Of these, only two are relevant for present purposes. Annex I is headed “Construction Methodology”.<sup>27</sup> It sets out in five parts over 66 pages the plaintiff’s detailed requirements as to how the defendants are to construct, outfit and commission the vessel. Annex III is headed “Technical Specification”.<sup>28</sup> It sets out in 18 sections<sup>29</sup> over 189 pages the plaintiff’s detailed specifications for the materials, systems, outfitting and testing of the vessel. Despite its formal title, the parties and the tribunal refer to Annex III as “the Construction Specifications” (see [201] below).<sup>30</sup>

58 Third, the Contract required the defendants to construct the vessel in accordance with the specifications and requirements of the “Classification Society” and the provisions of the Contract.<sup>31</sup> Article 1 read with Art 2.3.1<sup>32</sup> of the Contract as well as section 1.3 of Annex III<sup>33</sup> define the “Classification Society” as the American Bureau of Shipping (“the ABS”). Section 1.4 of Annex III reiterates that “The Vessel, with its equipment, shall be built under special survey of the [ABS] to the highest classification for Vessels of this type” and that “The Vessel as delivered, shall comply with the applicable regulatory

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<sup>27</sup> Plaintiff’s affidavit at p 380.

<sup>28</sup> Plaintiff’s affidavit at p 448.

<sup>29</sup> Plaintiff’s affidavit at p 451.

<sup>30</sup> Plaintiff’s affidavit at p 290, Award at para 227.

<sup>31</sup> Plaintiff’s affidavit at pp 324–325.

<sup>32</sup> Plaintiff’s affidavit at pp 326 and 330.

<sup>33</sup> Plaintiff’s affidavit at p 380.

requirements” of the ABS.<sup>34</sup> Sections 12.2, 12.3 and 15.2 of Annex III<sup>35</sup> set out the specifications for the vessel’s main and emergency generators. Significantly, Annex III is silent on the standard as to ingress protection which the vessel’s generators must meet.

59 Fourth, Art 5 of the Contract obliges the defendants (amongst other things) to permit the plaintiff’s representatives and assistants to inspect and test the vessel during construction.<sup>36</sup> In particular, Arts 5.3.4 and 5.3.5 of the Contract<sup>37</sup> require the defendants to prepare and execute, with the approval of the plaintiff and the ABS, a comprehensive programme of tests and trials during construction to ensure that the vessel is being built and equipped in accordance with the Contract. Article 5 further gives the plaintiff and the ABS the right to attend all tests and to receive at least seven days’ notice of the tests for that purpose.

60 Fifth, Art 7 of the Contract provides that the vessel, when completed, must undergo a suite of agreed tests (“Acceptance Tests”) to ensure that the vessel conforms with the requirements of the Contract and is capable of operating in accordance with the contractual specifications and the requirements of the ABS (“the Acceptance Standards”).<sup>38</sup> Article 7.3.1 of the Contract permits the defendants, if they consider that the results of the Acceptance Tests show that the vessel meets the Acceptance Standards, to serve a written notice of completion on the plaintiff stating that the vessel is ready for delivery. In that

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<sup>34</sup> Plaintiff’s affidavit at p 454.

<sup>35</sup> Plaintiff’s affidavit at pp 554 and 587.

<sup>36</sup> Plaintiff’s affidavit at pp 338–343.

<sup>37</sup> Plaintiff’s affidavit at p 341.

<sup>38</sup> Plaintiff’s affidavit at p 347.

event, the plaintiff has 48 hours to notify the defendants that it either accepts or rejects the vessel. If the plaintiff fails to reject the vessel within those 48 hours, it is deemed by Art 7.3.4 of the Contract to have accepted the vessel.<sup>39</sup>

61 Finally, Art 20 of the Contract provides that it is governed by Singapore law and that disputes arising out of or in connection with the Contract shall be referred to and resolved finally by arbitration in Singapore at the SIAC.<sup>40</sup>

62 In December 2012, the parties varied the Contract by entering into the first of four supplemental agreements.<sup>41</sup> The terms of this first supplemental agreement are not relevant for present purposes.

***The plaintiff sells the vessel to the End-Buyer***

63 The defendants failed to deliver the vessel by the Delivery Date, *ie* 31 May 2014. Towards the end of 2014, while the vessel was still under construction, the plaintiff entered into discussions to sell the vessel on to a third-party through a tender exercise. I shall refer to this third-party as “the End-Buyer”.<sup>42</sup>

64 As a result of these discussions, meetings took place between the End-Buyer and the plaintiff, at which the defendants were present, in December 2014 and again in January 2015.<sup>43</sup> Part of the purpose of these meetings was to agree the changes necessary to the technical requirements for the vessel in order for

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<sup>39</sup> Plaintiff’s affidavit at p 348.

<sup>40</sup> Plaintiff’s affidavit at p 377.

<sup>41</sup> Plaintiff’s affidavit at p 723.

<sup>42</sup> Plaintiff’s affidavit at p 266, Award at para 129.

<sup>43</sup> Plaintiff’s affidavit at p 266, Award at para 129 and p 286, Award at para 216.

the vessel to meet the End-Buyer's technical requirements instead of the plaintiff's (as originally set out in Annexes I and III to the Contract).

***The ABS tests the vessel***

65 In December 2014, the ABS conducted tests on the vessel. The defendants characterise these as Acceptance Tests within the meaning of Art 7 of the Contract (see [60] above). Accordingly, on 31 December 2014, the defendants served written notice of completion under Art 7.3.1 of the Contract on the plaintiff (see [60] above). The plaintiff failed to reject the vessel within 48 hours.

66 The defendants' position is that the results of these tests established that the defendants were ready to deliver the vessel in accordance with the Contract in December 2014. The plaintiff denied during the arbitration, and denies on this application, that these tests by the ABS amounted to Acceptance Tests within the meaning of the Art 7 of the Contract. It also denies that the vessel was ready for delivery in December 2014.<sup>44</sup>

***The second supplemental agreement***

67 In February 2015, the parties entered into a second supplemental agreement ("SA2").<sup>45</sup> SA2 amended the Contract to achieve two purposes. The first was to incorporate the End-Buyer's technical requirements into the Contract.<sup>46</sup> The second was to provide contractually for the consequences of the defendants' failure to deliver the vessel by 31 May 2014 as originally agreed.

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<sup>44</sup> Plaintiff's affidavit at pp 1647–1653, paras 4–21.

<sup>45</sup> Plaintiff's affidavit at p 727.

<sup>46</sup> Plaintiff's affidavit at p 266–267, Award at para 130.

68 SA2 has three annexes. Annex I of SA2<sup>47</sup> is headed “Technical Requirements and Other Requirements” and comprises twelve numbered subdivisions. Only two of those subdivisions are relevant for present purposes. The first relevant subdivision is Annex I-1.<sup>48</sup> It runs to 241 pages and is headed “Technical Agreement for [the vessel]”. This document was produced by the End-Buyer and bears its name or logo on every page. I shall call this the “SA2 Technical Agreement”. The second relevant subdivision is Annex I-12.<sup>49</sup> This document runs to only three pages and is headed “Minutes of Technical Negotiations between [the End-Buyer] and [the plaintiff] on the purchase of [the vessel]”. I shall call this document the “SA2 Minutes of Negotiations”. The SA2 Minutes of Negotiations are signed by the plaintiff and the defendants and record the principal points agreed between the plaintiff and the End-Buyer in the meetings with the End-Buyer in January 2015 (see [64] above).<sup>50</sup>

69 SA2 contains six sets of provisions which are relevant for present purposes.

70 First, Art 8 of SA2<sup>51</sup> contractually extends the Delivery Date from 31 May 2014 to 30 April 2015.

71 Second, Art 8 defines 30 June 2015 as the “Cancelling Date”. The significance of the Cancelling Date is that Art 12 of SA2<sup>52</sup> provides that, if the defendants fail to deliver the vessel by the Cancelling Date, the plaintiff is

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<sup>47</sup> Plaintiff’s affidavit at p 735.

<sup>48</sup> Plaintiff’s affidavit at p 736.

<sup>49</sup> Plaintiff’s affidavit at p 1119.

<sup>50</sup> Plaintiff’s affidavit at p 266, Award at para 129 and p 286, Award at para 216.

<sup>51</sup> Plaintiff’s affidavit at p 730.

<sup>52</sup> Plaintiff’s affidavit at p 731.

entitled *either* to: (i) reject the vessel and terminate the Contract; *or* (ii) accept delivery of the vessel and claim liquidated damages at the rate of US\$50,000 per day from the Cancelling Date to the date of actual delivery, capped at US\$5m.

72 Third, Art 3 of SA2<sup>53</sup> provides that Annex I of SA2 supersedes, amongst others, Annexes I and III of the Contract (see [54] above). In exchange, the plaintiff agrees to pay the defendants a US\$10.46m “Modification Fee” for all of the work done or to be done on the vessel to upgrade its specifications to meet those set out in Annex I of SA2. Article 3 of SA2 also obliges the defendants “to comply with all technical requirements based on [Annex I of SA2], in accordance with the Classification Society’s [*ie* the ABS’s] rules and regulations”.

73 Fourth, Art 6 of SA2<sup>54</sup> supplements the inspection plan under Art 5 of the Contract (see [59] above). Article 6 of SA2 obliges the defendants: (i) to permit the End-Buyer’s inspection agency, ModuSpec, to inspect and test the vessel in the course of construction; and (ii) to remedy and rectify any non-conformity that ModuSpec may discover and convey to the defendants through the plaintiff.<sup>55</sup>

74 Fifth, Art 15 of SA2<sup>56</sup> varies the “Permissible Delay” provisions in cl 9.3 of the Contract.<sup>57</sup> Article 15 provides that, if the defendants fail to deliver the vessel by the 30 April 2015, but the failure is caused by the defendants’

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<sup>53</sup> Plaintiff’s affidavit at p 728.

<sup>54</sup> Plaintiff’s affidavit at p 729.

<sup>55</sup> Plaintiff’s affidavit at p 730.

<sup>56</sup> Plaintiff’s affidavit at p 732.

<sup>57</sup> Plaintiff’s affidavit at p 356.



efforts to remedy or rectify non-conformities raised by the End-Buyer or by ModuSpec *before* 15 April 2015, that delay is a “Permissible Delay”. If, but only if, the defendants give notice of Permissible Delay to the plaintiff, the plaintiff is *obliged* to extend both the Delivery Date and the Cancelling Date for the period of the Permissible Delay, but no further than a long-stop date of 15 July 2015.

75 Finally, SA2 deals expressly with the protection of the vessel’s generators from the ingress of water. The international standard for the protection of electrical and electronic equipment (such as the generators) from the ingress of water and foreign objects is an “IP” rating. “IP” stands for “Ingress Protection”.<sup>58</sup> The higher the IP rating, the higher the degree of protection which is required in order to earn that rating.<sup>59</sup> As mentioned (at [58] above), the Contract did not expressly specify an IP rating for the generators. It merely obliged the defendants in general terms to comply with the regulatory requirements of the ABS as to ingress protection for generators. Section 15.2 of the SA2 Technical Agreement now expressly requires the generators to “generally” be “Waterproof grade IP44”.<sup>60</sup> But the SA2 Minutes of Negotiations (like the Contract) are silent on the IP rating of the generators. The SA2 Minutes of Negotiations merely oblige the defendants in general terms to submit to the plaintiff documents about the “IP grade of the generator, which shall meet the requirement of Construction Specification and Classification”.<sup>61</sup>

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<sup>58</sup> Plaintiff’s affidavit at p 1296, para 32.

<sup>59</sup> Plaintiff’s affidavit at pp 1296–1297, paras 32–33.

<sup>60</sup> Plaintiff’s affidavit at p 913.

<sup>61</sup> Plaintiff’s affidavit at p 1120.

76 The effect of SA2 was not only to extend the Delivery Date from 31 May 2014 to 30 April 2015 but also to give the defendants a further two-month grace period, after 30 April 2015 and up to the Cancelling Date, within which they would face no contractual consequence for having failed to deliver the vessel by 30 April 2015. But if the defendants failed to deliver the vessel by the Cancelling Date, and the plaintiff elected not to terminate the contract, SA2 gave the plaintiff the right to recover liquidated damages from the defendants starting from the Cancelling Date up to the date of actual delivery, subject to the cap of US\$5m.

***The plaintiff sells the vessel to the End-Buyer***

77 Following SA2, but also in February 2015, the plaintiff entered into a contract with the End-Buyer to sell the vessel to the End-Buyer.<sup>62</sup>

78 In April 2015, the parties entered into a third supplemental agreement.<sup>63</sup> The terms of this supplemental agreement are not relevant for present purposes.

79 In late April 2015, the End-Buyer informed the plaintiff that the generators already installed in the vessel did not conform to the End-Buyer's specifications for protection against the ingress of water because they were rated IP23 instead of IP44. The plaintiff duly informed the defendants of the non-conformity.<sup>64</sup> The defendants informed the plaintiff that it would take 11 months to upgrade the generators from IP23 to IP44.<sup>65</sup>

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<sup>62</sup> Plaintiff's affidavit at p 267, Award at para 131.

<sup>63</sup> Plaintiff's affidavit at p 1124.

<sup>64</sup> Plaintiff's affidavit at p 271, Award at para 151.

<sup>65</sup> Plaintiff's affidavit at p 32, para 3.9.1 and p 271, Award at para 154.

***The defendants fail to deliver the vessel***

80 The defendants proved unable to deliver the vessel by the Delivery Date of 30 April 2015 or even by the Cancelling Date of 30 June 2015.<sup>66</sup> On 1 July 2015, the plaintiff put the defendants on notice in writing that the defendants had: (i) failed to deliver the vessel in accordance with Art 8 of SA2; and (ii) failed to give notice of Permissible Delay under Art 15 of SA2.<sup>67</sup> But the plaintiff did not exercise its right under SA2 to terminate the Contract. It chose to keep the Contract on foot.

81 On 2 July 2015 and 1 September 2015, the ABS issued two interim class certificates for the vessel.<sup>68</sup> A class certificate is a certificate from the ABS confirming that the vessel complies with ABS standards for vessels of that particular class. These two class certificates were interim because the ABS was unable to certify a particular component of the vessel as a result of the plaintiff's failure to provide required information on Owner Furnished Equipment ("OFE").<sup>69</sup>

82 Between 3 July 2015 and 17 July 2015, ModuSpec carried out an inspection of the vessel. As a result of the inspection, ModuSpec raised a list of non-conformities for the defendants to remedy.<sup>70</sup> The defendants duly set about remedying them.

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<sup>66</sup> Plaintiff's affidavit at p 32, para 3.9.1.

<sup>67</sup> Plaintiff's affidavit at p 32, para 3.9.1 and p 1293, para 20.

<sup>68</sup> Plaintiff's affidavit at pp 102–103, paras 7.2.69–7.2.72; Plaintiff's submissions at p 22, para 2.5.

<sup>69</sup> Defendants' submissions at pp 40–42, para 81(2).

<sup>70</sup> Plaintiff's affidavit at p 274, Award at para 165.

*The fourth supplemental agreement*

83 On 12 September 2015, the parties entered into a fourth supplemental agreement (“SA4”). SA4 contains two provisions which are relevant for present purposes.

84 First, Art 3<sup>71</sup> extends the Delivery Date (as already extended by Art 8 of SA2) to “on or around 21 September 2015, but in no case later than 23 September 2015”.<sup>72</sup>

85 Second, Art 4 of SA4 fixes technical acceptance of the vessel for 12 September 2015.<sup>73</sup> As a result, Art 4 also provides that “... the calculation of all Liquidated Damages payable from one Party to the other under the terms and conditions of the [Contract], including but not limited to Art 12 of [SA2], shall cease on 11 September 2015”.

86 Although SA4 expressly extended the Delivery Date, it is silent about any extension of the Cancelling Date. The significance of the Cancelling Date is that it is the starting date for calculating liquidated damages under Art 12 of SA2.

87 Subject to the terms of SA4, the plaintiff allowed the Contract to remain on foot and allowed the defendants to work towards delivering the vessel under the Contract as varied by the supplemental agreements.

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<sup>71</sup> Plaintiff’s affidavit at p 1128.

<sup>72</sup> Plaintiff’s affidavit at p 1129.

<sup>73</sup> Plaintiff’s affidavit at p 1129.

***Delivery and acceptance***

88 The defendants delivered the vessel to the plaintiff on 22 September 2015, one day before the long stop date in SA4 (see [84] above). The plaintiff duly accepted the vessel and made full payment of the final instalment due under the Contract, of the Modification Fee and of all other payments due under SA2.<sup>74</sup> The plaintiff also delivered the vessel to the End-Buyer on the same day.<sup>75</sup>

**The disputes in the arbitration**

89 The parties agreed to deliver and accept the vessel even though the plaintiff was asserting, at that time, two claims against the defendants:<sup>76</sup>

(a) First, the plaintiff was claiming to be entitled to recover liquidated damages from the defendants for the delay in delivery of the vessel. I shall refer to this as the “delay claim”.

(b) Second, plaintiff was claiming to be entitled to recover damages from the defendants because the vessel’s generators were rated IP23 instead of IP44. I shall refer to this as the “IP44 claim”.

On the IP44 claim, it is not disputed that the defendants delivered the vessel with generators which were rated only IP23, not IP44. The only dispute is as to whether the defendants were contractually obliged to upgrade the generators from IP23 to IP44 before delivery.

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<sup>74</sup> Plaintiff’s affidavit at pp 268, Award at para 136 and pp 1333–1334, para 53.

<sup>75</sup> Plaintiff’s affidavit at pp 267, Award at para 135 and pp 1333–1334, para 53.

<sup>76</sup> Plaintiff’s affidavit at p 1154, paras 25–26.

90 I should add that the plaintiff also pursued a claim arising from the IP rating of the vessel's cranes. But the plaintiff's claim in respect of the cranes stands or falls with its claim in respect of the generators. I therefore need not and do not analyse separately the plaintiff's claim arising from the IP rating of the vessel's cranes.

91 The defendants rejected both of the plaintiff's claims. As a result, in October 2015, the plaintiff commenced arbitration against the defendants under Art 20 of the Contract (see [61] above).<sup>77</sup> A tribunal was constituted in January 2016, comprising three arbitrators appointed in the usual way.<sup>78</sup>

92 In March 2016, the plaintiff filed its statement of claim in the arbitration. In it, the plaintiff sought damages on both the delay claim and the IP44 claim.<sup>79</sup>

93 In April 2016, as amended in November 2016, the defendants filed their statement of defence and counterclaim.<sup>80</sup> The defendants denied both of the plaintiff's claims and advanced a counterclaim seeking, amongst other things, payment for work which they had done on the vessel allegedly outside the scope of the Contract.

### ***The delay claim***

94 The plaintiff pleaded its delay claim in the arbitration as follows.<sup>81</sup> Article 12 of SA2 entitles the plaintiff to liquidated damages starting from the

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<sup>77</sup> Plaintiff's affidavit at p 1149.

<sup>78</sup> Plaintiff's affidavit at p 248, Award at para 3.3.1.

<sup>79</sup> Plaintiff's affidavit at p 1284.

<sup>80</sup> Plaintiff's affidavit at p 1305.

<sup>81</sup> Plaintiff's affidavit at pp 1293–1296, paras 20–31.

Cancelling Date and ending on the actual date on which the defendants deliver the vessel. Article 8 of SA2 fixed the Cancelling Date as 30 June 2015. The defendants delivered the vessel on 22 September 2015. The plaintiff is therefore *prima facie* entitled to liquidated damages under Art 12 of SA2 for the 84 days from 30 June 2015 to 22 September 2015, totalling US\$4.2m. But by Art 4 of SA4, the parties agreed to calculate the defendants' liability to pay liquidated damages only up to 11 September 2015. Therefore, the plaintiff was entitled to liquidated damages only for the 73 days from 30 June 2015 until 11 September 2015, totalling US\$3.65m.<sup>82</sup>

95 In summary, the defendants' defence to the delay claim was that: (i) the defendants were entitled to extensions of time for Permissible Delay (see [74] above) such that delivery of the vessel on 22 September 2015 was not a breach of contract; (ii) alternatively, even if the defendants were not entitled to extensions of time, the delay was in fact caused by the plaintiff, and therefore the prevention principle operated to set time for delivery at large; and (iii) even if time was not set at large, the Cancelling Date, being the date on which the defendants' liability to pay liquidated damages commenced had been moved

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<sup>82</sup> Plaintiff's affidavit at p 270, Award at para 145.

contractually to a date after 11 September 2015, the date on which Art 4 of SA4 terminated the defendants' liability to pay liquidated damages.

96 In order to add detail to this summary, I set out the seven alternative defences to the delay claim which the defendants pleaded in their statement of defence:<sup>83</sup>

(a) First, the defendants' delivery of the vessel to the plaintiff on 22 September 2015 was not even a breach of contract because the defendants delivered the vessel before 23 September 2015, *ie* before the Delivery Date as varied and stipulated in Art 3 of SA4.<sup>84</sup>

(b) Second, there was Permissible Delay within the meaning of the Contract entitling the defendants to extensions of time for delivery.<sup>85</sup> The defendants gave the plaintiff contractually valid notices of Permissible Delay in March and April 2015. Accordingly, the defendants cannot be liable to pay damages, let alone to pay liquidated damages, for the delay.

(c) Third, under the "prevention principle", the time for the defendants to perform their contractual obligation to deliver the vessel was set at large by the plaintiff's acts of prevention.<sup>86</sup> Three acts of

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<sup>83</sup> Plaintiff's affidavit at p 36, para 4.2.1; *cf* Plaintiff's submissions at pp 9–11, para 1.5.

<sup>84</sup> Plaintiff's affidavit at pp 1325–1326, para 46(1).

<sup>85</sup> Plaintiff's affidavit at pp 1326–1327, para 46(2)(c) and pp 1329–1331, para 46(6).

<sup>86</sup> Plaintiff's affidavit at pp 1321–1325, para 45 and p 1327, para 46(2)(d).



prevention by the plaintiff caused the defendants' failure to deliver the vessel by the Cancelling Date:

- (i) The plaintiff caused a delay in registering the vessel because the plaintiff failed to provide the defendants certain information pertaining to the OFE<sup>87</sup> on the vessel which was necessary for registration.<sup>88</sup>
- (ii) The plaintiff caused the defendants delay in securing a class certificate from the ABS.<sup>89</sup>
- (iii) The plaintiff's inspector, ModuSpec, arrived at the shipyard to carry out its inspection late<sup>90</sup> and submitted its report late.<sup>91</sup>

The consequence was that the defendants' only obligation was to deliver the vessel within a time which was reasonable in all the circumstances. The defendants complied with this obligation when it delivered the vessel on 22 September 2015.

- (d) Fourth, on three grounds, the starting date for computing the defendants' liability to pay liquidated damages had been moved contractually from 30 June 2015 (*ie* the Cancelling Date) to a date *after* 11 September 2015 (*ie* the date on which SA4 terminated the defendants' liability to pay liquidated damages):

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<sup>87</sup> Plaintiff's affidavit at p 467, section 1.21 and pp 292–293, Award at para 238.

<sup>88</sup> Plaintiff's affidavit at p 1322, para 45(1).

<sup>89</sup> Plaintiff's affidavit at p 1322, para 45(2).

<sup>90</sup> Plaintiff's affidavit at pp 1322–1325, paras 45(3)–45(5).

<sup>91</sup> Plaintiff's affidavit at p 1325, para 45(6).

(i) The Cancelling Date was moved contractually to 22 November 2015.<sup>92</sup> Article 3 of SA4 extended the Delivery Date by 146 days from 30 April 2015 to 23 September 2015. The Cancelling Date was therefore also extended by an equal number of days, *ie* 146 days from 30 June 2015 to 22 November 2015.

(ii) The Cancelling Date was moved contractually to 23 September 2015.<sup>93</sup> That date became the Delivery Date upon execution of SA4. It is inconceivable that the Delivery Date should be *after* the Cancelling Date. That would mean that the plaintiff could have terminated the Contract under Art 12 of SA2 at any time after 30 June 2015 and could have done so even after it entered into SA4, even though it had agreed in SA4 to extend the Delivery Date to 23 September 2015.

(iii) The Cancelling Date was moved contractually to 15 September 2015. There was Permissible Delay under Art 15 of SA2. As stated in the defendants' letter to the plaintiff dated 7 July 2015, the defendants were entitled to an extension of time for delivery up to 15 July 2015.<sup>94</sup> The Cancelling Date was accordingly extended to two months after 15 July 2015, *ie* to 15 September 2015.<sup>95</sup>

(e) Fifth, the defendants' liability to pay liquidated damages had lapsed before the Cancelling Date as contractually moved (see [96(d)(i)]–[96(d)(iii)] above) arrived. Article 4 of SA4 expressly

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<sup>92</sup> Plaintiff's affidavit at p 1326, para 46(2)(a).

<sup>93</sup> Plaintiff's affidavit at p 1326, para 46(2)(b).

<sup>94</sup> Plaintiff's affidavit at pp 44–45, para 4.2.10(d).

<sup>95</sup> Plaintiff's affidavit at p 1326, para 46(2)(c) and pp 1329–1331, para 46(6).

provides that “calculation of all liquidated damages payable ... under the terms of the [Contract] ... including but not limited to Art 12 of [SA2] shall cease on 11 September 2015”.<sup>96</sup>

(f) Sixth, Art 12 of SA2 is a penalty clause and is therefore “invalid and/or unenforceable”.<sup>97</sup>

(g) Seventh, the plaintiff had waived its right to claim liquidated damages when it made full payment upon delivery of the final instalment due under the Contract and of the Modification Fee and other payments due under SA2.<sup>98</sup>

### ***The IP44 claim***

97 The plaintiff pleaded its IP44 claim in the arbitration as follows.<sup>99</sup> Section 15.2 of the SA2 Technical Agreement read with Art 3 of SA2 obliges the defendants to equip the vessel with generators rated IP44. In breach of contract, the defendants delivered the vessel with generators rated only IP23. As a result, the plaintiff had to give the End-Buyer a credit of US\$2m against the purchase price of the vessel. The plaintiff is therefore entitled to recover that US\$2m from the defendants as damages for breach of contract.

98 The defendants’ defence to the IP44 claim in summary was that: (i) the defendants were under no contractual obligation to deliver the vessel with generators rated IP44; alternatively (ii) the plaintiff was estopped from asserting

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<sup>96</sup> Plaintiff’s affidavit at p 1328, para 46(3)(b).

<sup>97</sup> Plaintiff’s affidavit at pp 1321–1322, para 45; p 1328 at para 46(3)(b).

<sup>98</sup> Plaintiff’s affidavit at pp 1328–1329, paras 46(4)–46(5).

<sup>99</sup> Plaintiff’s affidavit at pp 1296–1302, paras 32–40.

that the defendants were under an obligation to deliver the vessel with generators rated IP44.

99 In order to add detail to this summary, I set out the three defences to the IP44 claim which the defendants pleaded in their statement of defence:

(a) First, the Contract does not require the defendants to deliver the vessel with generators of any specific IP rating. The Contract requires only that the generators satisfy the ABS's requirements for class. Generators rated IP23 do satisfy the ABS's requirements for class.<sup>100</sup>

(b) Second, the defendants expressly informed the plaintiff in December 2014, shortly before a meeting between the plaintiff and the End-Buyer, at which the defendants were also present: (i) that the generators installed in the vessel were rated IP23, not IP44; (ii) that it was not practical to upgrade the generators to IP44 rating; and (iii) that generators rated IP23 were fit for purpose. The plaintiff expressly asked the defendants not to raise this issue with the End-Buyer at the meeting so as not to jeopardise the plaintiff's negotiations to sell the vessel to the End-Buyer. The defendants complied with the plaintiff's request.<sup>101</sup> The plaintiff thereby led the defendants to believe that the End-Buyer was prepared to accept generators rated IP23, provided this was acceptable to the ABS.<sup>102</sup> As a result, the plaintiff is estopped by representation

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<sup>100</sup> Plaintiff's affidavit at pp 1334–1335, para 55(1) and pp 1581–1585, Defendants' closing submissions at the arbitration ("DCS") at paras 157–163.

<sup>101</sup> Plaintiff's affidavit at pp 1335–1336, para 55(2).

<sup>102</sup> Plaintiff's affidavit at p 1336 at para 55(3).

from asserting that the defendants are under an obligation to upgrade the vessel's generators from IP23 to IP44.<sup>103</sup>

(c) Third, and consistent with the second defence, SA2 does not require the defendants to deliver the vessel with generators of any specific IP rating. The SA2 Minutes of Negotiations merely reiterate the defendants' general obligation in Annex III of the Contract to deliver the vessel with generators which "comply with the applicable regulatory requirements" of the ABS (see [58] above). The SA2 Minutes of Negotiations came into existence after the SA2 Technical Agreement and supersede the specific provision of the SA2 Technical Agreement requiring generators rated IP44 (see [75] above). Generators rated IP23 do indeed comply with the applicable regulatory requirements of the ABS.<sup>104</sup>

### ***The counterclaim***

100 The defendants' counterclaim<sup>105</sup> pleaded, amongst other things, that the plaintiff had required the defendants to carry out additional works to the vessel which were outside the scope of the Contract, even as varied by the supplemental agreements. The defendants accordingly counterclaimed US\$2.5m, being the value of these additional works.<sup>106</sup>

101 The plaintiff's defence to the counterclaim was that the defendants were not entitled to be paid anything at all for these works because the defendants

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<sup>103</sup> Plaintiff's affidavit at pp 1585–1586, DCS at para 164–167.

<sup>104</sup> Plaintiff's affidavit at pp 1336–1339 at para 55(4).

<sup>105</sup> Plaintiff's affidavit at p 1342.

<sup>106</sup> Plaintiff's affidavit at p 1359, prayer (5).

had failed to comply with the conditions precedent for payment for additional works which was stipulated in the Contract's change order procedure.<sup>107</sup>

## **The award**

### ***The tribunal dismisses the claim and the counterclaim***

102 The evidential hearing in the arbitration took place over nine days in May 2017.<sup>108</sup>

103 The tribunal delivered its award in October 2018.<sup>109</sup> The tribunal dismissed both the delay and the IP44 claims.<sup>110</sup> The tribunal also dismissed the defendants' counterclaim.<sup>111</sup>

### ***A dissent on the IP44 claim***

104 One of the arbitrators issued a brief dissenting opinion.<sup>112</sup> The dissent was confined to the majority's decision to dismiss the IP44 claim. The dissenting arbitrator would have held that the defendants were indeed obliged to deliver the vessel with generators rated IP44, such an obligation being consistent with the commercial purpose of SA2.<sup>113</sup>

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<sup>107</sup> Plaintiff's affidavit at p 272, Award at para 155.

<sup>108</sup> Defendants' submissions at para 8.

<sup>109</sup> Plaintiff's affidavit at p 239.

<sup>110</sup> Plaintiff's affidavit at p 299, Award at para 261.

<sup>111</sup> Plaintiff's affidavit at p 314, Award at para 308.

<sup>112</sup> Plaintiff's affidavit at p 1176.

<sup>113</sup> Plaintiff's affidavit at p 1177, Award (dissenting opinion) at para 3(d).

105 The dissenting arbitrator agreed in all other respects with the majority’s award.<sup>114</sup> In particular, he joined the majority in dismissing the plaintiff’s delay claim and in dismissing the defendants’ counterclaim.

106 I now turn to examine the chain of reasoning by which the tribunal arrived at its decision to dismiss the plaintiff’s claims.

### *Section G of the award*

107 The tribunal sets out its analysis of the facts and the parties’ cases and its reasoning in Section G of the award. This section is headed “The Tribunal’s Analysis and Findings” and runs from [199] to [308] of the award. The tribunal deals with the plaintiff’s claims from [199] to [261] of the award. It then deals with the defendants’ counterclaims from [262] to [308] of the award.

108 Section G is divided into nine parts with the following subheadings: (i) “Claimant’s Claim for Liquidated Damages”;<sup>115</sup> (ii) “Was the [Vessel] ready for Delivery to [the End-Buyer] on the Dates of the Inspection”;<sup>116</sup> (iii) [the End-Buyer’s] Tender;<sup>117</sup> (iv) Acceptance Test;<sup>118</sup> (v) “Has the [Plaintiff] failed to reject the Vessel in time?”;<sup>119</sup> (vi) “ABS Test and Class Certificate”;<sup>120</sup> (vii) “Tribunal’s Analysis and Findings of Fact on Negotiations of January

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<sup>114</sup> Plaintiff’s affidavit at p 1177, Award (dissenting opinion) at para 4.

<sup>115</sup> Plaintiff’s affidavit at pp 282–283, Award at paras 199–201.

<sup>116</sup> Plaintiff’s affidavit at pp 284–285, Award at paras 202–209.

<sup>117</sup> Plaintiff’s affidavit at pp 285–289, Award at paras 210–223.

<sup>118</sup> Plaintiff’s affidavit at pp 289–290, Award at paras 224–228.

<sup>119</sup> Plaintiff’s affidavit at pp 290–291, Award at paras 229–234.

<sup>120</sup> Plaintiff’s affidavit at pp 291–293, Award at paras 235–241.

2015”;<sup>121</sup> (viii) “Tribunal’s Findings on Factual Circumstances surrounding [SA2]”;<sup>122</sup> and (ix) “[Defendants’] Counterclaim”.<sup>123</sup>

109 I have read the award (as I must, see [52(c)] above) with all the generosity I can muster and with no intent whatsoever to find fault with the tribunal. The first difficulty is that – despite an optimistic indication given by the first heading in Section G – the tribunal does not deal with the plaintiff’s claim in two self-contained subsections, one dealing with the delay claim and the other dealing with the IP44 claim. The second difficulty is that the tribunal’s headings in Section G do not allude to or evoke readily identifiable elements of the plaintiff’s case or of the defendants’ defences. It is therefore impossible on the face of the award to distinguish between those findings which form part of the tribunal’s chain of reasoning on the delay claim and those which form part of its chain of reasoning on the IP44 claim. And it is exceedingly difficult to map those findings to the essential issues arising from the parties’ cases on both claims.

110 All that can be done is to extract the tribunal’s findings from the first eight subsections of Section G running from [199] to [261] of the award (*ie* excluding the ninth subsection, which deals only with the counterclaim) and then attempt with generosity to arrange those findings into a coherent chain of reasoning leading from the parties’ cases on each claim to the tribunal’s decision to dismiss that claim.

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<sup>121</sup> Plaintiff’s affidavit, at pp 294–295, Award at paras 242–246.

<sup>122</sup> Plaintiff’s affidavit, at pp 295–299, Award at paras 247–261.

<sup>123</sup> Plaintiff’s affidavit, at pp 299–314, Award at paras 262–308.



*The tribunal's findings*

111 As far as I can tell, the tribunal rested its decision to dismiss both the plaintiff's delay and IP44 claims on the following eleven findings.

112 At [208]–[209] of the award, under the heading “Was the [Vessel] ready for Delivery to [the End-Buyer] on the Dates of the Inspection?”, the tribunal found that the vessel was not ready for delivery on the dates on which ModuSpec inspected the vessel in July 2015 (see [82] above).<sup>124</sup>

113 At [216], under the heading “[The End-Buyer's] Tender”, the tribunal found that, the defendants were responsible for helping the plaintiff to deal with technical aspects of the End-Buyer's tender in December 2014 and January 2015.<sup>125</sup>

114 At [220]–[222] of the award, under the same heading, the tribunal found that the plaintiff's own representative Mr Tan (*cf* [175]–[184] below) provided supporting documents in December 2014 which showed that generators rated IP23 were fit for purpose.<sup>126</sup>

220. The Tribunal has noted that the Claimant's Mr Tan provided supporting documents to show that IP23 was fit for purpose. It is hard for the Tribunal to disregard what the Claimant itself had stated, particular (*sic*) in contemporaneous documents. In the premises, there is no need for any party to expressly demonstrate that the rating of IP23 is adequate or sufficient.

221. The Tribunal takes the view that the documents do point to previous tests that had been carried out in 1998 but the Tribunal takes the position that this goes neither here nor there since the Claimant has already stated in its own

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<sup>124</sup> Plaintiff's affidavit at pp 284–285, Award at paras 202–209.

<sup>125</sup> Plaintiff's affidavit at p 286, Award at para 216.

<sup>126</sup> Plaintiff's affidavit at p 2265, line 14–p 2268, line 12.

contemporaneous documents that IP23 was fit for its purpose. The Tribunal considers that the Respondent was led to believe IP23 was satisfactory and fit for purpose.

222. More importantly, the Tribunal has noted that the Claimant has failed to call any expert witness to testify on the adequacy of the IP 23 requirement, if indeed it is the Claimant's unpleaded position that IP23 is satisfactory but not fit for purpose.

115 At [223] of the award, under the same heading, the tribunal accepted that the End-Buyer required the vessel's generators to be rated IP44. The tribunal also accepted that the plaintiff's additional payment of US\$10.46m under SA2 (see [72] above) was very possibly in part to pay the defendants to upgrade the generators from IP23 to IP44 as specified in section 15.2 of the SA2 Technical Agreement (see [75] above). However, the tribunal concluded that the question was academic "in light of the plaintiff's own witness evidence that IP23 rating was fit for purpose" (*cf* [175]–[184] below):<sup>127</sup>

223. The Tribunal has noted that the End-Buyer had required the generators to be of IP44 standard and that negotiations leading to SA2 had resulted in the agreement to pay the [defendants] USD 10.46 million as Modification Fee. The Tribunal comes to the view that it is very possible that the upgrade of the [vessel's] generators from IP23 to IP44 was a reasonable explanation why the [defendants] agreed to incorporate this in Section 15.2 of the [SA2] Technical Agreement. However, in the light of the [plaintiff's] own witness evidence stating that IP23 rating was fit for purpose, this matter is now rendered academic.

116 At [227]–[228] of the award, under the heading "Acceptance Test", the tribunal found that: (i) the tests which the ABS conducted on the vessel in December 2014 (see [65] above) were indeed Acceptance Tests within the meaning of Art 7 of the Contract; and (ii) that the result of the Acceptance Tests

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<sup>127</sup> Plaintiff's affidavit at p 289, Award at paras 223.

had been successful, with ABS signing off on the test report, albeit subject to certain nonconformities which the defendants had to remedy.<sup>128</sup>

117 At [234] of the award, under the heading “Has the [Plaintiff] failed to reject the Vessel in Time?”, the tribunal found the defendants were not in breach of the Contract by delivering the vessel with generators rated IP23 because the plaintiff itself had confirmed that generators rated IP23 were fit for purpose (*cf* [175]–[184] below).<sup>129</sup> This finding rendered it unnecessary to resolve the disputed issue whether, under the terms of the Contract, the plaintiff was deemed to have accepted delivery of the vessel because it had failed to reject the vessel within 48 hours of receiving written notice of completion issued by the defendants following the successful acceptance test in December 2014 (see [65] above):<sup>130</sup>

234. However, the whole issue pertaining to timing of rejection of the Vessel is neither here nor there since the Tribunal has already decided that there was no breach by the [defendants] in supplying generators of IP23 rating, as the [plaintiff] itself had also confirmed that IP 23 was fit for purpose.

118 At [238] of the award, under the heading “ABS Test and Class Certificate”, the tribunal found that the plaintiff had failed to respond to the defendants’ complaint in the arbitration<sup>131</sup> that the plaintiff had “withheld relevant vessel registration information and OFE information from the [defendants] and that this had the effect of preventing the [defendants] from obtaining a class certificate”.<sup>132</sup> The tribunal therefore found that “it was the

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<sup>128</sup> Plaintiff’s affidavit at p 289, Award at paras 227–228.

<sup>129</sup> Plaintiff’s affidavit at p 291, Award at para 234.

<sup>130</sup> Plaintiff’s affidavit at p 291, Award at para 234.

<sup>131</sup> Plaintiff’s affidavit at p 292, Award at para 236, footnote 101.

<sup>132</sup> Plaintiff’s affidavit at pp 292–293, Award at para 238.

[plaintiff's] own fault for not co-operating with the [the defendants] to obtain the class certificate”.

119 As a result, the tribunal found at [240] of the award under the same heading that the plaintiff had “wrongfully prevented the [defendants] from obtaining a class certificate”.<sup>133</sup>

120 At [245]–[246] of the award, under the heading “Tribunal’s Analysis and Finding of Fact on Negotiations of January 2015”, the tribunal held that it was not necessary to resolve the factual dispute as to whether the defendants knew that the End-Buyer required generators which were rated IP44. This was because the plaintiff had confirmed contemporaneously (*cf* [175]–[184] below), and the tribunal had therefore already found as a fact, that generators rated IP23 were fit for the plaintiff’s purpose. That made it immaterial: (i) that the plaintiff had failed to adduce expert evidence that generators rated IP44 are different from generators rated IP23; (ii) that the defendants understood that they had to upgrade the generators from IP23 to IP44; and (iii) that it was common ground that the defendants delivered the vessel with generators which were rated only IP23, not IP44.<sup>134</sup>

245. The Claimant could have called a technical expert witness to say that IP44 generators are different to IP23 generators, if this was indeed part of its case. In any event, even such a step would not have assisted the Claimant as the Tribunal had already found, as a matter of fact, that the Claimant was content with IP23 rating (*sic*) generators.

246. The pleadings by the Parties and the supporting evidence presented in this case points to the conclusion that the Parties understood that the [vessel’s] generators had to be upgraded from IP 23 to IP 44. It is not in dispute between the Parties that the [vessel’s] generators were only constructed to

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<sup>133</sup> Plaintiff’s affidavit at p 293, Award at para 240.

<sup>134</sup> Plaintiff’s affidavit at pp 294–295, Award at para 246.

IP23 grade. However, the [plaintiff] had confirmed that IP23 grade was fit for its purpose. Any contradictory oral evidence given on this point by any factual witnesses would not have any impact or effect on the evidence and pleadings of the Parties.

[emphasis in original]

121 At [250] of the award, under the heading “Tribunal's Finding on Factual Circumstances surrounding [SA2]”, the tribunal accepted the defendants’ submission that “it is not unusual for a vessel to be delivered even if there are minor defects or deficiencies because the vessel is under warranty and such minor defects or deficiencies can be rectified either before the vessel leaves the yard or during the warranty period”.<sup>135</sup>

122 At [255] of the award, under the same heading, the tribunal held that the plaintiff had failed to prove that any defect in the vessel was “such a serious defect at the material time that it renders the [vessel] completely obsolete”.<sup>136</sup> Further, the plaintiff’s interests were protected by the defendants’ contractual obligation to attend to and remedy defective workmanship and materials during the vessel’s warranty period.<sup>137</sup> Accordingly, the plaintiff’s complaints about minor defects in the vessel were immaterial to the issues in the arbitration.<sup>138</sup>

123 The phrase “completely obsolete” in [255] of the award is a curious choice of words. It was never the plaintiff’s case in the arbitration that the IP23 rating of the generators rendered the vessel “obsolete”, *ie* out of date. In the paragraphs immediately before [255], however, the tribunal expounds on the well-known classification of contractual terms into conditions, warranties and

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<sup>135</sup> Plaintiff’s affidavit at p 296, Award at para 250.

<sup>136</sup> Plaintiff’s affidavit at p 297, Award at para 255 read with p 296, Award at para 252.

<sup>137</sup> Plaintiff’s affidavit at p 297, Award at para 256.

<sup>138</sup> Plaintiff’s affidavit at p 297, Award at para 257.

innominate terms and the consequences of that classification. In that context, therefore, I read the tribunal's finding at [255] of the award generously as a finding that the plaintiff had failed to prove that any of the defects in the vessel rendered it so completely useless as to amount to a repudiatory breach of the Contract. But it was never the plaintiff's case in the arbitration that the defendants had committed a *repudiatory* breach of the Contract.

124 At [260]–[261] of the award, the tribunal concluded its analysis by formally dismissing both of the plaintiff's claims. The tribunal found, further, that the dismissal of the plaintiff's claims made it unnecessary to consider whether the defendants were entitled to an extension of time to deliver the vessel:<sup>139</sup>

260. ... The way in which Article 8 of SA2 has been drafted means that if the [vessel] passes the test at the time of inspection conducted by the [plaintiff], it would be deemed to have passed the test even if there were minor defects or deficiencies. In the premises, the Tribunal dismisses each and all of the [plaintiff's] heads of claims, which include:

- a. The sum of United States Dollars Three Million Six Hundred Fifty Thousand (USD 3,650,000.00) being Liquidated Damages arising from the [defendants] failure to deliver the Vessel within the stipulated date(s) accordance with the terms and conditions of the ... Contract;
- b. The sum of United States Dollars Two Million (USD 2,000,000.00) being damages arising from the [defendants'] breach of their obligations to provide, build, fabricate, construct, equip, complete, test, commission, sell and/or deliver to the Claimant the Vessel in accordance to the Specifications in accordance with Article 3 of [SA2] of the ... Contract;
- c. Interest as applicable.

261. Having decided against the [plaintiff] on each separate section of the [plaintiff's] heads of claims, the Tribunal concludes that the [plaintiff] is not entitled to liquidated

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<sup>139</sup> Plaintiff's affidavit at p 299, Award at paras 260–261.

damages. In the premises, the Tribunal does not need to deal with the issue of extension of time. The Tribunal therefore dismisses the [plaintiff's] claims for USD 3,650,000 for liquidated damages, and USD 2,000,000 for damages arising from alleged breach of the [defendants'] obligations to provide, build, fabricate and construct etc. the Vessel.

***The tribunal's reasoning on the counterclaim***

125 The tribunal then turns, in the last subsection of Section G, to consider the defendants' counterclaim. In dismissing the defendants' counterclaim,<sup>140</sup> in so far as it is relevant for present purposes, the tribunal made the following findings:

- (a) At [282] of the award, the tribunal found that the defendants had indeed delayed in delivering the vessel under the Contract.<sup>141</sup>
- (b) At [295] of the award, the tribunal held that SA4 did not extend either the Delivery Date or the Celling Date.<sup>142</sup>
- (c) At [301]–[303] of the award, the tribunal held that the defendants were not entitled to rely on Permissible Delay because they had failed to comply with the contractual conditions precedent for invoking that provision.<sup>143</sup>

126 The plaintiff argues, with considerable force, that these findings on the counterclaim are completely irreconcilable with the tribunal's decision to dismiss the delay claim.

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<sup>140</sup> Plaintiff's affidavit at pp 299–314, Award at paras 262–308.

<sup>141</sup> Plaintiff's affidavit at p 313, Award at para 282.

<sup>142</sup> Plaintiff's affidavit at p 311, Award at para 295.

<sup>143</sup> Plaintiff's affidavit at p 313, Award at paras 302–303.

**Tribunal's assertion that it considered all the submissions**

127 The defendants submit, on both the delay claim and the IP44 claim, that the tribunal did in fact apply its mind to the essential issues arising from the parties' arguments.<sup>144</sup> For this submission, the defendants rely on [126] of the award:<sup>145</sup>

126. Both Parties served voluminous submissions and documents. The Tribunal has considered in detail such documents and submissions. Any omission to specifically mention any of the arguments advanced by the Parties or any submission, document or correspondence does not suggest that these have not been considered.

128 I do not accept that a general and self-serving paragraph of this nature can operate, in itself, to immunise an award against an allegation that the tribunal has breached the fair hearing rule. Whether a tribunal has breached the fair hearing rule is a matter of substance, not form. When a court has to assess whether an alleged breach of the fair hearing rule has substance, the law already requires the court to observe the doctrine of minimal curial intervention and to give the tribunal the benefit of a generous reading of the award. The law does not go so far as to allow a self-serving, boilerplate paragraph such as this to conclude the assessment in the tribunal's favour.

129 I therefore give this paragraph no weight in my analysis of the plaintiff's challenge. I begin the analysis with the alleged breach of the fair hearing rule in the tribunal's decision to dismiss the delay claim.

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<sup>144</sup> Defendants' submissions at pp 31–32, para 69.

<sup>145</sup> Plaintiff's affidavit at p 265, Award at para 126.



## The delay claim

### *The plaintiff's case*

130 The plaintiff's case on the delay claim is that the tribunal committed six breaches of natural justice in dismissing this claim:

- (a) The tribunal did not determine any of the defences raised by the defendants when it dismissed the delay claim.<sup>146</sup>
- (b) The tribunal did not determine any of the issues referred to it for determination.<sup>147</sup>
- (c) The tribunal decided issues that were not contemplated or submitted to it by the parties.<sup>148</sup>
- (d) There is no nexus between the chain of reasoning which the tribunal adopted and the cases which the parties advanced.<sup>149</sup>
- (e) The tribunal had regard to the parties' pleaded case and submissions in the most superficial sense and failed to direct its judicial mind to the merits of the arguments.<sup>150</sup>
- (f) The tribunal adopted a view which is wholly at odds with the established evidence.<sup>151</sup>

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<sup>146</sup> Plaintiff's submissions at p 21.

<sup>147</sup> Plaintiff's submissions at p 25.

<sup>148</sup> Plaintiff's submissions at p 29.

<sup>149</sup> Plaintiff's submissions at p 39.

<sup>150</sup> Plaintiff's submissions at p 45.

<sup>151</sup> Plaintiff's submissions at p 53.

131 I confine my analysis on the delay claim to the plaintiff's allegations that: (i) there is no nexus between the tribunal's chain of reasoning and the parties' cases on the delay claim (the fourth alleged breach of natural justice); and (ii) the tribunal failed to apply its mind to the parties' arguments (the second part of the fifth alleged breach of natural justice). In my view, it is these alleged breaches which most accurately capture the gist of the plaintiff's complaint on the delay claim. This is also how the defendants perceive the plaintiff's case.<sup>152</sup> I consider that the first, second and third alleged breaches add nothing to the plaintiff's case on the fourth alleged breach and the second part of the fifth alleged breach. And I accept the defendants' submission that the first part of the fifth alleged breach and the sixth alleged breach amount to an impermissible attempt to seek a review of the award on the merits.<sup>153</sup>

132 The plaintiff submits that the tribunal dismissed the delay claim on the basis of four findings, none of which have any nexus to the cases which the parties advanced in the arbitration:<sup>154</sup>

- (a) The vessel was not ready for delivery to the plaintiff and the End-Buyer when the ModuSpec inspection took place (see [112] above).<sup>155</sup>
- (b) The defendants conducted a successful Acceptance Test of the vessel within the meaning of Art 7 of the Contract in December 2014 (see [116] above).<sup>156</sup>

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<sup>152</sup> Defendants' submissions at p 31, para 68.

<sup>153</sup> Defendants' submissions at p 39, para 81.

<sup>154</sup> Plaintiff's submissions at pp 12–13, para 1.7

<sup>155</sup> Plaintiff's affidavit at pp 284–285, Award at paras 202–209.

<sup>156</sup> Plaintiff's affidavit at pp 289–290, Award at paras 224–228.

(c) The defendants were not obliged to deliver to the plaintiff a fully completed vessel; it sufficed if the defendants delivered a vessel which was substantially complete (see [124] above).<sup>157</sup>

(d) The plaintiff wrongfully prevented the defendants from obtaining a class certificate for the vessel (see [118]–[119] above).<sup>158</sup>

133 The plaintiff submits that the first three of these findings have no conceivable nexus to the defendants’ case on the delay claim. The plaintiff accepts that the fourth finding could be said to have *some* conceivable nexus to the defendants’ case, because it is arguably a finding connected to the prevention principle (see [96(c)] above). But the plaintiff submits that the tribunal failed to apply its mind to the essential issue of causation in its analysis of the parties’ arguments on the prevention principle.

### ***The defendants’ case***

134 The defendants’ case is that a generous reading of the award shows that the tribunal’s chain of reasoning on the delay claim does have a nexus to the prevention principle. The tribunal found that the plaintiff had withheld from the defendants information pertaining to the vessel’s registration and the OFE, and held that the plaintiff had thereby “wrongfully” prevented the defendants from obtaining a class certificate (see [118]–[119] above). Therefore, the tribunal must have applied its mind to and accepted that the defendants had established their case on the prevention principle.<sup>159</sup>

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<sup>157</sup> Plaintiff’s affidavit at pp 298–299, Award at paras 258–260.

<sup>158</sup> Plaintiff’s affidavit at pp 291–293, Award at paras 235–241.

<sup>159</sup> Defendants’ submission at pp 34–35, paras 75–76.

***The breach of the fair hearing rule****The defendants rely only on the prevention principle*

135 The defendants' case on the delay claim is that the tribunal's chain of reasoning has a nexus to the prevention principle. The defendants do not suggest that the tribunal's chain of reasoning has any nexus to any other of the defendants' defences. The defendants therefore concede by implication that the tribunal's chain of reasoning on the delay claim has no nexus to any of the defendants' other defences.

136 The defendants' case is understandable, constrained as it is by the terms of the award. There is no sign at all in the award that the tribunal adopted as part of its chain of reasoning on the delay claim any aspect of the defendants' other six defences. Thus, there is no mention in the award whatsoever of the sixth defence (penalty clause, see [96(f)] above) or the seventh defence (waiver, see [96(g)] above). Further, as the plaintiff points out, the tribunal's categorical and definitive findings in dismissing the counterclaim (see [125] above) are wholly irreconcilable with the tribunal adopting any aspect of the defendants' three other defences as part of its chain of reasoning. First, the tribunal found on the counterclaim that the defendants were in breach of the Contract for delivering the vessel late.<sup>160</sup> That finding amounts to a rejection of the first defence (no breach, see [96(a)] above). Second, the tribunal found that the defendants had failed to invoke the Permissible Delay provisions of SA4.<sup>161</sup> That finding amounts to a rejection of the second defence (extension of time, see [96(b)] above). Finally, the tribunal found that SA4 did not operate contractually to

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<sup>160</sup> Plaintiff's affidavit at p 307, Award at para 282.

<sup>161</sup> Plaintiff's affidavit at p 313, Award at paras 302–303.

extend either the Delivery Date or the Cancelling Date.<sup>162</sup> That finding amounts to a rejection of the fourth and fifth defences (Cancelling Date had moved contractually, see [96(d)] and [96(e)] above).

*The prevention principle*

137 To succeed in this application, therefore, the plaintiff need only show that the tribunal breached the fair hearing rule in adopting the prevention principle as an issue in its chain of reasoning on the delay claim.

138 In their opening statement in the arbitration, the defendants framed their case on the prevention principle as follows:<sup>163</sup>

102. In this regard, the law relating to the prevention principle has been pithily summarised very recently by the leading judgment of Jackson LJ in the English Court of Appeal in the following terms:

"If (a) an employer delays a contractor ... and (b) there is no mechanism for extending the time allowed for completion of that contractor's ... work, then time becomes at large. The contractor or sub-contractor is no longer required to complete by a specified date or within the contractually specified period. There is, ordinarily, substituted an obligation to complete within a reasonable time." (*Carillion Construction Ltd v. Woods Bagot Europe Ltd* (2017) 170 ConLR 1 at [54]).

139 On the defendants' own case, therefore, adopting the prevention principle as part of its chain of reasoning required the tribunal to ask itself three questions: (i) did the plaintiff commit an act of prevention as alleged (see [96(c)] above); (ii) if so, is there a mechanism under the Contract (as varied by the supplemental agreements) for the defendants to claim an extension of time for delivery of the vessel arising from that act of prevention; (c) if not, did that act

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<sup>162</sup> Plaintiff's affidavit at p 311, Award at para 295.

<sup>163</sup> Defendants' affidavit at p 1307, para 102.

of prevention *cause*, even in part, the defendants' failure to deliver the vessel by 30 April 2015. In other words, the tribunal had to find that the defendants had established an act of prevention by the plaintiff for which the defendants were not entitled to seek an extension of time and which *caused* the defendants' failure to deliver the vessel by 30 April 2015.

140 The plaintiff contested the causation point in its written closing submissions and reply submissions in the arbitration.<sup>164</sup> The case which the plaintiff advanced was that, even if the plaintiff had committed acts of prevention, the defendants had failed to prove that any of those acts lay on the defendants' critical path to delivering the vessel by 30 June 2015.<sup>165</sup> Thus, it was part of the plaintiff's case in response to the defendants' reliance on the prevention principle that none of these following alleged acts of prevention caused any part of the defendants' delay in delivering the vessel: (i) the late provision of vessel registration documents;<sup>166</sup> (ii) the late ABS certification;<sup>167</sup> and (iii) the late ModuSpec inspection.<sup>168</sup> On that basis, the plaintiff's case was that the defendants were indeed liable to pay liquidated damages for delay.

141 Of the three questions which the defendants' defence raised (see [139] above), the tribunal found expressly on the first question that the plaintiff had "wrongfully"<sup>169</sup> prevented the defendants from obtaining a class certificate for

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<sup>164</sup> Plaintiff's affidavit at pp 1675–1699, paras 89–148, at pp 1784–1788, 1938, 2006 and 2037–2039.

<sup>165</sup> Plaintiff's affidavit at pp 1675–1676, paras 90–91, at p 1766, para 371, and at pp 1784–1788, 1938, 2006 and 2037–2039.

<sup>166</sup> Plaintiff's affidavit at pp 1684–1687, paras 107–119.

<sup>167</sup> Plaintiff's affidavit at pp 1687–1698, paras 120–144.

<sup>168</sup> Plaintiff's affidavit at pp 1698–1699, paras 145–148.

<sup>169</sup> Plaintiff's affidavit at p 293, Award at para 240.

the vessel (see [118] above). Of course, it is true as a matter of law that an act of prevention may be quite legitimate conduct and does not have to amount to a breach of contract (*Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 at 607). Nevertheless, I read the award generously and accept the defendants' submission that this finding of "wrongful"

prevention is a finding that the plaintiff did commit at least one act of prevention.

142 There is no sign in the award that the tribunal considered the second question at all. But the plaintiff does not rely on this failure as a breach of natural justice. I therefore need not analyse it further.

143 On the third question, the tribunal summarised the defendants' reliance on the prevention principle thus at [158] of the award: "[The defendants] aver that the Vessel was not ready for delivery ... *due to* the [the plaintiff's] default ...". That summary of course has the plaintiff's causation point embedded in it, through the use of the words "due to". But the tribunal does not take the causation point any further than this implicit acknowledgement of its existence.

144 The defendants argue that the tribunal *did* apply its mind to the causation point<sup>170</sup> at [236]–[237] of the award:

236. The [defendants] have complained that:

*"The [plaintiff] also sought to put pressure on ABS to qualify its approval and to retest the Vessel. However, the Tribunal should note that from the completion of the Acceptance Test on 20 December 2014 up till the time the class certificate was issued on 2 July 2015, ABS did not carry out any other acceptance test or SIT for the Vessel. The [plaintiff] also withheld relevant vessel registration*

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<sup>170</sup> Defendants' submissions at para 80(1).

*information and OFE information from the [defendants] which had the effect of preventing the [defendants] from obtaining a class certificate.”*

237. The [plaintiff] counters this point by reminding the Tribunal that when one looks at the documents disclosed by the [defendants] alone, there were 44 discrete items that were outstanding works under the...Contract unaffected by the additional technical requirements under SA2. *The Tribunal has noted from the evidence that these uncompleted works were finally closed over a period from 13 April 2015 to 10 August 2015.*

[emphasis added]

145 The plaintiff submits that these paragraphs do not show that the tribunal identified and applied its mind to the causation point. I accept the plaintiff’s submission. On the plaintiff’s case in the arbitration, what triggered the defendants’ liability to pay liquidated damages was the defendants’ delivering the vessel after *both* the Delivery Date and the Cancelling Date had passed without any right to an extension of time. In these paragraphs, the tribunal finds as a fact that construction of the vessel was complete no earlier than 10 August 2015. This amounts to a finding that the vessel was ready for delivery only *on or after* 10 August 2015. That is a date *after* the Delivery Date *and* the Cancelling Date had *both* passed. Even on a generous reading, nowhere in these paragraphs does the tribunal apply its mind to whether the plaintiff’s acts of prevention *caused* the vessel to be ready for delivery only after the Delivery Date and the Cancelling Date had passed. There is no sign anywhere in the award that the tribunal identified, let alone applied its mind to, the third question, specifically, whether the plaintiff’s acts of prevention were on the critical path to achieving delivery by the Cancelling Date and thereby caused the defendants’ delay.



146 An essential issue arising from the parties' arguments on the prevention principle<sup>171</sup> was the plaintiff's case that the defendants had failed to adduce any evidence whatsoever of the critical path analysis necessary to establish the plaintiff's acts of prevention as the cause of the delay. The tribunal wholly failed to identify this essential evidential issue too, let alone to apply its mind to it.

147 The defendants do not point to any other paragraphs in the award as evidence that the tribunal identified the plaintiff's causation point or applied its mind to it. Indeed, when dealing with the defendants' counterclaim later in the award, the tribunal expressly rejected the application of the prevention principle. The defendants' counterclaim advanced all of its defences to the delay claim, including the prevention principle, by way of counterclaim. It was also part of the defendants' counterclaim, therefore, that the plaintiff's acts of prevention had set at large the time for the defendants to deliver the vessel.<sup>172</sup> As relief in the counterclaim, the defendants sought a series of declarations which were the mirror image of their defences to the delay claim. One of the declarations sought was a declaration that time for delivery under the Contract had been set at large. At [308] and [313] of the award, the tribunal dealt with the defendants' prayers for relief in its counterclaim. The tribunal expressly dismissed every single one of these prayers. This included, at [308(vi)(d)] and [313(f)] of the award, the defendants' prayer for a declaration that time had been set at large. As the tribunal said at [308]:<sup>173</sup>

(vi) Further, the Tribunal dismisses all of the additional declarations below that have been sought by the [defendants]:

<sup>171</sup> Plaintiff's affidavit at p 1686, para 114, at p 1687, para 119, at p 1688, para 122, at p 1697, para 143, at pp 1698–1699, para 146, at p 1766, para 371, and at pp 1784 and 2006.

<sup>172</sup> Plaintiff's affidavit at p 1327, para 46(2)(d), at p 1334, para 53(4), at p 1358, para 103, at p 1360, prayer (6)(d), at p 1553, para 81(3), and at p 1569, paras 119–120.

<sup>173</sup> Plaintiff's affidavit at p 315, Award at para 308(vi).

(a) *The Cancelling...Date was extended to 22 November 2015, or such other date as the Tribunal may determine, by virtue of the agreed extension of the Delivery Date to 21 September 2015; or alternatively*

(b) *Prior to the agreement of [SA4], the [defendants] were entitled to an extension of time to the Delivery Date to 15 July 2015 or alternatively mid August or such date to be determined by the Tribunal and a commensurate extension of time to the Cancellation Date to 15 September 2015, and that the Cancellation Date was therefore 15 September 2015 or later upon the agreement of [SA4]; or alternatively*

(c) *On a proper construction of [SA4], the Cancelling...Date was 23 September 2015; or alternatively*

(d) *Time under the [Contract] was at large.*

[Emphasis in italics in original. Emphasis in underline added.]

148 The tribunal's decision to dismiss the defendants' counterclaim in so far as it relied on the prevention principle is wholly inconsistent with the defendants' submission on the import of [236]–[237] of the award.

### **Conclusion**

149 In conclusion, I find that the chain of reasoning by which the tribunal arrived at its decision to dismiss the delay claim has no nexus to any of the defendants' defences. As the defendants implicitly concede, the only defence which could arguably have had a nexus to the tribunal's chain of reasoning was the prevention principle.<sup>174</sup> However, the tribunal denied the plaintiff natural justice in relying on this defence because it failed completely to identify for determination, let alone apply its mind to determine, an essential issue arising from the parties' arguments on this defence: the issue of causation.

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<sup>174</sup> Defendants' submissions at p 36, para 78.

150 I therefore find it an inescapable inference that the tribunal breached the fair hearing rule when it relied on the prevention principle to dismiss the plaintiff's delay claim.

151 I will deal with the third and fourth *John Holland* elements with respect to the delay claim after analysing the IP44 claim.

### **The IP44 claim**

#### ***The plaintiff's case***

152 The plaintiff's case on the IP44 claim is that the tribunal committed five breaches of natural justice in dismissing this claim:

- (a) The tribunal did not determine any of the defences raised by the defendants when dismissing the IP44 claim.<sup>175</sup>
- (b) The tribunal did not determine any of the issues advanced by the parties in the arbitration.<sup>176</sup>
- (c) The tribunal decided issues that were not contemplated or submitted to it by the parties.<sup>177</sup>
- (d) There is no nexus between the chain of reasoning which the tribunal adopted and the case which the parties advanced before the tribunal.<sup>178</sup>

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<sup>175</sup> Plaintiff's submissions at p 63.

<sup>176</sup> Plaintiff's submissions at p 65.

<sup>177</sup> Plaintiff's submissions at p 72.

<sup>178</sup> Plaintiff's submissions at p 75.

- (e) The tribunal adopted a view wholly at odds with the established evidence adduced by the parties.<sup>179</sup>

153 I confine my analysis to the plaintiff’s allegation that there is no nexus between the tribunal’s chain of reasoning and the parties’ cases on the IP44 claim, *ie* the fourth alleged breach of natural justice. In my view, it is this alleged breach which most accurately captures the gist of the plaintiff’s complaint about the tribunal’s failure to accord the plaintiff natural justice in dismissing the IP44 claim. I consider that the first, second and third alleged breaches add nothing to the plaintiff’s case on the fourth alleged breach. And I accept the defendants’ submission that the fifth alleged breach amounts to an impermissible attempt to seek a review of the award on the merits.<sup>180</sup>

154 The plaintiff submits that the tribunal dismissed the IP44 claim on the basis of three findings, none of which have any nexus to either party’s cases on that claim:<sup>181</sup>

- (a) The defendants were responsible for helping the plaintiff deal with the technical aspects of selling the vessel to the End-Buyer through the End-Buyer’s tender exercise (see [113] above).<sup>182</sup>
- (b) The plaintiff led the defendants “to believe that [generators rated] IP23 [were] satisfactory and fit for purpose” (see [221] of the Award cited at [114] above).<sup>183</sup>

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<sup>179</sup> Plaintiff’s submissions at p 76.

<sup>180</sup> Defendants’ submissions at pp 48–49, para 95.

<sup>181</sup> Plaintiff’s submissions at p 7, para 1.20.

<sup>182</sup> Plaintiff’s affidavit at pp 285–286, Award at paras 210–216.

<sup>183</sup> Plaintiff’s affidavit at pp 287–289, Award at paras 218–223.

(c) The fact that the vessel's generators were rated IP23 was a minor defect which did not render the vessel "completely obsolete" so as to amount to a repudiatory breach of the Contract (see [122]–[123] above).<sup>184</sup>

155 The plaintiff submits that the first and third findings (those at [154(a)] and [154(c)] above) have no conceivable nexus to the parties' cases on this claim. The only finding which could be said to have *some* conceivable nexus to the defendants' case on this claim is the second finding (at [154(b)]). That finding is arguably, on its face, a finding connected to estoppel, *ie* the defendants' second defence (see [99(b)] above). But the plaintiff submits that, in its chain of reasoning on the estoppel defence, the tribunal failed to apply its mind to an essential issue arising from the parties' arguments, *ie* whether the *plaintiff* made a representation to the defendants that generators rated IP23 were fit for the *End-Buyer's* purpose.

### ***The defendants' case***

156 The defendants' case is that a generous reading of the award shows that the tribunal's chain of reasoning in dismissing the IP44 claim has a nexus to the first and second defences which the defendants advanced in the arbitration to that claim (see [99(a)] and [99(b)] above). First, in finding that "there was no breach by the [the defendants] in supplying generators of IP23 rating" at [234] of the award (see [117] above), the majority must be taken to have accepted the defence that the Contract, even as varied by SA2, did not oblige the defendants to deliver the vessel with generators rated IP44.<sup>185</sup> Second, in finding that the defendants "were led to believe that [generators rated] IP23 [were] satisfactory

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<sup>184</sup> Plaintiff's affidavit at p 297, Award at paras 254–257.

<sup>185</sup> Defendants' submissions at p 52, para 98(2).

and fit for purpose” at [221] of the award (see [114] above), the majority must be taken to have considered and accepted the defendants’ defence that the plaintiff was estopped from insisting that the defendants were obliged to upgrade the vessel’s generators from IP23 to IP44 rating.<sup>186</sup>

***The breach of the fair hearing rule***

157 I now consider in turn each of the defendants’ three defences (see [99] above) to see if the tribunal’s chain of reasoning has any nexus to that defence.

***First defence: no breach of contract***

158 The first defence is that the defendants were not in breach of the Contract in delivering the vessel with generators rated IP23.<sup>187</sup>

159 The tribunal’s chain of reasoning has no nexus to the defendants’ first defence. I say that for two reasons. First, the majority expressly found at [223] of the award (see [115] above), when discussing the End-Buyer’s tender process, that the End-Buyer required the generators to be rated IP44. Second, the majority expressly found at [246] of the award that, because of the meetings with the End-Buyer in January 2015, “the Parties understood that the [vessel]’s generators had to be upgraded from IP 23 to IP 44”. These findings, taken together, amount to a finding that the defendants understood that they were under an obligation to upgrade (hence “... had to be upgraded ...”) the generators from IP23 to IP44 to meet the End-Buyer’s requirements. This can only mean that the tribunal rejected the first defence. That in turn excludes any

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<sup>186</sup> Defendants’ submissions at p 48, para 94.

<sup>187</sup> Defendants’ submissions at pp 51–52, para 98(1).

nexus between the tribunal's chain of reasoning in dismissing the IP44 claim and the first defence.

160 The defendants argue that the majority accepted the first defence at [234] of the award (see [117] above). In this paragraph, the majority found that “there was *no breach* by the [defendants] in supplying generators rated IP23, as the [plaintiff] ... confirmed that IP 23 was fit for purpose” [emphasis added]. The defendants’ case is that the tribunal’s use of the phrase “no breach” establishes a nexus to the defendants’ first defence.<sup>188</sup> That is because only the first defence turns on whether there is a breach of contract. The second defence is the defence of *estoppel*. Estoppel is a plea of confession and avoidance which assumes a breach but argues that the estoppel precludes the plaintiff from relying on the breach to secure a remedy. A finding of “no breach” cannot logically have a nexus to the defendants’ second defence.

161 I do not accept the defendants’ submission. I cannot give the phrase “no breach” in [234] a literal interpretation. Doing so would mean that the majority found *both* that the defendants understood that the vessel’s generators “had to be upgraded” from IP23 to IP44 to meet the End-Buyer’s requirements (at [223] and [246]) *and* that there was “no breach” by the defendants in delivering the vessel with generators rated only IP23 (at [234]). I must assume in the majority’s favour that they intended to deliver an award which was coherent and internally consistent. The only way to achieve that is to construe the words “no breach” at [234] liberally as meaning “no liability to the plaintiff” rather than literally as meaning “no breach of contract by the defendants”. This means that [234] of the award can have a nexus only to the second defence. A nexus to the first defence renders the award internally inconsistent and incoherent.

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<sup>188</sup> Defendants’ submissions at pp 51–52, para 98(1).

162 There are two other paragraphs in the award which I find have a nexus to the defendants’ second defence. First, at [223], the majority observed that the plaintiff’s “own witness evidence [stated] that IP23 rating was fit for purpose”. This is an observation not a finding. It is capable of having a nexus to the defendants’ first and second defences. But for the same reasons I have given in relation to [234], construing [223] as having a nexus to the first defence renders the award internally inconsistent and incoherent. To avoid that outcome, I must again construe [223] as having a nexus to the defendants’ second defence rather than to the first defence.

163 Second, at [245], the majority claimed to reiterate a finding (albeit one not found elsewhere in the award following the correction, see [175]–[184] below) that the plaintiff “was content with” generators rated IP23. Once again, to render the award internally consistent and coherent, I must construe this paragraph such that it has a nexus to the defendants’ second defence rather than to their first defence.

164 I therefore analyse these two paragraphs ([223] and [245]) when I come to the second defence.

*Second defence: estoppel*

165 The second defence is that the plaintiff is precluded by an estoppel from insisting that the defendants comply with any obligation to deliver the vessel with generators rated IP44 instead of IP23. The defendants’ case on estoppel shifted somewhat over the course of the arbitration, both as to the species of estoppel relied upon as well as the substance of the estoppel.

166 The statement of defence does not plead a specific species of estoppel. It simply pleads that the plaintiff asked the defendants not to raise the issue of



the generators' IP rating during the meeting with the End-Buyer in January 2015 and that the plaintiff is therefore estopped (it is not explained how) from complaining about the IP rating of the generators.<sup>189</sup> The statement of defence also pleads that the plaintiff led the defendants to believe that the End-Buyer was prepared to accept generators rated IP23 if that was acceptable to the ABS.<sup>190</sup> The defendants do not, however, plead that this gave rise to an estoppel, let alone specify the species of estoppel it gave rise to.

167 The defendants' opening statement made no reference to estoppel whatsoever. It advanced only the first defence, asserting that delivering the vessel with generators rated IP23 was not a breach of the Contract.<sup>191</sup>

168 The defendants' case in their closing submissions was that the species of estoppel they were relying on was a promissory estoppel. Accordingly, the defendants submitted to the tribunal that they had to prove three elements to succeed on the second defence:<sup>192</sup>

- (a) That the plaintiff made a clear and unequivocal promise to the defendants, whether by words or by conduct, that the plaintiff would not insist on its strict legal right to have the generators upgraded to IP44.
- (b) That the defendants relied on the plaintiff's promise.
- (c) That the defendants suffered detriment by relying on the plaintiff's promise.

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<sup>189</sup> Plaintiff's affidavit at pp 1312–1313, para 14 and pp 1335–1336, para 55(2).

<sup>190</sup> Plaintiff's affidavit at p 1336, para 55(3).

<sup>191</sup> Defendants' affidavit at pp 1320–1325.

<sup>192</sup> Plaintiff's affidavit at p 1585, para 165.

169 The defendants' submissions as to the substance of the estoppel were as follows:

(a) The plaintiff led the defendants to believe that both the plaintiff and the End-Buyer would accept generators rated IP23 provided that this was acceptable to the ABS.<sup>193</sup> Further, the plaintiff expressly asked the defendants not to raise the IP rating of the vessel's generators with the End-Buyer at a meeting in January 2015 so as not to jeopardise the plaintiff's negotiations to sell the vessel on to the End-Buyer. The plaintiff made this request "on the basis that the [plaintiff] would not insist on the generators being upgraded to IP44 given that the [defendants] had already informed the [plaintiff] that such an upgrade was neither practical nor realistic".<sup>194</sup>

(b) The defendants relied on the plaintiff's representation by duly not raising the issue of the generators' IP rating with the End-Buyer, as a result of which the plaintiff succeeded in on-selling the vessel to the End-Buyer.<sup>195</sup>

(c) The defendants suffered a detriment in that they lost the opportunity to earn additional revenue from upgrading the vessel's generators from IP23 to IP44 rating.<sup>196</sup>

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<sup>193</sup> Defendants' submissions at pp 46–47, para 91; Plaintiff's affidavit at pp 1312–1313, para 14 and p 1522, para 21(4).

<sup>194</sup> Plaintiff's affidavit at pp 1528–1529, para 40 and p 1586, para 166(1).

<sup>195</sup> Plaintiff's affidavit at p 1586, para 166(2).

<sup>196</sup> Plaintiff's affidavit at p 1586, para 166(3).

As a result, the defendants submitted, the plaintiff was permanently precluded from enforcing its strict contractual right to have the plaintiff deliver the vessel with generators rated IP44.<sup>197</sup>

170 The plaintiff took issue in the arbitration with two elements of this defence. First, the plaintiff submitted that the defendants had failed to prove that the plaintiff made any representation of any sort at any time to the defendants about the IP rating of the generators.<sup>198</sup> Second, the plaintiff submitted that the defendants had failed to prove that the actual generators rated IP23 which the defendants had installed on the vessel were in fact accepted by the ABS.<sup>199</sup>

171 The tribunal's chain of reasoning in the award has no nexus to the defendants' second defence. To explain my reasons for this conclusion, it is necessary to: (i) revisit [220] to [246] of the award and the tribunal's original chain of reasoning there, and (ii) examine the effect which the tribunal's corrections had on that original chain of reasoning.

(1) The tribunal's original chain of reasoning

172 The tribunal's original chain of reasoning rested entirely on an email from Mr Tan in December 2014 (see [114] above). Mr Tan's email enclosed supporting documents to show that generators rated IP23 were "fit for purpose". At [220] of the award, the tribunal refers to this email and identifies Mr Tan as

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<sup>197</sup> Plaintiff's affidavit at p 1529, para 40, at p 1585, para 164 and at p 1586, para 167.

<sup>198</sup> Plaintiff's affidavit at p 1731, para 268, at p 1827, para 59(4), at p 2051, para 401 and p 2057, para 414.

<sup>199</sup> Plaintiff's affidavit at pp 1731–1734, para 269–278 and p 1472.

a representative of the plaintiff. On the basis of that identification, the majority attributes the supporting documents attached to Mr Tan's email to the plaintiff.

173 The tribunal held that these supporting documents, having been sent by the plaintiff's representative to the defendants contemporaneously, *ie* in December 2014, sufficed in themselves to prove that generators rated IP23 were fit for the plaintiff's purpose (at [220]–[221] of the award, see [114] above). Relying on these documents, the tribunal concluded that the plaintiff had indeed led the defendants to believe that generators rated IP23 were both adequate in a general sense to meet the ABS's requirements for a vessel of this class and fit in a specific sense for the plaintiff's particular purpose in accordance with the Contract.<sup>200</sup>

174 The tribunal held, further, that these supporting documents – emanating as they did from the plaintiff itself and emanating contemporaneously in December 2014 – rendered all the following issues academic for the following reasons:

(a) Whether generators rated IP23 are not fit for the plaintiff's purpose despite being adequate for a vessel of this class “is neither here nor there since the [plaintiff] has already stated *in its own contemporaneous documents* that IP23 was fit for its purpose” (at [221]–[222] of the award, see [114] above).

(b) Whether: (i) generators rated IP23 are fit for the End-Buyer's purpose; (ii) the defendants were obliged to upgrade the generators from IP23 to IP44; and (iii) this is why the plaintiff agreed to pay an additional US\$10.46m to the defendants under SA2 are all rendered academic “in

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<sup>200</sup> Plaintiff's affidavit at p 288, Award at paras 220–222.

the light of the [plaintiff's] own witness evidence stating that IP23 rating was fit for purpose" (at [223] of the award see [115] above).

(c) Whether the plaintiff had rejected delivery of the vessel late is "neither here nor there since "the [plaintiff] itself had ... confirmed that IP 23 was fit for purpose ...". Therefore, the defendants were not in breach of the Contract by supplying generators rated IP23 (at [234] of the award (see [117] above).

(d) It was immaterial that both the plaintiff and the defendants understood that the vessel's generators had to be upgraded from IP 23 to IP 44 because "the [plaintiff] had confirmed that IP23 grade was fit for its purpose" (at [246] of the award, see [120] above).

(2) The tribunal misidentified Mr Tan

175 There is one difficulty with the majority's original chain of reasoning. It is based on an entirely false premise. It is undisputed that Mr Tan was in fact a member of the defendants' staff,<sup>201</sup> not the plaintiff's. The tribunal was therefore undisputedly and indisputably in error in attributing his supporting documents to the plaintiff at [220] of the award.<sup>202</sup> The dissenting arbitrator relied on the majority's error in this paragraph as one of his reasons for his decision to dissent on the IP44 claim.<sup>203</sup>

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<sup>201</sup> Plaintiff's affidavit at pp 1223–1224, para 45 and p 1198, Respondent's comments on para 220.

<sup>202</sup> Plaintiff's affidavit at p 1188, para 40; p 1198 referring to Award at [220].

<sup>203</sup> Plaintiff's affidavit at p 1177, Award (dissenting opinion), para 3(e).

176 The majority’s error is inexplicable. Mr Tan is mentioned by name only in two paragraphs of the award: [219] and [220]. At [219(d)],<sup>204</sup> just a few lines above [220], the majority correctly identifies Mr Tan as a representative of the ship builders, *ie the defendants*. No doubt [219(a)] to [219(d)] do not originate from the tribunal. It is a verbatim reproduction of paragraphs 20(1) to 20(4) of the defendants’ closing submissions.<sup>205</sup> The majority’s error is inexplicable because I must assume in the majority’s favour that they applied their mind to these submissions rather than simply cutting and pasting them unthinkingly into the award.

177 It is necessary at this point to say a few words about Mr Tan and his role in the arbitration.

(3) Mr Tan’s role in the arbitration

178 Mr Tan did not give evidence for either party in the arbitration.<sup>206</sup> But in December 2014, in the course of the parties’ discussions (see [64] above), Mr Tan sent an email to the plaintiff on behalf of the *defendants*. In the email, he asserted that generators rated IP23 were fit for purpose. He attached to his email certain documents said to support his assertion. These supporting documents originated from the ABS and from the manufacturer of the generators. One of the documents originating from the manufacturer describes the results of water tightness tests conducted on the generators in 1998 (hence the reference to “tests that had been carried out in 1998” at [221] of the award (see [114] above)). The defendants relied expressly on this email in their defence.<sup>207</sup>

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<sup>204</sup> Plaintiff’s affidavit at p 288.

<sup>205</sup> Plaintiff’s affidavit at p 1520–1521, paras 20(1)–20(4).

<sup>206</sup> Plaintiff’s affidavit at p 1188, para 40.

<sup>207</sup> Plaintiff’s affidavit at p 1313, Statement of Defence at para 15.

179 Mr Tan featured in the arbitration only because counsel for the defendants put Mr Tan's December 2014 email and the supporting documents attached to it to the plaintiff's witness, whom I shall refer to as Mr Chan, in cross-examination. Mr Chan is the plaintiff's project manager and was its principal witness in the arbitration.<sup>208</sup> The defendants' counsel cross-examined Mr Chan to attempt to establish (amongst other things) that generators rated IP23 were fit for the plaintiff's purpose.<sup>209</sup>

180 Given that Mr Tan was in fact a member of the *defendants'* staff,<sup>210</sup> and leaving aside any issue as to the admissibility of hearsay evidence in arbitration, the majority ought to have approached the issue of whether generators rated IP23 were fit for purpose as a contested issue requiring a reasoned analysis of both parties' oral and documentary evidence. Instead, the tribunal relied in error on Mr Tan's supporting documents as an *admission* by the plaintiff – and an admission which the plaintiff had made *contemporaneously* in December 2014 – that generators rated IP23 were fit for the plaintiff's purpose.

(4) The plaintiff's request for correction

181 One of the plaintiff's 18 requests for correction under Art 33(1)(a) of the Model Law<sup>211</sup> (see [8] above) sought a correction to [220] of the award to identify Mr Tan as the defendants' representative rather than the plaintiff's. The plaintiff also invited the tribunal to make consequential corrections to [221], [223], [234] and [246] of the award<sup>212</sup> (see [114], [115], [117] and [120] above).

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<sup>208</sup> Plaintiff's affidavit at p 3, para 1.1.

<sup>209</sup> Plaintiff's affidavit at p 1226, Addendum at para 53.

<sup>210</sup> Plaintiff's affidavit at pp 1223–1224, para 45.

<sup>211</sup> Plaintiff's affidavit at p 1187, paras 32–34.

<sup>212</sup> Plaintiff's affidavit at p 1188, para 37, at p 1188, para 41 and p 1189, paras 44–47.

These are the paragraphs in which the majority relied on Mr Tan's supporting documents to sweep away as being immaterial all of the issues arising from the parties' respective cases on the IP44 claim (see [174] above).

182 The defendants accepted that the tribunal ought to correct [220] of the award in order to identify Mr Tan as a representative of the defendants.<sup>213</sup> But the defendants opposed any consequential corrections to [221], [223], [234] and [246] of the award.

183 The tribunal accepted that the majority was wrong to have identified Mr Tan as the plaintiff's representative at [220] of the award. The tribunal's addendum therefore corrected its error at [220] as follows (with deletions and insertions indicated by strikethrough and underlining respectively):<sup>214</sup>

220. The Tribunal has noted that the ~~{the plaintiffs}~~ [the defendants] Mr Tan provided supporting documents to show that IP23 was fit for purpose. ~~It is hard for the Tribunal to disregard what the Claimant itself had stated, particular in contemporaneous documents. In the premises, there is no need for any party to expressly demonstrate that the rating of IP23 is adequate or sufficient.~~

184 The tribunal characterised all of its corrections to [220] as correcting a "clerical error or error of similar nature arising from an accidental slip".<sup>215</sup> I have difficulty in accepting that that was what this correction amounted to. It is clear to me that the finding that Mr Tan's supporting documents were attributable to the plaintiff was not a clerical error but reflected accurately what the tribunal intended to find, albeit on an erroneous factual basis. Certainly, the tribunal's decision to delete the last two sentences of [220] cannot on any view be the

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<sup>213</sup> Plaintiff's affidavit at p 1198, Respondent's comments on para 220.

<sup>214</sup> Plaintiff's affidavit at pp 1223–1224, Addendum at paras 45–47.

<sup>215</sup> Plaintiff's affidavit at p 1223, Addendum at para 45.



correction of a mere “clerical error”. Those two sentences express why the tribunal felt justified in according almost dispositive weight to what it had mistakenly found to be a clear and contemporaneous admission by the plaintiff on a contested issue of fact.

185 The tribunal rejected the plaintiff’s request for consequential corrections to [221], [223], [234] and [246] of the award. The reason given by the tribunal was that: (i) any correction to these paragraphs were outside the scope of Art 33(1)(a) of the Model Law and Art 29 of the SIAC Rules; and (ii) the tribunal’s findings in these paragraphs were in any event not premised on [220] but on other evidence in the arbitration.<sup>216</sup> For what it is worth, I consider the tribunal to have correctly rejected the plaintiff’s requests to correct these paragraphs. The alleged errors identified by the plaintiff in these paragraphs were not, on any view, mere computational, typographical or clerical errors within the meaning of Art 33(1)(a) of the Model Law. But I also consider that the tribunal ought to have rejected, on the same grounds, the plaintiff’s request to correct [220].

(5) The effect of the correction

186 Be that as it may, the tribunal’s correction to [220] meant that that paragraph now identifies Mr Tan correctly as the defendants’ representative. But the tribunal also “corrected” [220] by deleting the last two sentences of that paragraph. The purpose of those sentences was to establish that the majority was relying on Mr Tan’s supporting documents as amounting to a clear and

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<sup>216</sup> Plaintiff’s affidavit at p 1224–1226, Addendum at paras 50–54.

contemporaneous admission by the plaintiff that generators rated IP23 were fit for purpose.

187 It is important that the majority cited no evidential basis for its primary finding against the plaintiff at [220] of the award other than the misattribution of Mr Tan's supporting documents to the plaintiff. So too, the majority cited no evidential basis in its award for its secondary findings that evidence emanating from or attributable to the plaintiff rendered academic all of the issues listed at [174] above.

188 A reasonable reading of the award as it stood *before* correction, and affording the majority the generosity to which it is entitled, leads directly to the conclusion that: (i) the majority's basis for the finding in the last two sentences of [220] of the award was – and was only – Mr Tan's supporting documents which the majority erroneously attributed to the plaintiff; and (b) the majority's basis for sweeping away all of the issues listed at [174] above was – and was only – the majority's finding at [220] that Mr Tan's supporting documents amounted to a clear and contemporaneous admission attributable to the plaintiff, requiring no further analysis of the evidence.

189 The tribunal's correction to [220] of the award therefore poses a fundamental problem. If the tribunal had left [220] as it was, the plaintiff's setting aside application in relation to the IP44 claim would necessarily have failed. I would have had to give the award a generous reading and would have read the majority's finding at [220] as amounting to a finding that the *plaintiff* had indeed made a representation to the *defendants* through the supporting documents that generators rated IP23 were fit for its purpose. That would have sufficed to establish a nexus between the majority's chain of reasoning on the IP44 claim and the defendants' promissory estoppel defence. Further, the last

two sentences of [220] would have established a nexus between the plaintiff's (misattributed) representation in the uncorrected [220] and the majority's chain of reasoning in arriving at the findings in the paragraphs which follow [220] of the award, and which I have listed at [174] above.

190 Rejecting the plaintiff's request to correct [220] would, of course, have left an egregious and fundamental error of fact patent on the face of the award. The effect of that error of fact would have been traceable through the majority's chain of reasoning to its ultimate decision to dismiss the IP44 claim. But, as the defendants correctly submit, a tribunal's error – no matter how fundamental, egregious or patent, and whether of fact or law – is no basis whatsoever on which to set aside an award.

191 But the award as presented to me contains [220] *subject to* the tribunal's corrections. The effect of the corrections is that [220] no longer has any nexus to the defendants' estoppel defence. There is nothing either in [220] or indeed anywhere else in the award which I can read, generously or otherwise, as a finding that the plaintiff made any representation of any sort to the defendants. There is also nothing which can be read even generously as a finding that the plaintiff represented to the defendants that generators rated IP23 were fit for any purpose at all, whether that is the plaintiff's purpose, the End-Buyer's purpose or the ABS's purpose. Further, deleting the last two sentences of [220] deleted with it any nexus between [220] and the majority's references to evidence attributed to the plaintiff in the paragraphs which followed:

- (a) "... the [plaintiff] has already stated in its own contemporaneous documents that IP23 was fit for its purpose ..." (at [221], see [114] above);

- (b) “... in the light of the [plaintiff’s] own witness evidence stating that IP23 rating was fit for purpose ...” (at [223], see [115] above);
- (c) “ ...the [plaintiff] itself had also confirmed that IP23 was fit for purpose ...” (at [234], see [117] above); and
- (d) “... the [plaintiff] had confirmed that IP23 grade was fit for its purpose.” (at [246], see [120] above).

192 In the addendum, the tribunal does not explain what evidence, if not Mr Tan’s supporting documents, it relied upon for its findings on the IP44 claim, and in particular for sweeping away as academic and unnecessary for decision the remainder of the parties’ cases at [221], [234] and [246].<sup>217</sup>

193 The tribunal does, however, attempt to cite other evidence as support for the finding at [223] (see [115] above). At [223], the majority held that it was unnecessary to determine whether the End-Buyer in fact required the generators to be rated IP44, claiming to rely on “the [plaintiff’s] own witness evidence”. The plaintiff invited the tribunal to correct this paragraph consequential to the correction to [220].<sup>218</sup> In the addendum, the tribunal held that there was no error at [223] to be corrected under Art 29.1 of the SIAC Rules. In any event, the tribunal noted that [223] referred to “witness evidence” rather than to “contemporaneous documents” as [220] and [221] did. The tribunal accepted the defendants’ submission opposing a correction that the “witness evidence” referred to in [223] was not a reference to Mr Tan’s “supporting documents” in [220] but to the evidence of the plaintiff’s witness Mr Chan.<sup>219</sup> When counsel

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<sup>217</sup> Plaintiff’s affidavit at p 1225, Award at para 51.

<sup>218</sup> Plaintiff’s affidavit at p 1188, para 41.

<sup>219</sup> Plaintiff’s affidavit at p 1226, Addendum at para 53.

for the defendants cross-examined Mr Chan on Mr Tan's email and the supporting documents attached to it, counsel for the defendants put to Mr Chan the specific proposition: "So you are saying IP23 standard is insufficient; am I correct?" Mr Chan's response was "I do not say that".<sup>220</sup> The position taken by the tribunal in the addendum is that *this* is the evidence of "the [plaintiff's] own witness" that the tribunal was referring to at [223] of the award.<sup>221</sup>

194 The tribunal's reference in the addendum to this this passage from the cross-examination of Mr Chan makes no difference to my analysis for two reasons.

195 First, nowhere in the original award does the tribunal make any reference to this evidence of Mr Chan. It was the defendants who identified this passage for the tribunal in their response to the plaintiff's request for a correction to [223].<sup>222</sup> In their response, the defendants gave this passage as just one example of "the [plaintiff's] own witness evidence stating that IP23 rating was fit for purpose". The tribunal adopted the defendants' submission and cited this passage as *the* witness evidence from the plaintiff that the tribunal was referring to in [223] of the award.<sup>223</sup> It is curious that the defendants should know what the tribunal had in mind in [223] of the award when the tribunal failed to make that manifest anywhere in the award.

196 Second, even if the tribunal's claim were correct, this would not change the fact that [223] has no nexus to the defendants' estoppel defence. Mr Chan's evidence under cross-examination has nothing to do with a representation of a

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<sup>220</sup> Plaintiff's affidavit at p 2266, line 25–p 2267, line 4.

<sup>221</sup> Plaintiff's affidavit at p 1225, Addendum at para 51.

<sup>222</sup> Plaintiff's affidavit at p 1199, Respondents' response on para 223.

<sup>223</sup> Plaintiff's affidavit at p 1225, Addendum at para 51.

promissory nature which the plaintiff made to the defendants in or about December 2014 and on which the defendants relied such that the plaintiff became permanently precluded from insisting that the defendants deliver the vessel with generators rated IP23. As such, [223] still would have no nexus to the defendants' estoppel defence.

(6) Fitness for whose purpose?

197 There is a further point which the plaintiff makes on the defendants' estoppel defence. What was in issue on this defence was the *End-Buyer's* purpose. The defendants' case was that the plaintiff led them to believe that generators rated IP23 were fit for *the End-Buyer's* purpose if generators rated IP23 were acceptable to the ABS. Fitness for the *plaintiff's* purpose ceased to be of any contractual importance as soon as the parties entered into SA2 and as soon as the defendants agreed to build the vessel from that point forward for the *End-Buyer's* purposes. The IP44 claim as the plaintiff framed it in the arbitration had nothing to do with fitness for *the plaintiff's* purpose. The issue which arose from SA2, and the essential issue on this defence, was whether generators rated IP23 were fit for the *End-Buyer's* purpose if generators rated IP23 met the regulatory requirements of the ABS.

198 The majority wholly failed to identify this issue in the award, let alone to apply their mind to it. This is despite the fact that the defendants relied on Mr Tan's email and the supporting documents attached to it when cross-examining Mr Chan to establish their case: (i) that generators rated IP23 complied with the regulatory requirements of the ABS; and (b) that they had conveyed this to the plaintiff contemporaneously, in December 2014.<sup>224</sup> Translated to the language

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<sup>224</sup> Defendants' submissions at p 47, para 92.

of estoppel in which the defendants framed this defence, the representation which the defendants alleged that the plaintiff had made and the representation which the majority applied its mind to are different in content and unrelated in substance.

*Third defence: The SA2 Minutes of Negotiations*

199 The defendants' third defence to the IP44 claim was that the general obligation in the SA2 Minutes of Negotiations superseded the specific obligation in the SA2 Technical Agreement and permitted the defendants to deliver the vessel with generators rated IP23.

200 As with the first defence, the defendants do not argue that the majority relied on the third defence to dismiss the IP44 claim. Once again, the defendants' case is constrained by the terms of the award. Simply put, the majority does not refer anywhere in the award to the SA2 Minutes of Negotiations.

*The Acceptance Test*

201 The defendants rely on the majority's finding that the plaintiff is precluded from raising any complaints about the IP rating of the generators because the vessel passed an Acceptance Test under the Contract in December 2014 (see [65] above).<sup>225</sup> Thus, the majority held at [228]:

... the Tribunal does not factually accept that the [defendants] failed in their acceptance test or the contractual acceptance test as set out under Section 16.7 of the Construction Specifications.

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<sup>225</sup> Defendants' submissions at pp 53–54, para 100.

202 I accept that this is a finding by the majority that the vessel passed an Acceptance Test under the Contract in December 2014. However, this finding has no nexus to the conclusion that the plaintiff is precluded from asserting that it is a breach of contract for the defendants to deliver the vessel with generators rated IP23 instead of IP44. The Acceptance Test was conducted pursuant to the provisions of the Contract. The Contract was entered into in November 2012 and catered for the requirements of the plaintiff, as the buyer of the vessel at that time. The IP44 claim has nothing to do with the plaintiff's requirement or the Contract. It arises under the SA2 Technical Agreement. That contractual document came into existence to cater for the End-Buyer's requirements.

203 Therefore, whether the vessel passed an Acceptance Test under the Contract in December 2014 has no nexus to the plaintiff's case that the defendants were in breach of SA2. More importantly, even on the defendants' own case, the successful Acceptance Test had the effect only of precluding the plaintiff from *refusing to accept formal delivery of the vessel*.<sup>226</sup> This is a distinct and unrelated issue from the issue of whether the plaintiff is precluded from asserting and recovering damages for a breach of SA2. The majority's finding that the vessel passed the Acceptance Test in December 2014 has no nexus to the cases which the parties advanced in the arbitration.

204 For the foregoing reasons, I find that the majority could not have rejected the IP44 claim on the basis that the vessel successfully passed the Acceptance Tests within the meaning of the Contract. In the alternative, if the majority *did* in fact reject the IP44 claim on the basis of this finding, that would amount to a breach of the fair hearing rule, as this finding has no nexus to the plaintiff's claim or to any defence which the defendants raised to that case.

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<sup>226</sup> Defendants' affidavit at p 2008.



### ***Conclusion***

205 I therefore find that the majority did not rely on a chain of reasoning with a nexus to the defendants’ defences on the IP44 claim in arriving at its decision to dismiss that claim.

### **The third *John Holland* element: connection to the award**

206 I have thus far found that the tribunal breached the fair hearing rule in dismissing both the delay claim and the IP44 claim. That does not suffice for the plaintiff to have the award set aside. The plaintiff must go on to establish the third and fourth *John Holland* elements (see [49] above).

207 The third *John Holland* element requires the plaintiff to show that the tribunal’s breach of the fair hearing rule “occurred in connection with the making of the award” within the meaning of s 24(b) of the Act. This requires the plaintiff to establish a causal connection between the breach of natural justice and the aspect of the award that the plaintiff is seeking to set aside. The defendants do not address this element separately in their written submissions.<sup>227</sup> Those submissions go straight from submitting that there was no breach of natural justice at all to submitting that even if there was a breach of natural justice, it did not cause any prejudice to the plaintiff.

208 There are only two possibilities as to the chain of reasoning by which the tribunal arrived at its decision to dismiss the delay claim and the IP44 claim: either that chain of reasoning adopted one of the defendants’ defences in the arbitration or it did not.

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<sup>227</sup> Defendants’ submissions at pp 43–44, paras 84–85.

209 The first possibility posits that the tribunal dismissed the delay claim for some reason *other than* the prevention principle and dismissed the IP44 claim for some reason *other than* the estoppel defence. If so, the connection between the breach of the fair hearing rule and the tribunal's dismissal of both claims is manifest. The breach of natural justice would leave the tribunal's chain of reasoning in dismissing each claim with no connection whatsoever to the defences which the defendants raised in the arbitration.

210 The second possibility posits that the tribunal dismissed the delay claim because it adopted the defendants' prevention principle defence in its chain of reasoning and dismissed the IP44 claim because it adopted the defendants' estoppel defence in its chain of reasoning. Yet, in relying on each defence, the tribunal failed to apply its mind at all to an essential issue arising from the parties' arguments: the causation issue on the prevention principle and the existence of a representation on the estoppel defence. The tribunal's breach of natural justice on each claim is causally connected to the making of the award.

#### **The fourth *John Holland* element: prejudice**

211 The fourth *John Holland* element requires the plaintiff to establish that the breach caused the plaintiff to suffer prejudice (*John Holland* at [18]). In order to satisfy this element, the plaintiff must show "actual or real prejudice" going beyond simply the fact that it was denied natural justice (see *Soh Beng Tee* at [86] and [91]). A breach of natural justice causes a party to suffer actual or real prejudice if complying with the rules of natural justice *could reasonably have* (not *would have*) made a difference to the outcome of the arbitration (see *LW Infrastructure Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [54]).

212 The fourth *John Holland* element is easily established in this case.

213 On both claims, if the tribunal had applied its mind to parties' cases and the essential issues arising from the parties' arguments on those cases, it certainly *could* have found in favour of the plaintiff on both the delay claim and the IP44 claim. The tribunal's breach of natural justice on both claims thus caused real prejudice to the plaintiff.

**The plaintiff's case under Art 34(2)(a)(iii)**

214 It is not necessary to analyse separately the plaintiff's case under Art 34(2)(a)(iii) of the Model Law. I say that for two reasons.

215 First, I have held that the plaintiff's application succeeds under s 24(b) of the Act. It is therefore unnecessary to consider whether it also succeeds under Art 34(2)(a)(iii) of the Model Law. On the plaintiff's case, these are alternative arguments leading to precisely the same result.

216 Second, the plaintiff's attack on the award under Art 34(2)(a)(iii) of the Model Law relies on the very same facts and raises the very same core concern as its attack on the award under s 24(b) of the Act. That core concern is whether the chain of reasoning by which the tribunal arrived at its decision to dismiss the plaintiff's claims had any nexus to the defendants' defences and whether the tribunal applied its mind to the essential issues arising from the parties' arguments. I consider that Art 34(2)(a)(iii) is not apt to address this core concern. The core concern addressed by Art 34(2) is that the award should deal with all of the disputes and matters which the parties submit to arbitration and with no others. Despite the deficiencies in the award which I have identified, I consider that it does in fact deal with all of the disputes and matters which the parties submitted to arbitration and with no others.

## Remission

217 The defendants submit that, even if I am satisfied that the plaintiff has established grounds for setting the award aside, I should suspend this setting aside application and remit the award to the tribunal pursuant to Art 34(4) of the Model Law in order to give the tribunal an opportunity to eliminate the grounds for setting aside.<sup>228</sup>

218 The power to remit an award is a discretionary power. It is an alternative to setting aside an award. This has two consequences. First, the power to remit cannot be exercised unless a plaintiff has succeeded in establishing grounds for setting aside an award. Second, the power to remit cannot be exercised after an award has in fact been set aside.

219 In addition to being a discretionary power, the power to remit an award is also a limited power. The principle of limited curial intervention militates against its exercise rather than in favour of it (see *AKN v ALC* [2016] 1 SLR 966 at [25]–[34]).

220 In considering whether to exercise the power to remit, the court must bear in mind: (i) the policy in favour of upholding finality in arbitration; and (ii) the policy in favour of vindicating the reasonable commercial expectations of parties to an arbitration. One of those expectations is that the successful party in an arbitration will not be denied the fruits of its success by reason of a curable defect in the award. But the opposing expectation is that an award which suffers from a fundamental procedural defect will be set aside.

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<sup>228</sup> Defendants' submissions at p 3, para 3.

221 I decline to remit the award. I have arrived at this conclusion for two reasons.

222 First, the tribunal's breaches of natural justice are fundamental and woven deeply into the analytical exercise which the tribunal undertook and reasoned in Section G of the award. This is not a case in which the tribunal breached natural justice in the procedural conduct of the arbitration, for example by declining to receive evidence. If that were the case, the grounds for setting aside would be susceptible to elimination simply by allowing the tribunal to receive the further evidence and consider its effect on its decision. This is a case in which the tribunal breached the fair hearing rule by adopting a defective chain of reasoning and by failing to apply its mind to essential issues arising from the parties' arguments. It failed to do so because it fundamentally misapprehended the parties' arguments on the defences. It is difficult to see how a ground for setting an award of this nature aside can be eliminated. Eliminating it would require the tribunal to undertake *de novo* its entire analytical task. To my mind, that goes beyond the purpose of remission.

223 Second, the purpose of remission, most importantly, is to afford the party who has established a ground for setting aside a genuine opportunity, after the tribunal has eliminated the grounds for setting aside, to persuade the tribunal to arrive at a different result. The purpose of remission is not to give the tribunal a further opportunity to formulate *ex post facto* rationalisations for its original decision.

224 In the addendum, the tribunal corrected the manifest factual error at [220] of the award. But it then sought to deny the obvious effect which that error had had on the majority's chain of reasoning in the paragraphs which followed. I accept the plaintiff's submission that this does not inspire confidence that

remitting the award will result in the plaintiff having a genuine opportunity to persuade the tribunal to arrive at a different result.<sup>229</sup> That militates against remission even in a case, such as this, where there is no allegation of apparent bias, let alone a finding of actual bias (see *Secretary of State for the Home Department v Raytheon Systems Ltd* [2015] 1 Lloyd's Rep 495 at [10]; *Lovell Partnerships (Northern) Ltd v AW Construction plc* (1997) 81 BLR 83 at p 99).

225 For these reasons, I do not consider that the tribunal's breach of natural justice in this case is a ground for setting aside which can be eliminated upon remission. I therefore decline to remit the award.

### Conclusion

226 In conclusion, I accept the plaintiff's submission that the tribunal reached its decision to dismiss the plaintiff's delay claims and IP44 claim in breach of the fair hearing rule. An analysis of the award and the chain of reasoning in it reveals that this is not a case in which the tribunal posed the correct questions to itself but, through error of fact or law, arrived at the wrong answers to those questions. This is a case in which the tribunal failed entirely to appreciate the correct questions it had to pose to itself, let alone apply its mind to determining those questions. It therefore rendered its award in breach of the fair hearing rule and in breach of natural justice.

227 I have therefore set aside the entirety of the award (as corrected by the addendum) in so far as it dismisses the plaintiff's claims in the arbitration.

228 The award continues to stand in so far as it dismisses the defendants' counterclaim.

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<sup>229</sup> Plaintiff's submissions at pp 90–94, paras 9.26–9.38.

Vinodh Coomaraswamy  
Judge of the High Court

Leonard Chia, Priyanka Shinde Sayaji and Eli Peh (Asia Ascent  
Law Corporation) for the plaintiff;  
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for the defendants.

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