IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2023] SGHC(I) 22

Originating Summons No 1 of 2023

Between

CZT

… *Plaintiff*

And

CZU

… *Defendant*

JUDGMENT

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

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CZT
v
CZU

[2023] SGHC(I) 22

Singapore International Commercial Court — Originating Summons No 1 of 2023
Chua Lee Ming J, Dominique Hascher IJ and Sir Jeremy Cooke IJ
4 September 2023

27 November 2023 Judgment reserved.

Chua Lee Ming J (delivering the judgment of the court):

Introduction

1 This is an application by the plaintiff to set aside an arbitral award issued by an arbitral tribunal in arbitration proceedings seated in Singapore and conducted in accordance with the Rules of Arbitration of the International Chamber of Commerce 2017 ("ICC Rules 2017").

Background facts

2 The plaintiff entered into a contract with the defendant (the "Provisional Contract") under which the plaintiff contracted to deliver certain component packages that included materials, machinery and equipment (the "Material

Packages") as well as other documentation, designs and services.[1] A third party to be appointed by the defendant (the "Contractor") was to use the Material Packages to construct certain products for the defendant.

3 Article 1.1 of the Provisional Contract set out the "main obligations" of the plaintiff and the defendant, which included the following:

> (a) The plaintiff agreed to "deliver to the [Contractor] … the [Material Packages], out of which the [Contractor] shall, under a separate contract with the [defendant], construct ... and deliver to the [defendant] [certain products]".
>
> (b) The plaintiff agreed to "render training to the [defendant's] personnel …".
>
> (c) The "[defendant/Contractor]" agreed to "provide the [plaintiff] with all necessary declarations regarding the final destination of the … Material Packages, …".

4 Subsequently, the defendant appointed the Contractor. The plaintiff, the defendant and the Contractor then entered into an agreement for the transfer of the defendant's rights and obligations under the Provisional Contract to the Contractor (the "Transfer Agreement").[2]

5 Article 1 of the Transfer Agreement provided that all rights and obligations of the defendant in the Provisional Contract were unconditionally and irrevocably transferred to the Contractor except those "identified" in an

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1 1st affidavit filed on behalf of the plaintiff on 17 December 2021 ("Plaintiff's 1st affidavit"), at pp 66–159.

2 Plaintiff's 1st affidavit, at pp 161–164.

attachment to the agreement (the "Attachment"). Article 2 of the Transfer Agreement provided that the defendant was "completely released from all the contractual obligations and waive[d] all contractual rights stipulated in the Provisional Contract except for those as identified in the Attachment".

6 The Attachment set out a table containing two columns. The left-hand column was titled "Article" and the right-hand column was titled "Comments". The table included the following references to and comments on Art 1.1 of the Provisional Contract:

Article	**Comments**
1.1	[The Contractor] shall render training to the [defendant] as per Annex …
1.1	The [defendant] shall provide [the Contractor] with all necessary declarations regarding the final destination of the … Material Packages, …

As stated in [3] above, Art 1.1 provided that the *plaintiff* was to render training to the defendant's personnel and the *defendant/Contractor* was to provide the *plaintiff* with the necessary declarations regarding the final destination.

7 Article 6 of the Transfer Agreement provided that the Transfer Agreement and the Attachment were incorporated and made part of the Provisional Contract.

8 Two other contracts were entered into:

(a) The plaintiff entered into a contract with the Contractor for the supply of the Material Packages to the Contractor (the "Supply Contract").[3]

(b) The defendant entered into a contract with the Contractor for the Contractor to construct certain products for the defendant (the "Domestic Contract").[4]

9 The defendant alleged that it subsequently discovered that certain components of the Material Packages were defective. The defendant filed an action in the defendant's home jurisdiction ("Country D") against the Contractor and the plaintiff (the "Litigation"). The court found the Contractor liable for 30% of the damages suffered by the defendant. The claim against the plaintiff was dismissed due to lack of jurisdiction because of an arbitration agreement in the Provisional Contract.

10 The arbitration agreement in the Provisional Contract provided for disputes to be settled by arbitration in Singapore by three arbitrators "in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce".[5]

The arbitration proceedings

11 On 25 April 2019, the defendant commenced arbitration proceedings against the plaintiff (the "Arbitration").[6] In due course, the arbitration tribunal

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3 Plaintiff's 1st affidavit, at pp 458–556.

4 Plaintiff's 1st affidavit, at pp 558–586.

5 Plaintiff's 1st affidavit, at p 136.

6 Plaintiff's 1st affidavit, at pp 626–648.

(the "Tribunal") was constituted, comprising Professor Douglas Jones AO ("Prof Jones"), Professor Keechang Kim ("Prof Kim") and Dr Philipp Habegger ("Dr Habegger"). Prof Kim was the defendant's nominee while Dr Habegger was the plaintiff's nominee. Prof Jones was appointed by the International Court of Arbitration of the International Chamber of Commerce as President of the Tribunal pursuant to Art 12(2) of the ICC Rules 2017.

12 In brief, the defendant claimed against the plaintiff for damages suffered by the defendant as a result of the plaintiff's failure to perform its obligations, including its obligation to deliver the Material Packages free from any defect.

13 The Provisional Contract was governed by the laws of Country D. Under Art X of the relevant Code (the "Code") in Country D, the defendant was entitled to claim damages against the plaintiff in respect of the defective Material Packages. However, the defendant could rely on Art X only if it had the right to delivery of the Material Packages and this right remained with the defendant after the Transfer Agreement was executed.

14 The issues in the Arbitration that are relevant to the present proceedings were whether:

(a) the defendant had a right to delivery of the Material Packages under Art 1.1 of the Provisional Contract; and

(b) if so, whether the right to delivery under Art 1.1 of the Provisional Contract remained with the defendant or whether it was transferred to the Contractor pursuant to the Transfer Agreement.

15 The defendant argued in the Arbitration that:

(a) The obligation under Art 1.1 of the Provisional Contract to deliver the Material Packages to the Contractor was an obligation to physically deliver the Material Packages to the Contractor and an obligation to supply the Material Packages free of defects to the defendant.[7]

(b) As the Contractor was not initially a party to the Provisional Contact, the delivery obligation must have been understood as owed to the defendant prior to the execution of the Transfer Agreement.[8]

(c) The rights and obligations "as identified" in the Attachment remained with the defendant. This "identification" was done by listing Articles in the left-hand column of the Attachment.[9]

16 On the other hand, the plaintiff argued that:

(a) It was clear from Art 1.1 of the Provisional Contract that the plaintiff was to deliver the Material Packages to the Contractor.[10] The defendant was not entitled to any right to delivery of the Material Packages. The Provisional Contract did not create any effective rights or obligations until the Contractor was appointed, at which point the plaintiff's delivery obligations were owed to the Contractor.[11]

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7 Final Award, at para 149 (Plaintiff's 1st Affidavit, at p 207).

8 Final Award, at para 149 (Plaintiff's 1st Affidavit, at p 207).

9 Final Award, at para 381 (Plaintiff's 1st Affidavit, at p 263).

10 Final Award, at para 183 (Plaintiff's 1st Affidavit, at p 216).

11 Transcript (Arbitration), 25 November 2020, at 79:21 – 80:20 (Plaintiff's 1st Affidavit, at pp 1147–1148). See, also, plaintiff's Statement of Rejoinder in the Arbitration, at para 116 (Plaintiff's 1st Affidavit, at p 860).

(b) In any event, only the obligations listed under the "Comments" column in the table in the Attachment remained with the defendant. Thus, the only rights and obligations under Art 1.1 of the Provisional Contract that remained with the defendant were those relating to training and the certificates of final destination (see [6] above).[12] The intent was to transfer rights and obligations to the Contractor.[13]

(c) The defendant's submissions contradicted those that it made in the Litigation, in which the defendant had denied that the main rights under the Provisional Contract remained with the defendant.[14]

17 No claims were made in the Arbitration with respect to the Domestic Contract. The Contractor's entitlement (if any) under the Supply Contract or any other contract was also not in issue in the Arbitration.

The Final Award and Dissent

18 On 20 September 2021, the ICC sent the final award (the "Final Award")[15] dated 14 September 2021 to the parties.[16] The Final Award was a majority award by Prof Jones and Prof Kim (the "Majority"). The Majority concluded that the defendant had a valid claim against the plaintiff for breach of contract under the Provisional Contract with respect to the plaintiff's delivery of defective Material Packages, which constituted incomplete performance

12 Final Award, at para 176 (Plaintiff's 1st Affidavit, at p 214).

13 Final Award, at para 186 (Plaintiff's 1st Affidavit, at p 216).

14 Final Award, at para 185 (Plaintiff's 1st Affidavit, at p 216).

15 Plaintiff's 1st affidavit, at pp 166–298.

16 Plaintiff's 1st affidavit, at para 20.

under Art X of the Code.[17] The Majority ordered the plaintiff to pay the defendant damages, interests and costs.[18]

19 In brief, the Majority found that:

(a) At the time that the Provisional Contract was entered into, the plaintiff's obligations under the Provisional Contract, including delivery of the Material Packages to the Contractor, were owed to the defendant.[19] The phrase "deliver to the [Contractor]" in Art 1.1 of the Provisional Contract referred to a physical location of delivery, and must have referred to rights and obligations between the defendant and the plaintiff.

(b) Pursuant to the Transfer Agreement, the rights and obligations that remained with the defendant were identified in the Attachment by listing the Articles in the left-hand column of the table in the Attachment.[20] The Comments clarified ambiguous aspects of the Articles that were identified. Based on the words of the Transfer Agreement and Attachment, the logical meaning was that the rights and obligations in Art 1.1 of the Provisional Contract, as identified in the left-hand column of the table in the Attachment, remained with the Claimant.[21]

20 The Majority's reasons for its interpretation of the Transfer Agreement included the following:

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17 Final Award, at para 365 (Plaintiff's 1st Affidavit, at p 259).

18 Final Award, at para 367 (Plaintiff's 1st Affidavit, at p 259).

19 Final Award, at para 376 (Plaintiff's 1st Affidavit, at p 262).

20 Final Award, at paras 381 and 383 (Plaintiff's 1st Affidavit, at p 263).

21 Final Award, at para 407 (Plaintiff's 1st Affidavit, at p 270).

(a) The interpretation was consistent with the wording of Art 1.1 of the Provisional Contract and the Supply Contract.[22] If the rights and obligations of the defendant were transferred by virtue of the Transfer Agreement, one would have expected the wording of Art 1.1 to change from the Provisional Contract to the Supply Contract. Instead, Art 1.1 of the Supply Contract retained the same wording as Art 1.1 of the Provisional Contract.[23] In other sections of the Supply Contract, the parties quite carefully changed the expression '[the defendant/the Contractor]" into "[the defendant]" or "[the Contractor]" when they saw that such a change was needed, *eg*, in Arts 3.3.2, 3.3.3, 3.3.4, 22.8.1 and 12.3.1.[24]

(b) The plaintiff's reading of the Attachment would create inconsistency and render meaningless the parties' express agreement about the defendant's remaining obligations to the plaintiff under the Provisional Contract.[25] Under Art 1.1 of the Provisional Contract, the defendant/Contractor had the obligation, among others, to "effect the payments to the [plaintiff]".[26] According to the plaintiff's interpretation of the Attachment, by virtue of the Transfer Agreement, the defendant would no longer have the obligation to effect payments to the plaintiff. If this was correct, it would not make much sense for the parties to expressly agree that Art 12 of the Provisional Contract (which stipulates

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22 Final Award, at para 387 (Plaintiff's 1st Affidavit, at p 264).

23 Final Award, at para 388 (Plaintiff's 1st Affidavit, at pp 264–265).

24 Final Award, at paras 389–392 (Plaintiff's 1st Affidavit, at pp 265–266).

25 Final Award, at para 394 (Plaintiff's 1st Affidavit, at p 267).

26 Final Award, at para 396 (Plaintiff's 1st Affidavit, at p 267).

the consequences of termination) shall also apply to the defendant "to the extent it refers to remaining rights and obligations" of the defendant.

(c) For example, Art 12.4.1 of the Provisional Contract provided that the defendant/Contractor and the plaintiff "shall both have the right to terminate this Contract …, without prejudice to any other rights or remedies the terminating party may have, if … the other party has become insolvent or entered into liquidation …"[27] If the plaintiff terminated the Provisional Contract pursuant to Art 12.4.1 upon the insolvency of the Contractor, the plaintiff must be entitled to claim payment in respect of Material Packages already delivered or any services already rendered, from the defendant as well as the Contractor.[28] According to the plaintiff's interpretation, however, the plaintiff would have no recourse to the defendant when it most needed to have such a recourse because of the insolvency of the Contractor.

21 On the same day (20 September 2021), Dr Habegger (the "Minority") sent a copy of his dissenting opinion (the "Dissent")[29] to the parties' lawyers.[30] The Dissent dealt with Part Q1 of the Final Award. Part Q1 of the Final Award dealt with the defendant's entitlement to claim against the plaintiff for the plaintiff's incomplete performance of its obligation to deliver the Material Packages under the Contract. The Minority found the plaintiff not liable.

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27 Final Award, at para 397 (Plaintiff's 1st Affidavit, at p 267).

28 Final Award, at para 399 (Plaintiff's 1st Affidavit, at p 268).

29 Plaintiff's 1st affidavit, at pp 300–435.

30 Plaintiff's 1st affidavit, at p 1934.

The present proceedings

22 On 17 December 2021, the plaintiff filed the present application in the General Division of the High Court to set aside the Final Award pursuant to:

(a) section 24(*b*) of the International Arbitration Act 1994 (2020 Rev Ed) ("IAA") and/or Art 34(2)(*a*)(ii) of the Model Law (*ie*, the Majority acted in breach of natural justice);

(b) further or in the alternative, Art 34(2)(*a*)(iii) of the Model Law (*ie*, the Majority exceeded the terms or scope of the submission to arbitration);

(c) further or in the alternative, Art 34(2)(*a*)(iv) of the Model Law (*ie*, the arbitral procedure was not in accordance with the agreement of the parties); and

(d) further or in the alternative, Art 34(2)(*b*)(ii) of the Model Law (*ie*, the award is in conflict with the public policy of Singapore).

In its submissions before us, the plaintiff did not rely on (d) above.

23 On 21 March 2023, the plaintiff filed Summonses Nos 788 of 2023, 789 of 2023 and 790 of 2023 in which it sought production of the records of deliberations from Prof Kim, Dr Habegger and Prof Jones respectively (the "Production Applications").

24 On 31 March 2023, the proceedings were transferred to the Singapore International Commercial Court.

25 On 28 June 2023, we dismissed the Production Applications: see *CZT v CZU* [2023] SGHC(I) 11.

The plaintiff's case

26 The plaintiff's case before us is as follows:

(a) The Majority failed to consider critical arguments made by the plaintiff in the Arbitration.

(b) The Majority reached conclusions in the Final Award based on facts or matters that were not argued by the parties during the Arbitration and wrongly attributed arguments and positions to the parties that were not supported by the Arbitration record.

(c) There is a reasonable suspicion of bias on the part of the Majority as apparent from (i) the Award and as identified by the Dissent, and (ii) the separate *ex parte* communications between Prof Kim and counsel for the parties in the Arbitration.

Whether the Majority failed to consider critical arguments

The legal principles

27 Pursuant to s 24(*b*) of the IAA, the court may set aside an arbitral award if there has been a breach of natural justice. It is axiomatic that an error of law or fact in the award does not amount to a breach of natural justice: *CJA v CIZ* [2022] 2 SLR 557 ("*CJA*") at [68]. Further, the courts take a serious view of challenges based on alleged breaches of natural justice; cases that have succeeded are limited to egregious cases where the error is clear on the face of the record: *Coal & Oil Co LLC v GHCL Ltd* [2015] 3 SLR 154 at [2], citing

TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd [2013] 4 SLR 972 ("*TMM Division*") at [125].

28 In *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*"), the Court of Appeal held (at [29]) that a party challenging an arbitration award as having contravened the rules of natural justice must establish:

(a) which rule of natural justice was breached;

(b) how it was breached;

(c) in what way the breach was connected to the making of the award; and

(d) how the breach prejudiced its rights.

29 With respect to prejudice, the issue is whether as a result of the breach of natural justice, the arbitrator was denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to his deliberations; the test is whether the material could reasonably have made a difference to the arbitrator rather than whether it could necessarily have done so: *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 at [54].

30 The two pillars of natural justice are first, that an adjudicator must be disinterested and unbiased; and second, that parties must be given adequate notice and opportunity to be heard: *Soh Beng Tee* at [43]. The latter pillar (the "fair hearing rule") is also found in Art 34(2)(*a*)(ii) of the Model Law which

provides that an arbitral award may be set aside by the court if any party was unable to present his case.

31 It is well established that the failure by an arbitral tribunal to address an issue submitted to it for decision can constitute a breach of the fair hearing rule: *CKH v CKG and another matter* [2022] 2 SLR 1 ("*CKH*") at [12], citing *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 and *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN*").

32 In *CKH*, the Court of Appeal also emphasised the following (at [14]):

(a) There is an important distinction between making a decision on an issue (which may be right or wrong) and failing to consider an issue at all; it is only the latter which may lead to court intervention.

(b) There must be shown to be a causal nexus between the breach and the award.

(c) The breach must have prejudiced the aggrieved party's rights.

33 A breach of the fair hearing rule can also arise from the tribunal's chain of reasoning. To comply with the fair hearing rule, the tribunal's chain of reasoning must be: (a) one which the parties had reasonable notice that the tribunal could adopt; and (b) one which has a sufficient nexus to the parties' arguments. 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. See *BZW and another v BZV* [2022] 1 SLR 1080 ("*BZW*") at [60(b)].

34 The overriding burden is on the applicant to show that a reasonable litigant in his shoes could not have foreseen the possibility of the reasoning of the type revealed in the award. The arbitrator is not expected to consult the parties on his thinking process before finalising his award unless it involves a dramatic departure from what has been presented to him. See *Soh Beng Tee* at [65(d)–(e)].

35 An arbitral tribunal has to ensure that the essential issues are dealt with; it need not deal with each point made by a party and in determining the essential issue, the tribunal should not have to deal with every argument canvassed under each of the essential issues: *TMM Division* at [73]; *CYE v CYF* [2023] SGHC 275 at [101] ("*CYE*").

The plaintiff's submissions

36 The plaintiff submitted that in coming to its decision, the Majority ignored the following arguments made by it:[31]

(a) that Art 2.2.1 of the Provisional Contract and the Supply Contract provided specifically for a payment obligation of the Contractor, not the defendant;

(b) that the Provisional Contract did not create any effective rights or obligations until the Contractor was appointed, at which point the plaintiff's delivery obligations were owed to the Contractor; the

[31] Plaintiff's Submissions, at paras 44–49.

plaintiff's obligation under the Provisional Contract was to deliver the Material Packages to the Contractor; and

(c) that during the Litigation, the defendant took the position that the main rights under the Provisional Contract were transferred to the Contractor.

37 These points were not raised in the plaintiff's affidavit filed in support of the application to set aside the Final Award. It bears reminding that the application and supporting affidavit must compendiously inform the defendant of the specific grounds upon which the arbitral award is being challenged and the evidence for such grounds: *BTN and another v BTP and another and other matters* [2022] 4 SLR 683 at [62]. Nevertheless, we deal with these grounds below.

Article 2.2.1 of the Provisional Contract and Supply Contract

38 Article 2.2.1 in both the Provisional Contract and the Supply Contract stated as follows:

> The [Contractor] shall pay to the [plaintiff] the total Contract price as per ARTICLE 2.1.1 and any other amount to be paid to the [plaintiff] under this Contract in EURO, …

39 It is important to understand what the plaintiff's case in the Arbitration with respect to Art 2.2.1 was. The only reference by the plaintiff to Art 2.2.1 in the Arbitration was in its Statement of Defence. There, the plaintiff referred to Art 2.2.1 in support of its case that it was clear that the intention from the very beginning was to transfer the rights and obligations in the Provisional Contract

to the Contractor and that the plaintiff's core obligation was towards the Contractor, not the defendant.[32]

40 As the Court of Appeal emphasised in *CKH* (see [32] above), the court will intervene only if (a) the tribunal failed to consider an issue *at all*, and (b) there is a causal nexus between the breach and the award, and (c) the breach prejudiced the aggrieved party's rights.

41 In our view, the Majority did not fail to consider the plaintiff's argument *at all*. In the Final Award, the Majority set out the plaintiff's argument that the intent was to transfer rights and obligations to the Contractor, and expressly noted that the "[plaintiff] says that this intention is also specifically envisaged at Articles 15.3.1, 1.1 and 2.2.1."[33]

42 The fact that the Majority did not separately deal specifically with Art 2.2.1 in the Final Award is insufficient reason to set aside the Final Award. An essential issue in the Arbitration was what were the rights and obligations under Art 1.1 that remained with the defendant. It is clear that the Majority dealt with this issue; it did not have to deal with every point made by the plaintiff in support of its case on this issue (see *TMM Division*; *CYE* at [35] above).

43 *Even if* there was a breach of the fair hearing rule, in our view, there is no causal nexus between the breach and the Final Award, and the breach did not prejudice the plaintiff's rights. The plaintiff's reliance on Art 2.2.1 was to support its case that the intention from the very beginning was to transfer the

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[32] Statement of Defence in the Arbitration, at paras 88–90 (Plaintiff's 1st affidavit, at pp 735–736).

[33] Final Award, at paras 180, 186 (Plaintiff's 1st Affidavit, at pp 215–217).

rights and obligations to the Contractor.[34] However, the plaintiff's own case was that this intention was subject to "a limited number of specifically stipulated rights or obligations".[35]

44 The Transfer Agreement dealt with the very question as to what were the rights and obligations that were not transferred. The Final Award was based on the Majority's interpretation that based on the Transfer Agreement, the rights and obligations under Art 1.1 of the Provisional Contract (as clarified by the comments to Art 1.1 in the Attachment) remained with the defendant. The plaintiff's reliance on Art 2.2.1 could not reasonably have made a difference to the Majority's interpretation of the effect of the Transfer Agreement.

45 In its submissions before us, the plaintiff appeared to make the argument that the Majority ignored Art 2.2.1 in connection with its finding that the plaintiff was obliged, in the first place, under the Provisional Contract to deliver the Material Packages to the defendant.[36] However, the plaintiff's reliance on Art 2.2.1 in the Arbitration was for a different point. In the Arbitration, the plaintiff relied on Art 2.2.1 for its argument that the intention was to *transfer* the defendant's rights and obligations under the Provisional Contract to the Contractor (see [39] above). The plaintiff did not rely on Art 2.2.1 to argue that the obligation to deliver to the defendant *did not exist* under the Provisional Agreement. The plaintiff cannot be permitted to accuse the Majority of having ignored arguments that the plaintiff did not in fact make.

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34 Statement of Defence in the Arbitration, at paras 88–89 (Plaintiff's 1st affidavit, at p 735).

35 Statement of Defence in the Arbitration, at para 32 (Plaintiff's 1st Affidavit, at p 718).

36 Plaintiff's Submissions, at paras 8 and 45–50.

46 In any event, the Majority did consider Art 2.2 in connection with the defendant's right to delivery of the Material Packages. The Majority expressed the following views:[37]

> 461. The 'Method of Payment' under Article 2.2 does not negate or override the payment obligation of the "[defendant/Contractor]" under Article 1.1 of the same contract. …
>
> 462. … Article 2.2 which stipulates the "Method of Payment" does not dictate any conclusion as to who has the right to the delivery of the Material Packages. … No conclusion as to the delivery entitlement may be deduced from a particular method of payment agreed between the multiple parties. …

No effective rights or obligations under the Provisional Contract before the Contractor was appointed

47 In para 376 of the Final Award, the Majority said:[38]

> 376 At the time of entry into the Provisional Contract …, the parties to the contract were the [defendant] and the [plaintiff]. It is uncontentious that, at that point in time, the obligations owed by the [plaintiff] under the Provisional Contract, including delivery of the Material Packages to the [Contractor], were owed to the [defendant]. It is reasonable to conclude that the phrase "deliver to the [Contractor]" refers to a physical agreed location of delivery. It could not have referred to a legal right since the [Contractor] was not an original party to the Provisional Contract. Even if it was intended that [the Contractor] would join the contract later, at that point in time, it could not have been bound to any legal rights under the Provisional Contract. Therefore, in that context, references to [the Contractor] were descriptive only, not legal rights, and must have referred to rights and obligations between the [defendant] and [the plaintiff]. Had the Parties intended to give legal rights and obligations to the [Contractor] at the time of entry into the Provisional Contract, they could have entered into a tripartite contract from the beginning.

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37 Final Award, at paras 461–462 (Plaintiff's 1st Affidavit, at p 283).

38 Final Award, at para 376 (Plaintiff's 1st Affidavit, at p 262).

48 Before us, the plaintiff submitted that its case during the Arbitration was that the Provisional Contract did not create any effective rights or obligations until the Contractor was appointed, at which point the plaintiff's delivery obligation was owed to the Contractor as it was always meant to be owed to the Contractor.[39] The plaintiff relied on an exchange between Dr Habegger and the plaintiff's counsel in which the latter had said that the Provisional Contract was "essentially a contract that was entered into between the parties conditional upon the selection" of the Contractor and that the Transfer Agreement was "the condition for the [Provisional Contract] to have any effect".[40]

49 The plaintiff submitted that by considering it "uncontentious" that at the time of entry into the Provisional Contract the plaintiff's obligations under that contract were owed to the defendant, the Majority had ignored the plaintiff's argument that there were no effective rights or obligations until the Contractor was appointed.

50 We disagree with the plaintiff's submission. In its submission, the plaintiff treated the word "uncontentious" as meaning "undisputed".[41] We do not think that is correct. In its ordinary meaning, the word "uncontentious" means not "likely to cause disagreement": Oxford Advanced Learner's Dictionary of Current English (Oxford University Press, 5th ed, 1995) at p 249. All that the Majority did in para 376 of the Final Award was to express its view that at the time the Provisional Contract was entered into, the plaintiff's obligations under the Provisional Contract were owed to the defendant, and that

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39 Plaintiff's Submissions, at para 38.

40 Plaintiff's Submissions, at para 48; Plaintiff's 1st Affidavit, at p 1148 (lines 10–18).

41 Transcript of hearing on 4 September 2023, at 23:2–5.

this view should not give rise to argument. The Majority was not saying that this view was undisputed.

51 The Majority was aware of the plaintiff's argument that there were no effective rights or obligations until the Contractor was appointed. In the Final Award, the Majority had noted that the defendant "reject[ed] the [plaintiff's] proposition that Article 1.1 had no effect until it was 'actualised' by the Transfer Agreement."[42] The fact that the Majority noted that the defendant rejected the plaintiff's argument also shows that in using the word "uncontentious", the Majority was merely expressing its view in the statement that the plaintiff has complained about, as opposed to being mistaken that the point was undisputed. The fact that the Majority took a view that was different from the plaintiff's is no reason for the court to intervene.

The defendant's position in the Litigation

52 The plaintiff submitted that the Majority ignored the points that it had made in paras 166–168 of its Statement of Rejoinder[43] in the Arbitration, to the effect that in the Litigation, the defendant had taken the position that "the main rights under the Provisional Contract were transferred to [the Contractor]".[44]

53 We disagree with the plaintiff's submission. The plaintiff has not shown that the Majority failed to consider the argument *at all*. The Majority set out the plaintiff's argument in this regard in the Final Award.[45] The fact that the Majority did not separately and specifically deal with this argument in the Final

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42 Final Award, at para 149 (Plaintiff's 1st Affidavit, at p 207).

43 Plaintiff's 1st Affidavit, at pp 875–876.

44 Plaintiff's Submissions, at para 44.

45 Final Award, at para 185 (Plaintiff's 1st Affidavit, at p 216).

Award is insufficient basis upon which to challenge the Final Award when the Tribunal clearly grappled with the central issue between the parties as to the effect of the Transfer Agreement and the two columns in the Attachment. This point holds good for a number of the arguments raised by the plaintiff and also highlights the absence of causal nexus referred to below.

54 *Even if* there was a breach, there is no causal nexus between the breach and the Final Award, and the breach did not prejudice the plaintiff's rights. During the Litigation, the defendant did not take an absolute position that the main rights under Provisional Contract were transferred to the Contractor. What the defendant said during the Litigation was that its release from any rights or obligations was *subject to the Transfer Agreement*. As the plaintiff itself stated in para 166 of its Statement of Rejoinder in the Arbitration:[46]

> 166. If we look at the brief submitted by [the defendant] during the Litigation, [the defendant] was keen to emphasize that "*[the defendant] is completely released from any rights, liabilities or obligations* ***except for those prescribed in the [Transfer Agreement]***". What is argued now before the Tribunal is not a genuine belief but a tactical change of position.
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> [emphasis in italics in the original; emphasis added in bold]

55 In any event, the Majority had to interpret the Transfer Agreement to decide the question as to whether the rights and obligations under Art 1.1 of the Provisional Contract remained with the defendant. Whatever position the defendant might have taken in the Litigation was irrelevant in this regard and could not reasonably have made a difference to the Majority's interpretation of the Transfer Agreement.

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46 Plaintiff's 1st Affidavit, at pp 875–876.

Whether the Majority based its conclusions on extraneous matters

Legal principles

56 Where an arbitral tribunal makes a decision based on matters that were not argued by the parties or based on arguments and positions that were wrongly attributed to the parties, the tribunal would have breached natural justice since the parties did not have the opportunity to be heard on these matters.

57 The legal principles relating to breach of the fair hearing rule have been dealt with earlier.

58 Pursuant to Art 34(2)(*a*)(iii) of the Model Law, the court may set aside an arbitral award if the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration.

59 Article 34(2)(*a*)(iii) concerns *the issue* that has been determined by a tribunal, which is different from *the arguments* of the parties on the issue. As the Court of Appeal explained in *CFJ and another v CFL and another and other matters* [2023] 3 SLR 1 at [123]:

> … It is important to remember that excess of jurisdiction concerns the question of whether *the issue* that has been determined by a tribunal falls within the scope of submission to arbitration. The issue must be distinguished from the arguments of the parties on the issue. If the question is whether the tribunal made a determination that does not adopt or is not in line with the parties' respective position on the issue, then that is more pertinent to the question of natural justice: *Soh Beng Tee* ([113] *supra*) at [65(e)]. It therefore seems to us that the Seller's complaint that the Tribunal arrived at an interpretation of FID that was not advanced by either party is more appropriately framed as a complaint that the Tribunal arrived at a determination of FID in breach of natural justice. Indeed, this is how the Seller has framed its argument on natural justice. …

> [emphasis in original]

60 Thus, where an issue that has been determined by a tribunal is within the scope of submission to arbitration, a complaint that the tribunal's chain of reasoning involved arguments that were not raised by the parties would be more appropriately framed as a complaint of breach of natural justice but that can only be the case where it is plain that the reasoning of the Tribunal was something so far outwith the contemplation of the parties as a course that the Tribunal could follow that it could not have been foreseen as flowing from what was argued.

61 With respect to excess of jurisdiction, the Court of Appeal explained in *CJA* (at [38]) that a two-stage inquiry is followed in assessing whether an arbitral award should be set aside under Art 34(2)(*a*)(iii) for an excess of jurisdiction:

> … (a) first, the court must identify what matters were within the scope of submission to the arbitral tribunal; and (b) second, whether the arbitral award involved such matters, or whether it involved a "*new difference* … outside the scope of the submission to arbitration and accordingly would have been *irrelevant to the issues requiring determination*" …
>
> [emphasis in original]

The Court of Appeal also emphasised that the court "does not apply any unduly narrow view of what the issues were: rather, it is to have regard to the totality of what was presented to the tribunal whether by way of evidence, submissions, pleadings or otherwise and consider whether, in the light of all that, these points were live".

The plaintiff's submissions

62 As mentioned earlier, the Majority interpreted the Transfer Agreement to mean that all of the rights and obligations under Articles identified in the left-hand column of the Attachment remained with the defendant. The Majority's reasons (in so far as they are relevant to the present proceedings) were as follows:

(a) Its interpretation was consistent with the fact that Art 1.1 of the Supply Contract retained the same wording as Art 1.1 of the Provisional Contract (*ie*, Art 1.1 of the Supply Contract listed out the same rights and obligations found in Art 1.1 of the Provisional Contract).[47]

(b) If the defendant retained only the right and obligation relating to training and the issuance of certificates of final destination (as the plaintiff had argued – see [16(b)] above), the Supply Contract would have set out these two items as the rights and obligations that remained with the defendant.[48]

(c) If the defendant no longer had rights and obligations relating to the delivery of the Material Packages or the obligation to effect the payments, the parties would not have knowingly retained the expression "[defendant/Contractor]" in Art 1.1 of the Supply Contract.[49]

(d) In other sections of the Supply Contract, the parties quite carefully changed the expression "[defendant/Contractor]" which was present in the Provisional Contract, into "[defendant]" or "[Contractor]"

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47 Final Award, at para 387 (Plaintiff's 1st Affidavit, at p 264).

48 Final Award, at para 387 (Plaintiff's 1st Affidavit, at p 264).

49 Final Award, at para 388 (Plaintiff's 1st Affidavit, at pp 264–265).

when they saw that such change was needed, *eg*, in Arts 3.3.2, 3.3.3, 3.3.4, 22.8.1 and 12.3.1.[50]

(e) The Supply Contract designated "the [defendant]" as the party who had the right to "order" (3.3.2), "demand" (3.3.3), or "request" (3.3.4) to the plaintiff. Article 22.8.1 of the Supply Contract provided that the auditing certificate shall be supplied "to the [defendant] through the [Contractor]" rather than "to the [defendant/Contractor]" (as provided in the Provisional Contract).[51]

(f) Article 12.3.1 of the Provisional Contract referred to the consequences of termination by the "[defendant/Contractor]". The reference to the "[defendant]" was removed in Art 12.3.1 of the Supply Contract. The Supply Contract was between the Contractor and the plaintiff; the defendant was not a party and could not terminate the Supply Contract.[52] The change of the references in Art 12.3.1 did not indicate that the delivery of the Material Packages was no longer owed to the defendant. The correct reading of Art 12.3.1 of the Provisional Contract and Art 12.3.1 of the Supply Contract was that the defendant retained the contractual entitlement to the delivery of the Material Packages and the right of termination under the Provisional Contract, and that the Contractor had the contractual entitlement to the delivery and the right of termination under the Supply Contract ("the "Dual Contractual Entitlement Finding").

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50 Final Award, at para 389 (Plaintiff's 1st Affidavit, at p 265).

51 Final Award, at para 390 (Plaintiff's 1st Affidavit, at p 265).

52 Final Award, at para 391 (Plaintiff's 1st Affidavit, at pp 265–266).

(g) The plaintiff's reading of the Attachment would create inconsistency and render meaningless the parties' express agreement about the defendant's remaining obligations under the Provisional Contract.[53] Under Art 1.1 of the Provisional Contract, the defendant/Contractor had the obligation to "effect the payments to the [plaintiff]". According to the plaintiff's interpretation, the defendant would no longer have the obligation to effect payment.[54]

(h) Article 12.4.1 of the Provisional Contract provided that the defendant/Contractor and the plaintiff had the right to terminate the contract without prejudice to any other rights or remedies the terminating party may have if (among other reasons) the other party became insolvent or entered into liquidation. If the plaintiff terminated the Provisional Contract pursuant to Art 12.4.1 upon the insolvency of the Contractor, the plaintiff must be entitled to claim payment (in respect of Material Packages already delivered or services already rendered) from the defendant as well as the Contractor because under Art 1.1 of the Provisional Contract the '[defendant/Contractor]" has the obligation to effect payment and because Art 1.1 is exempt from the transfer as it is identified in the Attachment (the "Insolvency Argument").[55] The plaintiff's interpretation was unsustainable because, according to the plaintiff's interpretation, the plaintiff would have no recourse to the defendant when it most needed it.

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53 Final Award, at para 394 (Plaintiff's 1st Affidavit, at p 267).

54 Final Award, at para 396 (Plaintiff's 1st Affidavit, at p 267).

55 Final Award, at para 399 (Plaintiff's 1st Affidavit, at p 268).

(i) Article 22.8 of the Provisional Contract provided that upon request by the defendant, the plaintiff was to provide an auditing certificate (to verify the comparability of the contract prices) to the "[defendant/Contractor]". The comment in the Attachment clarified that this provision "shall apply to the [defendant] and [plaintiff] only"; Art 22.8 of the Supply Contract was "accordingly modified".[56] Article 22.8 of the Supply Contract stated that the certificate was to be provided to the defendant through the Contractor.

(j) The Transfer Agreement existed so that the plaintiff and the Contractor's relationship was not legally incomplete; however, it did not create an unrealistic characterisation that the Material Packages were no longer to be delivered to and owned by the defendant (the "Ownership Finding").[57] Article X of the Code gives the "owner" legal remedies. The term "owner" is used to refer to a contractual party who commissions a "contractor".[58]

63 The plaintiff's complaints are as follows:

(a) Without hearing any arguments on the use of the term "[defendant/Contractor]" in Arts 3.3.2, 3.3.3, 3.3.4, 22.8.1 and 12.3.1, the Majority considered these Articles and held that "parties quite carefully changed the expression "[defendant/Contractor]", which was present in the Provisional Contract, into "[defendant]" or "[Contractor]" when they saw that such a change was needed" (see [62(d)] above).[59]

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56 Final Award, at para 461 (Plaintiff's 1st Affidavit, at p 283).

57 Final Award, at para 421 (Plaintiff's 1st Affidavit, at pp 273–274).

58 Final Award, at para 422 (Plaintiff's 1st Affidavit, at p 274).

59 Plaintiff's Submissions, at para 59.

(b) The Dual Contractual Entitlement Finding (see [62(f)] above) was not pleaded or argued and did not satisfy the chain of reasoning test.[60]

(c) The Insolvency Argument (see [62(h)] above) was not argued by the parties.[61]

(d) With respect to the Majority's reasons relating to Art 22.8 (see [62(i)] above), neither party had argued that the Attachment was capable of modifying the Supply Contract.[62]

(e) The Ownership Finding (see [62(j)] above) was never raised, pleaded or argued.[63]

64 Clearly, the plaintiff was alleging that the above showed that the fair hearing rule had been breached. It was less clear whether the plaintiff was also alleging that the above showed that the Majority had exceeded its jurisdiction. In any event, the overarching issue which the Majority determined (*ie*, whether the defendant had a claim against the plaintiff under Art X of the Code) was within the scope of the submission to arbitration. In our view, the plaintiff's complaints about the Majority's chain of reasoning would be more appropriately framed as complaints of breach of natural justice (see [60] above), but none of the points made by the Tribunal went outside the range that could be expected when construing contractual provisions and comparing the terms of related agreements which were linked to the Transfer Agreement. The parties

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60 Plaintiff's Submissions, at paras 62–64.

61 Plaintiff's Submissions, at para 78.

62 Plaintiff's Submissions, at para 92.

63 Plaintiff's Submissions, at paras 12, 107 and 110.

were on notice as to comparisons to be made between the wording of one contract vis a vis another and the reasoning employed by the Tribunal was of the same kind as the parties themselves adopted in advancing their cases on construction.

Articles 3.3.2, 3.3.3, 3.3.4, 22.8.1 and 12.3.1 in the Supply Contract

65 The Majority's reference to Arts 3.3.2, 3.3.3, 3.3.4, 22.8.1 and 12.3.1 of the Supply Contract was part of its chain of reasoning for its interpretation of the Transfer Agreement (see [62(a)] to [62(d)] above). These Articles were cited as examples that illustrated how the expression "[defendant/Contractor]", which was present in the Provisional Contract, was changed into "[defendant]" or "[Contractor]" when the change was needed. In contrast, Art 1.1 of the Supply Agreement retained the same language found in Art 1.1 of the Provisional Agreement.

66 The plaintiff submitted that the Majority had considered the use of the term "[defendant/Contractor]" in Arts 3.3.2, 3.3.3, 3.3.4, 22.8.1 and 12.3.1 of the Supply Contract without hearing any arguments. It is true that these Articles were not specifically referred to in the course of the Arbitration. The question is whether the Majority's chain of reasoning in respect of these Articles was (a) one which the parties had reasonable notice that the Tribunal could adopt; and (b) one which had a sufficient nexus to the parties' arguments (see [33] above).

67 In its Statement of Rejoinder in the Arbitration, the plaintiff had argued that changes between the Provisional Contract and the Supply Contract provided an indication as to what the parties intended to achieve with the

Transfer Agreement.[64] The plaintiff referred to the fact that the expression "[defendant/Contractor]" in several parts of Art 4 of the Provisional Contract was changed to "[Contractor]" in the corresponding Article in the Supply Contract. The plaintiff also pointed out the fact that Art 22.9 of the Provisional Contract which provided that "the [defendant] shall assure that the [Contractor] and other ... parties …" was changed to state that "the [Contractor] shall assure that the [defendant] and other … parties …".[65]

68 As the Majority noted, the plaintiff had argued that "there are a number of notable changes between the Provisional Contract and the Supply Contract that support its position and provide an indication of what the Parties intended to achieve with the Transfer Agreement".[66]

69 Clearly, the plaintiff's own arguments in the Arbitration included an analysis into how the term "[defendant/Contractor]" in the Provisional Contract had been changed in the Supply Contract. The plaintiff's submissions before the Tribunal referred to the fact that the expression "[defendant/Contractor]" used in the Provisional Contract had changed in the corresponding provisions in the Supply Contract. The plaintiff referred to Arts 4 and 22.9 as examples. Articles 3.3.2, 3.3.3, 3.3.4, 22.8.1 and 12.3.1 (which the Majority referred to) were simply other examples. Ultimately, the point that the Majority was considering was how the fact that the expression "[defendant/Contractor]" had changed between the Provisional Contract and the Supply Contract affected the interpretation of the Transfer Agreement. This was a point that the plaintiff itself had argued before the Tribunal.

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64 Plaintiff's 1st Affidavit, at pp 874–875 (para 163).

65 Plaintiff's 1st Affidavit, at p 860 (para 114).

66 Final Award, at para 191 (Plaintiff's 1st Affidavit, at pp 217–218).

70 Further, it is clear from an exchange during the Arbitration hearing between Prof Kim and the plaintiff's counsel that the exercise involved comparing the Provisional Contract and the Supply Contract to see how the references to the defendant/Contractor had changed.[67]

71 In our view, the Majority's chain of reasoning involving Arts 3.3.2, 3.3.3, 3.3.4, 22.8.1 and 12.3.1 did not breach the fair hearing rule. It was reasonably within expectation that the Majority could refer to other Articles as part of the comparative analysis. It is also clear that the references to the Articles complained about had a clear nexus to the plaintiff's argument.

The Dual Contractual Entitlement Finding

72 The Dual Contractual Entitlement Finding consists of the finding that the defendant retained the contractual entitlement to the delivery of the Material Packages and the right of termination under the Provisional Contract, and the finding that the Contractor had the contractual entitlement to the delivery and the right of termination under the Supply Contract (see [62(f)] above).

73 The plaintiff submitted that the Dual Contractual Entitlement Finding was not pleaded or argued and that it was crucial to the Majority's finding that the defendant was entitled to delivery of the Material Packages.[68]

74 We disagree with the plaintiff's submission. The defendant had argued in the Arbitration that the delivery obligation under Art 1.1 of the Provisional Contract was an obligation to physically deliver the Material Packages to the

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67 Transcript, Day 2, at pp 67–69 (Plaintiff's 1st Affidavit, at pp 1135–1137).

68 Plaintiff's Submissions, at paras 64 and 75.

Contractor and an obligation to supply the Material Packages free of defects to the defendant.

75 The Dual Contractual Entitlement Finding comprises the finding that the defendant had a right to delivery under the Provisional Contract and the finding that the Contractor had a right to delivery under the Supply Contract. The defendant had argued for the former in the Arbitration. As for the latter, in our view, that finding was one which the parties had reasonable notice that the tribunal could make and it had a sufficient nexus to the defendant's arguments. It flowed reasonably from or was related to the argument that the plaintiff had the obligation to make physical delivery to the Contractor and the fact that the Contractor had entered into the Supply Contract with the plaintiff. It did not involve a dramatic departure from what was presented to the Tribunal. The Dual Contractual Entitlement Finding therefore did not breach the fair hearing rule (see [33] above).

76 In any event, in our view, the finding that the Contractor had a contractual entitlement to delivery under the Supply Contract had no causal nexus to the Majority's finding that the defendant had a contractual right to delivery under the Provisional Contract. It also had no causal nexus to the Majority's finding that this right to delivery remained with the defendant after the Transfer Agreement was executed.

77 The plaintiff argued that the Dual Contractual Entitlement Finding was crucial to the Majority's decision because a finding that the defendant was entitled to delivery could not have survived the clear wording of Art 12.3.1 of the Supply Contract.[69] We do not see why the finding that the defendant was

[69] Plaintiff's Submissions, at para 76.

entitled to delivery under the Provisional Contract would not survive the wording in Art 12.3.1 of the Supply Contract. As the Majority noted, the Provisional Contract and the Supply Contract co-existed; neither was terminated, superseded or replaced.[70]

78 The plaintiff also argued that the Majority had to resort to the Dual Contractual Entitlement Finding because a finding that *both the defendant and the Contractor* had the right to delivery and termination under the *Provisional Contract* could not have survived the Majority's finding that at its inception, the Contractor was not a party to the Provisional Contract.[71] The logic behind this argument is unclear. In any event, this argument is a non-starter. The Majority did not (and did not need to) find that the *Contractor* had the right to delivery and termination under the *Provisional Contract*.

The Insolvency Argument

79 The Insolvency Argument (see [62(h)] above) is one part of what the plaintiff described as the Majority's "Payment Finding", the second part of the Payment Finding being the Majority's reasoning in para 461 of the Final Award relating to Art 22.8 (see [62(i)] above).[72]

80 The Insolvency Argument was one of the reasons given by the Majority for rejecting the plaintiff's interpretation of the Transfer Agreement on the ground that it was unsustainable. The gist of the Insolvency Argument was that the plaintiff's interpretation of the Transfer Agreement meant that:

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70 Final Award, at para 391 (Plaintiff's 1st Affidavit, at p 266).

71 Plaintiff's Submissions, at para 76.

72 Plaintiff's Submissions, at para 78.

(a) the defendant no longer had any payment obligation under Art 1.1 of the Provisional Contract; and

(b) consequently, if the plaintiff terminated the Provisional Contract upon the Contractor's insolvency, the plaintiff would not have recourse to the defendant when it most needs to have such recourse.

81 The plaintiff submitted that the suggestion that the defendant had a payment obligation that survived the Transfer Agreement was not pleaded or argued.

82 We accept that the Insolvency Argument was not pleaded or argued. However, to succeed on this ground, the plaintiff has to show that the Majority's consideration of the Insolvency Argument had prejudiced its rights. We are not persuaded that the plaintiff's rights have been prejudiced. The Insolvency Argument was one of several reasons given by the Majority in support of its interpretation of the Transfer Agreement. It is abundantly clear to us that even if the plaintiff had been invited to respond to, and was successful in rebutting, the Insolvency Argument, that would not have made a difference to the Majority's interpretation of the Transfer Agreement.

Article 22.8 of the Supply Contract

83 The Majority noted how Art 22.8 was treated in the Attachment (see [62(i)] above). Article 22.8 of the Provisional Contract provided that upon request by the defendant, the plaintiff was to provide an auditing certificate (to verify the comparability of the contract prices) to the "[*defendant/Contractor*]". The Attachment clarified that Art 22.8 "shall apply to the [defendant] and [the plaintiff] only". Article 22.8 of the Supply Contract then provided that the certificate was to be provided by the plaintiff to the *defendant through the*

Contractor. In para 461 of the Final Award, the Majority noted that "Article 22.8 of the Supply Contract [was] accordingly modified."[73]

84 The plaintiff submitted that neither party argued that the Attachment was capable of modifying the Supply Contract.[74] We reject the plaintiff's submission. The plaintiff has taken the Majority's statement completely out of context. The Majority did not make any finding that the Attachment was capable of amending the Supply Contract. That was not even possible since the Supply Contract was entered into *after* the Transfer Agreement was executed. More importantly, the Majority's statement clearly meant that the language in Art 22.8 of the Supply Contract was modified from that found in Art 22.8 of the Provisional Contract to reflect the clarification in the Attachment. That this was what the Majority meant becomes crystal clear when one looks at para 390 of the Final Award in which the Majority states:[75]

> 390 … Article 22.8.1 was also modified. The said Article in the Supply Contract now reads that the auditing certificate shall be supplied "to the [defendant] through the [Contractor] rather than "to the [defendant/Contractor]".

It seems to us that the plaintiff's submission was created out of desperation.

85 For completeness, we note that in its submissions, the plaintiff also alleged that the Majority had to find that the Attachment modified the Supply Contract in order to "work around" some difficulty in relation to Art 22.8.2.[76] It suffices for us to say that this allegation is a non-starter. As we have said, the

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73 Final Award, at para 461 (Plaintiff's 1st Affidavit, at p 283).

74 Plaintiff's Submissions, at para 92.

75 Final Award, at para 390 (Plaintiff's 1st Affidavit, at p 265).

76 Plaintiff's Submissions, at paras 88–91.

Majority did not make any finding that the Attachment modified the Supply Contract. In addition, it is clear that Art 22.8.*2* did not feature at all in the Majority's findings.

The Ownership Finding

86 The Ownership Finding is set out in [62(j)] above. The plaintiff's complaint is in respect of the Majority's statement in para 422 of the Final Award[77] that it understood "the use of 'owner' to refer to a contractual party who commissions a 'contractor'". The plaintiff submits that there were no pleadings on this issue and the Majority did not invite submissions on it.[78]

87 The simple answer to the plaintiff's submission is that in any event, there was no causal nexus between the Ownership Finding and the Final Award, nor was there any prejudice caused. As the Majority expressly stated, it was "not required to determine the question of ownership for the purposes of a claim under Article [X] of the [Code]".[79]

Apparent Bias

The legal principles

88 As stated in [30] above, one of the pillars of natural justice is that the adjudicator must not be biased. Bias may be actual or apparent. In the present case, the plaintiff's case is one of apparent bias.

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77 Final Award, at para 422 (Plaintiff's 1st Affidavit, at p 274).

78 Plaintiff's Submissions, at para 115.

79 Final Award, at para 422 (Plaintiff's 1st Affidavit, at p 274).

89 In *BOI v BOJ* [2018] 2 SLR 1156, the Court of Appeal held as follows (at [103]):

> (a) The test for apparent bias is whether there are circumstances that would give rise to a reasonable suspicion or apprehension of bias in the fair-minded and informed observer; the test is an objective one.
>
> (b) A reasonable suspicion or apprehension arises when the observer would think, from the relevant circumstances, that bias is *possible*. It cannot be a fanciful belief, and the reasons for the suspicion must be capable of articulation by reference to the evidence presented.
>
> (c) The court must be mindful not to supplant the observer's perspective by assuming knowledge outside the ken of reasonably well-informed members of the public. The observer would be informed – that is, he or she would be apprised of all relevant facts that are capable of being known by members of the public generally. The observer would also be fair-minded; he or she would be neither complacent nor unduly sensitive and suspicious.

The plaintiff's submissions

90 The plaintiff submitted that the following gave rise to a reasonable suspicion of bias on the part of the Majority:

> (a) a careful reading of the Final Award and the Dissent;[80] and

[80] Plaintiff's Submissions, at para 133.

(b) *ex parte* calls by Prof Kim to the defendant's solicitors and subsequently, the plaintiff's solicitors, coupled with Prof Kim's email dated 8 October 2021.[81]

The Final Award and the Dissent

91 The plaintiff's arguments on bias largely relied on the arguments that it had made in connection with their submissions that the Majority failed to consider critical arguments and that the Majority based its conclusions on extraneous matters.[82] We have dealt with these submissions except for two points which we will now deal with.

92 The first relates to para 461 of the final Award, in which the Majority had said that:[83]

(a) the plaintiff "also admits that the price formed part of the 'bargain between the [defendant] and [plaintiff]'"; and

(b) its "conclusion takes into account the Parties' submissions, specifically on the interpretation of the expression of '[defendant/Contractor]'".

The Majority provided certain footnote references to each of the statements.

93 The plaintiff complained that none of the references to the footnotes had anything to do "with the interpretation of the expression '[defendant/Contractor]'"in the context of what it described as the "second

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81 Plaintiff's Submissions, at paras 153 and 155.

82 Plaintiff's Submissions, at paras 134–138.

83 Final Award, at para 461 (Plaintiff's 1st Affidavit, at p 283).

block" of Art 1.1.[84] It will be recalled that Art 1.1 dealt with the main obligations of the parties. The "first block" of Art 1.1 dealt with the plaintiff's obligations whilst the "second block" of Art 1.1 dealt with the defendant's/Contractor's obligations.[85]

94 In our view, the plaintiff's argument is misconceived and unfounded.

95 The statement in [92(a)] above is even not about the interpretation of the expression "[defendant/Contractor]". It simply stated the Majority's view that the plaintiff admitted that the price formed part of the bargain between the defendant and the plaintiff. The references in the footnote to that statement do support the Majority's stated view.

96 As for the statement in [92(b)] above, para 461 of the Final Award dealt with the payment obligation of the defendant/Contractor, which fell under the second block of Art 1.1. The references in the footnote do not deal specifically with the interpretation of the expression "[defendant/Contractor]" in the context of the second block of Art 1.1. However, the plaintiff's complaint about the footnotes is premised on the assumption that when the Majority said that they took into account the parties' submissions, they meant submissions specifically in the context of the second block of Art 1.1.

97 We do not see why the Majority's reference to the parties' submissions has to be read so narrowly. In our view, the Majority was referring to the parties' submissions on the interpretation of the expression "[defendant/Contractor]" generally. The issue before the Tribunal was the interpretation of the Transfer

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84 Plaintiff' Submissions, at para 134 read with para 94.

85 Plaintiff's Submissions, at para 57.

Agreement, specifically, what were the rights and obligations that remained with the defendant. In connection with this, comparisons were made between specific Articles in the Provisional Contract and the Supply Contract to see how the expression "[defendant/Contractor]" had changed. It was in this context that para 461 of the Final Award considered certain specific Articles. It is clear to us that the parties' submissions about the interpretation of the expression "[defendant/Contractor]" generally was relevant. After all, para 461 of the Final Award was part of the Majority's explanation of "how its analysis interact[ed] with other aspects of the contractual framework."[86]

98 The second point that we have to deal with relates to the plaintiff's reliance on para 16(b)(ii) of the Dissent.[87] In that paragraph, the Minority had alleged that when he alerted the Majority about its due process violations, the Majority substantially revised and amended the Award by:[88]

> ii. purporting for the first time that points were pleaded by the Parties when the Majority never so held or stated before (or even stated the opposite) and when it had never objected to any related criticism.

99 In our view, the allegation by the Minority is hardly sufficient basis for a finding of apparent bias. The allegation is without particulars and as we noted in our judgment in the Production Application (at [65]–[66]):

> 65 … The Minority's allegations represent his own subjective views or opinions. … Clearly, such bare allegations, even if made by a co-arbitrator, cannot be sufficient. This is all the more so when the Minority has made serious allegations tantamount to accusing the Majority of dishonesty.
>
> 66 The plaintiff submitted that the Minority is in an invidious position because that is all that he could say in the

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86 Final Award, at para 456 (Plaintiff's 1st Affidavit, at p 282).

87 Plaintiff's Submissions, at para 138.

88 Plaintiff's 1st Affidavit, at pp 308–309.

> Dissent. In our view, the plaintiff's submission is not borne out by the Dissent. The Dissent includes allegations concerning what happened during the deliberations … In addition, the Minority himself applied the following principles (at para 11 of the Dissent):
>
> > (a) An arbitrator is under a duty to disclose misconduct to the parties.
> >
> > (b) Where an arbitrator witnesses improprieties in the course of the arbitral proceedings, which go to the integrity of the proceedings, he might properly raise these matters in a dissenting opinion.
>
> It seems to us that the Minority did not at all feel constrained about disclosing what he alleged to be misconduct and improprieties.

100 The Minority's frustration at not having been able to persuade the Majority to his views is palpable from the Dissent. However, that is clearly no reason for this Court to intervene.

Ex parte calls by Prof Kim and his email dated 8 October 2021

101 In the morning of 23 September 2021 (three days after the Final Award and Dissent had been received by the parties), Prof Kim spoke to the defendant's solicitor. In his affidavit, the defendant's solicitor said that during the call, Prof Kim explained the reasons for the delay in the finalisation of the Final Award, that the ICC had taken the position the Dissent should not form part of the Final Award, and that Dr Habegger's unilateral distribution of the Dissent was therefore unauthorised.[89]

102 In the evening of 23 September 2021, Prof Kim spoke to the plaintiff's solicitor. The plaintiff's solicitor kept a note of the call. In summary:[90]

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89 Defendant's solicitor's Affidavit, at para 61.

90 Plaintiff's 1st Affidavit, at p 447.

(a) Prof Kim said that the Tribunal and the ICC had taken the position that the Dissent should not form part of the Final Award, its distribution was unauthorised, and that it was so defamatory and misleading that Prof Jones may consider legal action against Dr Habegger.

(b) The plaintiff's solicitor asked if Prof Kim had seen the Dissent before the Final Award was issued and Prof Kim said that he had.

103 On 8 October 2021, the plaintiff's counsel disclosed the contents of Prof Kim's call to the plaintiff's solicitor, to the ICC Secretariat, the members of the Tribunal and the defendant's solicitors.[91]

104 On the same day (8 October 2021), Prof Kim replied to the plaintiff's counsel's email, disclosing that he spoke to the defendant's solicitor on 23 September 2021 at 9:53am for four minutes eight seconds, and to the plaintiff's solicitor at 8:11pm on the same day for nine minutes 11 seconds.[92] Prof Kim said that both calls were to explain the unusual delay in the finalisation of the Final Award, and the point that the Dissent should not be mistaken as forming part of the Final Award.

105 The plaintiff submitted that the *ex parte* calls and Prof Kim's email dated 8 October 2021 give rise to a reasonable suspicion of bias for the following reasons:[93]

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91 Plaintiff's 1st Affidavit, at pp 449–450.

92 Plaintiff's 1st Affidavit, at p 453.

93 Plaintiff's Submissions, at para 153.

(a) As the time limit for corrections and interpretation of the Final Award pursuant to Art 36 of the ICC Rules 2017 and Art 33 of the Model Law had not expired, it was highly unusual and unorthodox for Prof Kim to independently reach out to the defendant's solicitor to explain the delay in issuing the Final Award.

(b) The call to the defendant's solicitor contradicted established arbitral norms and was a serious departure from the agreed procedure. Clause 5.8 of the Procedural Order No 1 (Amended 11 May 2020) provided that "the Parties shall not make any *ex parte* communications relating to this Arbitration to the Tribunal or any of its members".

(c) The call to the defendant's solicitor was contrary to paras 65, 66 and 68 of the ICC's Note to parties and Arbitral Tribunals on the Conduct of Arbitration.

(d) Prof Kim sought to interfere with the plaintiff's right to refer to or rely on the Dissent by telling the plaintiff's solicitor during the phone call that Prof Jones was considering a defamation claim against Dr Habegger, and stating in his 8 October 2021 email that no party "has an obligation or legal right to disseminate the [Dissent] because it is not part of the Award. If any person disseminates it, it is entirely due to that person's own deliberate decision which is not justified by any legal right or obligation to do so."

(e) Prof Kim did not disclose his call to the defendant's solicitor until prompted by the plaintiff.

106 We are satisfied that the above matters do not give rise to a reasonable suspicion of bias. The calls and the 8 October 2021 email evidenced Prof Kim's

unhappiness with Dr Habegger's dissemination of the Dissent, contrary to the ICC's position that the Dissent should not form part of the Final Award. Further, the dissemination of the Dissent, the calls and the 8 October 2021 email were events that took place after the Final Award had been issued. We do not see how the calls and the 8 October 2021 email can be said to give rise to a reasonable suspicion of bias. We note as well that the plaintiff's reliance on the agreed procedure in cl 5.8 of the Procedural Order No 1 (Amended 11 May 2020) (see [105(b)] above) was erroneous. That clause prohibited the *parties* from making any *ex parte* communication to the Tribunal or its members.

107 We note that the plaintiff also submitted that certain kinds of apparent bias such as Prof Kim's undisclosed *ex parte* communications with the parties in this case may amount to a breach of the agreed arbitral procedure and the Final Award may therefore be set aside pursuant to Art 34(2)(*a*)(iv) of the Model Law.[94] This is an alternative submission that is premised on a finding of apparent bias. As we have rejected the plaintiff's claim of apparent bias, this alternative submission falls away.

Conclusion

108 For the reasons set out above, we dismiss the plaintiff's application.

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94 Plaintiff's Submissions, at para 131.

109 The parties are to file their submissions on costs (limited to five pages) within 14 days of this judgment.

Chua Lee Ming
Judge of the High Court

Dominique Hascher
International Judge

Sir Jeremy Cooke
International Judge

Nair Suresh Sukumaran, Tan Tse Hsien, Bryan (Chen Shixian) and Joel Wang Pinwen (PK Wong & Nair LLC) for the plaintiff;
Koh Swee Yen SC, Claire Lim, Pang Yi Ching, Alessa and Teo Wei Kiat Samuel (WongPartnership LLP) for the defendant.