IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2024] SGHC(I) 4

Originating Application No 5 of 2023

Between

DFI

… *Claimant*

And

DFJ

… *Defendant*

JUDGMENT

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

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DFI
v
DFJ

[2024] SGHC(I) 4

Singapore International Commercial Court — Originating Application No 5 of 2023
Sir Vivian Ramsey IJ
4 December 2023

1 February 2024 Judgment reserved.

Sir Vivian Ramsey IJ:

1 This case concerns an application by the claimant to set aside the Partial Award dated 10 February 2023 (the "Award") made in an arbitration (the "Arbitration") under the auspices of the International Chamber of Commerce (the "ICC"), pursuant to s 24(*b*) of the International Arbitration Act 1994 (2020 Rev Ed) ("IAA") and/or Art 34(2)(*a*)(ii) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), as incorporated under s 3 of the IAA, on the ground that the arbitral process that led to the Award was in breach of the rules of natural justice.

2 For the reasons that follow, I find that there was no breach of natural justice in the process that led to the making of the Award and so dismiss the application.

Introduction

3 On 15 March 2017, at the request of the claimant, the defendant provided the claimant with a technical proposal (the "Technical Proposal") for the design, engineering and supply of a 300 "tonnes crushed per day" ("TCD") raw sugar plant (the "Sugar Plant").

4 On 30 April 2017, the claimant entered into two agreements. First, a contract with a third-party company, hereinafter referred to as "X Company", for the "design engineering and supply" of the Sugar Plant (the "Sugar Plant Contract"). Secondly, a contract with the defendant (the "Agreement") for the supply, amongst other things, of a 0.5MW turbine (the "0.5MW Turbine").

5 On 26 August 2020, the claimant commenced the Arbitration against the defendant. In the Arbitration, the claimant contended that, pursuant to the Agreement, the defendant was required to supply a turbine that was sufficient to meet the power required for the running and operation of the Sugar Plant and/or to supply what it had contracted to supply, that is, a turbine capable of generating 500KW (or 0.5MW) of power. The claimant's case in the Arbitration was that, in breach of the Agreement, the defendant failed to do so.

6 The jurisdiction of the tribunal (the "Tribunal") was challenged by the defendant, and, on 16 July 2021, the Tribunal issued a Jurisdiction Award (the "Jurisdiction Award") determining that it had the jurisdiction to continue with the Arbitration. Thereafter, between August 2021 and September 2021, the parties submitted their respective cases. The hearing took place over seven days between 27 June 2022 and 1 July 2022. Four witnesses were called by the claimant, one of whom was its expert. The defendant called two to testify: its witness and an expert.

7 On 10 February 2023, the Tribunal rendered the Award dismissing all of the claimant's claims. Thereafter, on 15 May 2023, the claimant commenced this present application. The claimant submits that the Tribunal acted in breach of the fair hearing rule of the rules of natural justice, as it had disregarded a substantial portion of the evidence, submissions and arguments raised by the claimant in finding that:

(a) The defendant had not undertaken to provide sufficient power for all the electrical needs of a 300 TCD sugar plant but just the sugar-producing operations (Award at [70]);

(b) There was "no doubt" that the defendant did supply the equipment it had contracted to supply, *ie*, the 0.5MW Turbine (Award at [90]);

(c) The defendant had provided sufficient evidence to show that the equipment supplied was actually reasonably fit for purpose (Award at [122(11)]);

(d) The claimant had not produced reliable technical data or documents to support its allegations of inadequacies in the design or supply of the 0.5MW Co-Generation Plant (*ie*, the 0.5MW Turbine) (Award at [122(11)]); and

(e) The claimant has not produced any scientific or technical evidence that the Sugar Plant had not been running satisfactorily and/or could not have been doing so if there were no additional works and no upgrading or expansion (Award at [122(14)]).

Principles to be applied

8 Article 34(2)(*a*)(ii) of the Model Law provides that an arbitral award may be set aside where "the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case".

9 In *BZW and another v BZV* [2022] 1 SLR 1080 ("*BZW*"), the Court of Appeal stated that in order for the court to set aside an arbitral award on grounds of breach of natural justice, the following four elements must be present (at [59]):

(a) First, the specific rule of natural justice that was breached.

(b) Second, how it was breached.

(c) Third, how the breach was connected to the making of the award.

(d) Fourth, how the breach prejudiced the respondent's rights.

10 In relation to the fair hearing rule, the Court of Appeal in *BZW* explained (at [60]) that there were two ways in which this rule can be breached:

> (a) One, a breach of the fair hearing rule can arise from a tribunal's *failure to apply its mind* to the essential issues arising from the parties' arguments. …
>
> (b) Two, 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* ([29] *supra*) at [149]). 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 Industries* at [150], [152], [154] and [156]). 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" (*Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [65(d)]).
>
> [emphasis in original]

11 On the requirements that the breach must be connected to the making of the award and that the breach must have caused prejudice, it was stated in *Bagadiya Brothers (Singapore) Pte Ltd v Ghanashyam Misra & Sons Pte Ltd* [2023] 4 SLR 984 (at [42]) that the applicant must demonstrate that, as a result of the breach, "the arbitrator was denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to his deliberations"; or put another way, that "the material could reasonably have made a difference to the arbitrator" (*JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 at [194], citing *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 at [54]).

12 I also observe that, as regards the requirement of prejudice, the Court of Appeal in *BZW* said (at [63]):

> … 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 made a difference to the outcome of the arbitration (see *L W Infrastructure* ([35] *supra*) at [54]) … It is not necessary for us to hold that giving proper consideration would have caused the Tribunal to find in the respondent's favour on both claims. The prejudice arising from the failure to

> consider the submissions which arguably could have succeeded is sufficient.

The claimant's case

13 The claimant submits that, whilst the Tribunal stated in the Award that it had considered all "submissions, documents and evidence" from the parties, the Tribunal did not in fact do so, given the various documentary and witness evidence which the Tribunal failed to address and which arguably would have led the Tribunal to reach a different outcome in the Award, particularly in relation to the following issues:

(a) whether the 0.5MW Turbine was to provide all the power needs for the Sugar Plant;

(b) whether the defendant had supplied what it had contracted to do; and

(c) the spare parts claim.

Whether the 0.5MW Turbine was to provide all the power needs for the Sugar Plant

14 The Tribunal found that the defendant had not undertaken to provide for all the electrical needs of the entire Sugar Plant other than for the sugar-producing (and/or jaggery-producing) operations of the Sugar Plant (Award at [57]–[71]).

15 In doing so, the claimant contends that the Tribunal failed to address the following documents, evidence and arguments raised by it. First, it says that the Tribunal failed to address the Technical Proposal which set out the technical specifications of the Sugar Plant and was created and put forward by the

defendant. The claimant says that the Technical Proposal was incorporated into the Agreement, and it refers to the recital which states:

> WHEREAS, the SELLER has agreed to supply and the CLIENT has agreed to purchase from the former, the Machinery 0.5 mw Co-generation Plaint [*sic*] and balance of Plant, as per the specifications mentioned in the Technical Proposal with all the necessary procurement, fabrication, assembly supervision, testing at workshop, at CIF … basis, as per terms and conditions, which follow and form part of this Contract.

16 It also refers to the part of the Technical Proposal which stipulated that the 0.5MW Turbine was to have a maximum continuous rating of 6 tons per hour ("TPH") and that the turbo alternator set was to have a power capacity of 0.5MW at 0.8 power factor. If the 0.5MW Turbine was not intended to meet the full needs of the entire Sugar Plant, the claimant says that the Technical Proposal would have identified the potential shortfalls in power generation or specified other means or methods of supplementing power, but it did not do so.

17 Secondly, the claimant refers to email and WhatsApp correspondence between the claimant and defendant prior to entering into the Agreement and prior to finalising the Technical Proposal which indicated that a 300 TCD sugar plant would require a 0.5MW turbine. In particular the claimant refers to:

(a) An email dated 7 December 2016 (timed at 2.34pm), in which the defendant agreed to provide a 300 TCD plant with a 6 TPH boiler and 0.5MW turbine. At the time, it was contemplated that the defendant would be supplying the entire Sugar Plant. If the 0.5MW Turbine was insufficient for the needs of a 300 TCD plant, then the claimant says that the defendant would have stated this; but the defendant did not do so.

(b) Subsequent emails dated 14 December 2016 (timed at 11.37am) and 15 December 2016 (timed at 8.58am), in which the defendant sent the "final specs" and "final technical offer" for the 300 TCD plant which confirmed the supply of a 0.5MW turbine.

(c) A WhatsApp message to the claimant on 16 January 2017 stating that the defendant was "almost done with the basic engineering of the 300 tcd plant". The claimant says that this message makes clear that what went into the Technical Proposal was entirely from the defendant and hence it was the defendant's proposal or representation that the 0.5MW Turbine would be sufficient for the purposes of the Sugar Plant.

18 Thirdly, the claimant refers to invoices issued by the defendant to the claimant which stated that the 0.5MW Turbine was being supplied for a "300 TCD Sugar Project". Taken in the broader context of all the earlier discussions between the parties and the Technical Proposal, the claimant submits that these invoices further affirm that the Sugar Plant only required a 0.5MW Turbine and support the claimant's position that at all relevant times, the parties were collectively labouring under the clear understanding that the equipment being supplied was meant to cater to the needs of the entire Sugar Plant.

19 Fourthly, the claimant submits that, as gleaned from several extracts of the transcript, the defendant's representative agreed during cross-examination that if the Sugar Plant had been installed according to the Technical Proposal, the 0.5MW Turbine was in fact intended to supply enough power for the Sugar Plant. Given that the Agreement expressly incorporates the Technical Proposal put forward by the defendant, the claimant contends that this confirms that the 0.5MW Turbine was intended to supply all the power needs of the Sugar Plant.

20 Fifthly, the claimant says that during cross-examination, the defendant's representative accepted that the Technical Proposal was tailor made for the claimant's requirements. On this point, while the defendant's witness refused to accept that this meant that the 0.5MW would suffice for the needs of a 300 TCD sugar plant, the claimant argues that his responses were illogical and to be disbelieved.

21 Sixthly, the defendant had solicited and obtained an acceptance certificate dated 15 May 2019 (the "Acceptance Certificate") from the claimant stating that the defendant had "designed, manufactured, supplied, erected and commissioned our Organic Sugar Plant". The claimant says that this certificate, the draft of which was produced by the defendant, was an implicit, if not explicit acceptance that the power generation provided by the defendant was intended to be sufficient for the purposes of the Sugar Plant.

22 On this basis, the claimant submits that had the Tribunal addressed the above evidence tendered by it, the Tribunal could have come to a different view as to whether the defendant had undertaken that the 0.5MW Turbine would meet the entire power needs of the Sugar Plant, which in this case, as was undisputed, it did not.

Whether the defendant supplied what it had contracted to do

23 The claimant submits that the Tribunal inexplicably found that the defendant had in fact supplied what it had contracted to supply, a 0.5MW Turbine. This, the claimant submits, stands in stark contrast with the Tribunal's observations at [101(1)] and [120(a)] of the Award that there was evidence that the 0.5MW Turbine was not able to achieve 0.5MW. It refers to the Tribunal's full reasoning at [79]–[123] of the Award.

24 In arriving at its decision, the claimant contends that the Tribunal failed to account for various documents and/or arguments which the claimant raised in its Closing Submissions.

25 First, the claimant says that there are numerous WhatsApp messages exchanged between the claimant and the defendant where the claimant complained that the Turbine was operating at below capacity and the defendant did nothing to refute those messages. In particular, the claimant constantly highlighted that the 0.5MW Turbine kept stalling when it reached a power output of 400KW and that a safe load for the 0.5MW Turbine was between 300KW and 350KW only, which the defendant never refuted.

26 Secondly, the claimant refers to emails where the defendant acknowledged the inadequacy of the 0.5MW Turbine or did not refute the inadequacy of the 0.5MW Turbine.

27 Thirdly, after all the discussions between the parties, a representative of the defendant sent a WhatsApp message to the claimant in which he says "let us search for a suitable turbine". The claimant submits that this was as clear an admission as possible from the defendant that the 0.5MW Turbine was not suitable and that is why a search for an alternative turbine was necessary.

28 Fourthly and most importantly, there is a report from a third party ("Y Entity") stating categorically that the 0.5MW Turbine was only capable of generating an average power of 400KW to 425KW, even though what the claimant had contracted for was a turbine that could generate 0.5MW (on the assumption that 0.5MW was sufficient to meet the needs of the Sugar Plant).

29 The claimant submits that the Tribunal could have come to a different view as to whether the defendant supplied what it had contracted to do – a 0.5MW turbine – if it had considered the above evidence and arguments raised by the claimant. Instead, it says that the Tribunal inexplicably made the finding that the claimant has not produced any scientific or technical evidence that the Sugar Plant has not been running satisfactorily and/or could not have been running unsatisfactorily if there were no additional works and no upgrading or expansion. In support of this point, it refers to [122(14)] of the Award.

30 The claimant contends that there was no evidential basis for the Tribunal to reach this finding as Y Entity was an independent third party to the Arbitration and its report conclusively found that the 0.5MW Turbine could not generate the requisite power of the Sugar Plant. If the Tribunal found that Y Entity's report was insufficient, then the claimant submits that the Tribunal should have given the claimant an opportunity to lead further evidence and/or make additional submissions before the Tribunal, which could reasonably have made a difference to the Tribunal's finding.

31 By failing to consider the above evidence, the claimant submits that there was a breach of natural justice, by which the claimant's rights were substantially prejudiced.

The spare parts claim

32 The claimant refers to [179] of the Award in which the Tribunal declined to determine its claim for US$39,437 paid by the claimant to the defendant for spare parts for the Sugar Plant on the basis that the spare parts claim fell outside the purview of the Arbitration Agreement.

33 The claimant submits that the Tribunal's decision was at odds with the Tribunal's decision in the Jurisdiction Award. The claimant says that the Tribunal had expressly rejected the challenge to its jurisdiction and determined that it had the jurisdiction to continue with the Arbitration (Jurisdiction Award at [94]). However, it submits that the Tribunal has now reversed its position, choosing instead to find that one aspect of the claim falls outside of its jurisdiction.

34 The claimant submits that the Tribunal's decision to exclude the spare parts claim from the scope of the Arbitration was an outcome of which it neither had notice nor an opportunity to address the Tribunal on the issue. As such, it was prevented from presenting its case on that issue.

Summary

35 The claimant submits that nowhere in the Award was there any consideration by the Tribunal of any of the evidence and submissions referred to above and which were fundamental to its claim. By not considering that evidence and submissions, the claimant submits that the Tribunal acted in breach of the rules of natural justice and/or failed to exercise the authority conferred to it by failing to decide the matters submitted to it.

36 It says that it has been gravely prejudiced because, if the Tribunal had considered its evidence and submissions on these points, such arguments could reasonably have made a difference to the Tribunal, and ultimately the findings in the Award. The claimant contends that the Tribunal's breaches of the rules of natural justice denied it the full effect of the claimant's arguments and evidence, and that these had a real as opposed to a fanciful chance of making a difference to its deliberations.

The defendant's case

Whether the 0.5MW Turbine was to provide all the power needs for the Sugar Plant

37 The defendant submits that the claimant's submission that the Tribunal had failed to account for various documents and/or arguments from the claimant in finding that the defendant was not required to provide for all the power needs of the Sugar Plant (at a specification of 300 TCD) is opportunistic and an attempt at a "second bite at the cherry" which the courts do not condone, referring to *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 (at [65(b)]).

38 By picking particular documents and arguments, the defendant says that the claimant has ignored the following other reasons for the Tribunal's finding on this issue:

(a) At [70(a)] of the Award, the Tribunal found that the Agreement did not provide expressly or impliedly that the defendant was to provide sufficient power for all the needs of the Sugar Plant.

(b) At [70(b)] of the Award, the Tribunal found that the claimant itself was unaware, at the time during and after the Agreement, which type of sugar or jaggery the Sugar Plant was to produce. Further, the parties had discussed the possibility of expanding the plant to a 500 TCD plant and 800 TCD plant in the future. The defendant submits that it can scarcely be said that it had to meet the need of a 300 TCD sugar plant when the claimant itself was unsure of what type of sugar and at what capacity the plant was intended to produce.

(c) At paragraph [70(d)] of the Award, the Tribunal held that the Agreement was for a relatively much smaller sum of US$1,108,800 for the supply of the 0.5MW Turbine compared to US$10,215,000 in respect of the Sugar Plant Contract for the Sugar Plant with a specification of 300 TCD.

(d) At [70(e)] of the Award, the Tribunal found that the claimant has failed or refused to produce Annexure A of the Sugar Plant Contract (for which adverse inferences were made against the claimant) or any other sufficient information which contains the specifications of the equipment supplied by X Company for the Sugar Plant. The defendant says that it was therefore kept from knowing all the specifications of the parts of the Sugar Plant and knowledge of all the power requirements of the Sugar Plant cannot be imputed to the defendant.

39 Having regard to those findings by the Tribunal, the defendant submits that the Tribunal would not have reached a different conclusion on the issue of whether the defendant was obliged to provide for all the power needs of the Sugar Plant under the Agreement, and the claimant did not suffer any real prejudice as the final outcome of the arbitral proceedings would not have been altered in any case.

40 In relation to the claimant's contention that the Tribunal failed to address the Technical Proposal put forward by the defendant, the defendant says that, to the contrary, it is manifestly clear from the Award that the Tribunal had considered the contents of the Technical Proposal. The Tribunal was aware that the claimant's team had opportunities to review the defendant's proposals before they were finalised as the Technical Proposal of 15 March 2017 and

attached to the Agreement. The Tribunal reproduced the contents of the Technical Proposal at [48] of the Award and considered the defendant's scope of works under the Technical Proposal and also the scope of X Company's works. The Tribunal noted, at [50] of the Award, that "both Parties' respective witnesses accepted at the Hearing that the [defendant] was responsible for the supply of the 6 TPH Boiler and [the 0.5MW Turbine], but the supply of all other plant, machinery and equipment were in the scope of [X Company] [*sic*]". The Tribunal also considered the provisions of the Sugar Plant Contract at [49] of the Award. In fact, the "turbo alternator set" with "a power capacity of 500KW at 0.8 factor" is referred to in the Award (at p 29).

41 The Tribunal had also noted that from the documents cited by the claimant such as "the Technical Proposal, the Agreement, the boiler manual and the invoices", there was an "association" of the Sugar Plant with the 0.5MW Turbine at the time of entering the agreement. However, the Tribunal was "careful" not to draw conclusions merely from impressions from such "associations" but focused on the "actual agreed terms and conditions of the Agreement between the Parties".

42 At [70(c)] of the Award, the Tribunal noted that the claimant's team had opportunities to review the technical proposal before it was finalised and attached to the Agreement. In fact, at [63] of the Award, the Tribunal had delved into considerable detail as to the implications of the fact that the claimant's team had the opportunity to review the Technical Proposal, including the fact that the claimant had ample opportunity to state that a 6 TPH boiler and/or the 0.5MW Turbine would not have been suitable.

43 The defendant refers to the claimant's reliance on the defendant's witness statement as evidence that the erection of the Sugar Plant was based on the defendant's Technical Proposal. It says that the claimant's team reviewed the Technical Proposal before it was finalised, and the defendant was only responsible for the scope of Annexures III (relating to the 6 TPH boiler) and IV (relating to the 0.5MW Turbine) of the Technical Proposal.

44 Therefore, the defendant submits that the claimant's contention that the Tribunal failed to consider the contents of the Technical Proposal is wrong and there is no breach of natural justice in this regard.

45 In relation to the claimant's submission that the Tribunal failed to "account for" various emails and WhatsApp correspondence prior to the entering into the Agreement, the defendant says that this correspondence was exchanged in the context of the entire scope of works being awarded to the defendant. However, the claimant chose to split the scope of the Technical Proposal into two contracts and the defendant was only responsible for the supply of the 6 TPH boiler and the 0.5MW Turbine.

46 In any event, the defendant says that the Tribunal had, in fact, considered the correspondence which the claimant alleges was disregarded and it refers to [53(c)], [60] and [63] of the Award. In particular, at [53(c)] of the Award, the Tribunal reproduced the email dated 7 December 2016 and clearly recognised that the defendant stated "our phase 1 will have a 300 TCD plant with 6 TPH AND 0.5 MW turbine [*sic*]" in the email. The Tribunal therefore clearly considered the arguments advanced by the claimant. Also, at [63(c)] of the Award, the Tribunal sets out the latter half of the email dated 14 December 2016 which stated: "[a]ttached are the final specs of 300 TCD and next phase of 500

TCS frozen after consideration all the points from the team and final discussions with [the defendant], Marking a copy to the team to have a final look at the specs [*sic*]".

47 The defendant submits that, therefore, the Tribunal did not fail to consider the relevant correspondence but, rather, the Tribunal was persuaded by the defendant's submissions that the claimant's team had the opportunity to review the defendant's proposals before they were finalised as the Technical Proposal which was attached to the Agreement, as set out in [70(c)] of the Award. The defendant therefore submits that the claimant cannot say that the Tribunal had failed to consider the correspondence between the parties before they entered into the Agreement.

48 In relation to the claimant's contention that the Tribunal failed to consider invoices issued by the defendant stating that the 0.5MW Turbine was supplied for a 300 TCD sugar plant, the defendant says that, again, the Tribunal did not fail to consider the invoices. Rather, the Tribunal considered the invoices but was not persuaded that the invoices evidenced an obligation on the part of the defendant to meet all the power requirements of the Sugar Plant.

49 At [57(c)] of the Award, the Tribunal set out the claimant's arguments in relation to the alleged invoices and, having considered the invoices, the Tribunal stated at [68(4)] and [68(5)] of the Award that it was careful not to draw conclusions based on mere "associations" to a 300 TCD plant in the alleged invoices and that it focused on the "actual terms and conditions of the Agreement between the Parties". Given that due consideration was given by the Tribunal to the invoices and the arguments advanced by the claimant relating to

those invoices, the defendant submits that there has been no breach of natural justice.

50 In relation to the claimant's contention that the Tribunal failed to consider evidence from the cross-examination of the defendant's witness, the defendant submits that the claimant has misconstrued the evidence given by that witness when it submits that he agreed that the 0.5MW Turbine was intended to supply power for the entire Sugar Plant. The defendant says that its witness very clearly stated that "the agreement between [the claimant] and [the defendant] is for a 0.5-megawatt co-generation plant. [T]here's no agreement between [the claimant] and [the defendant] for a 300 TCD Plant". The defendant submits that the claimant appears to be conflating the Sugar Plant Contract with the Agreement. In fact, the defendant's witness was unable to answer "a yes or no" when asked whether the 0.5MW Turbine was supposed to supply power for the entire Sugar Plant, indicating that the defendant was unsure of whether the 0.5MW Turbine was even supposed to satisfy the power requirements of the Sugar Plant to begin with.

51 Further, the defendant says that its witness testified that the technical specifications were "tailor made" for the claimant's requirements which, it submits, supports its arguments that the claimant clearly had the opportunity to review the Technical Proposal.

52 As a result, the defendant submits that it is unclear how this evidence from its witness's cross-examination provides any conclusive basis for the Tribunal to be able to determine that the 0.5MW Turbine was intended to supply enough power for the Sugar Plant, much less that there was a breach of natural justice.

53 In relation to the claimant's contention that the Tribunal failed to account for the Acceptance Certificate dated 15 May 2019 from the claimant, which stated that the defendant "designed, manufactured, supplied, erected and commissioned our Organic Sugar Plant", the defendant says that the Tribunal extensively dealt with this issue at [87]–[89] and [90(4)]–[90(5)] of the Award. The defendant also refers to [89] of the Award where it says that the Tribunal had set out this exact argument of the claimant. The Tribunal therefore did not fail to consider the claimant's arguments in relation to the Acceptance Certificate.

Whether the defendant supplied what it had contracted to do

54 The defendant submits that it is pertinent to note the reasons for the Tribunal's finding that the defendant had supplied the equipment it had contracted to supply and was not liable for the alleged problems with the equipment:

(a) At [122(1)] of the Award, the Tribunal found that the defendant's communications with the claimant were not really admissions by the defendant that the problems were due to inadequacies and defects in the defendant's equipment. Rather, the communications were efforts to work together with the claimant to try to resolve the problems with achieving sufficient power for the running of the Sugar Plant.

(b) At [122(2)] of the Award, the Tribunal found that the claimant did admittedly have problems with cane feeding and the provision of bagasse as fuel for the boilers to generate sufficient power for the Sugar Plant. As provided by Clause 3(b) of the Agreement, the claimant was responsible for the provision of raw materials and fuel for the operation

of equipment at the plant. The claimant also admitted that they did have constraints on cane feeding for the operation of the power generation equipment, such as availability of sufficient sugar cane, bagasse, wood, and fuel.

(c) At [122(4)] of the Award, the Tribunal found that the claimant had not produced any reliable technical data or documents (such as log readings of the power generation equipment, amount of cane feeding or other data) to not only support the claimant's own allegations of inadequacies in the design or supply of the defendant's equipment, but also to rebut the suspicions that the equipment supplied by X Company could be over-sized and hence increased the electrical workload of the Sugar Plant, or that the constraints in cane feeding and bagasse contributed to the shortfall in power attained for the operations of the Sugar Plant.

(d) At [122(5)] of the Award, the Tribunal found that, ultimately, the claimant had not adduced any technical or scientific evidence, or documents and data, to prove their allegations that the problems were due to under-capacity and shortcomings in the defendant's equipment.

55 While the claimant seeks to cast doubt on the findings of the Tribunal by stating that its findings at [101(1)] and [120] of the Award, that the 0.5MW Turbine was having problems achieving the load of 0.5MW, contradicted the Tribunal's findings at [90] of the Award that the defendant had supplied what it contracted to, the defendant says that the claimant omits reference to several other salient paragraphs in the Award which explain the rationale for the Tribunal's findings at [90] of the Award. The defendant says that the Tribunal had determined at [101(2)] of the Award that the problems with the boiler and

the 0.5MW Turbine arose out of a "mixture" of reasons. The defendant says that two reasons, in particular, were highlighted by the Tribunal. First, the claimant had cane-feeding problems and insufficient bagasse which led to insufficient fuel for the boiler to generate sufficient power for the Sugar Plant, as reflected in contemporaneous correspondence and admitted in cross-examination by one of the claimant's witnesses. Secondly, there was suspected over-sizing of the equipment supplied by X Company which the claimant was unable to rebut as it failed to produce any reliable technical data or documents (such as log readings of the power generation equipment, amount of cane feeding, or any other data).

56 Having regard to the Tribunal's findings set out above, the defendant submits that the Tribunal would not have reached a different conclusion on the issue of the defendant's liability, and the claimant did not suffer any real prejudice as the final outcome of the arbitral proceedings would not have been altered.

57 In relation to the claimant's contention that the Tribunal failed to account for various communications between the claimant and the defendant in which it says that the defendant admitted to the inadequacy of the 0.5MW Turbine, the defendant says that they in fact related to *future* plans to expand the plant and were not made in the context of issues arising out of the supplied equipment. In any event, the defendant says that the Tribunal reproduced at [103(a)] of the Award the claimant's arguments and submissions that the "[d]efendant [had] admitted problems with the running [of] the boiler" showing that the Tribunal was aware of and had considered the claimant's argument. The defendant says that the Tribunal had further reproduced the defendant's submission at [105] of the Award and determined that such correspondence

referred to finding a solution or probable solution but "this did not mean or imply that the problem was caused by the [defendant]."

58 The defendant points out that the Tribunal referred to an email dated 18 June 2019 from a representative of the defendant at [109(d)] of the Award and the defendant's submission that the email correspondence showed that "there were cane-feeding issues on the [c]laimant's side which ought to have been resolved by the [c]laimant, but which the [defendant] was in any case good faith co-operating with and assisting the [c]laimant to resolve".

59 After considering the parties' submissions, the Tribunal found at [122(1)] of the Award that the alleged communications between the claimant and the defendant "were not really admissions" but "efforts to work together with the [c]laimant to try to resolve the problems of achieving sufficient power for the running of the 300 TCD Sugar Plant".

60 On that basis the defendant submits that the Tribunal did in fact consider the alleged communications between the parties in relation to the problems with the equipment and made a finding which was not in the claimant's favour. As a result, it could not be said that there was any breach of natural justice when the alleged communications and arguments advanced by the claimant were indeed considered by the Tribunal.

61 In relation to the claimant's contention that the Tribunal failed to "account for" a report from Y Entity, the defendant refers to the context in which the claimant now places reliance on this document. First, it says that there was no representative from Y Entity as a witness in the Arbitration and such reliance on Y Entity's report offended the hearsay rule as it could not be tested by cross-

examination. Secondly, the defendant says that the "report" was merely minutes of a meeting held between the claimant and Y Entity without the defendant, which occurred on 4 July 2021 after the Arbitration had been commenced on 26 August 2020.

62 Thirdly, the fact that the minutes of meeting from Y Entity stated that the 0.5MW Turbine "was only capable of generating average power of 400KW to 425 KW" was considered by the Tribunal and reproduced in [113(c)] of the Award.

63 Further, the defendant says that the Tribunal also had the benefit of the expert report of the claimant's expert but found that it could not rely on it owing to various deficiencies, including:

(a) There was a lack of documentation and data on the technical issues to support his findings, and the limited information provided to him to do his report (Award at [130(b)]).

(b) The report did not enclose the log readings of the boiler and 0.5MW Turbine (Award at [130(c)]); and

(c) The claimant's expert admitted that the log readings should have ideally been checked on an hourly basis, but this was also not done. The log readings would have been useful to check and determine the performance of the boiler and 0.5MW Turbine (Award at [130(c)]).

64 The defendant therefore submits that, by seeking to say that the Tribunal did not consider the "report" by Y Entity, the claimant is belatedly trying to rely

on the "report" even though the Tribunal had determined that it was unable to rely on it owing to its deficiencies.

The spare parts claim

65 The defendant submits that, contrary to the claimant's contention, the Tribunal's decision to decline to determine the spare parts claim was not "at odds" with its previous decision in the Jurisdiction Award.

66 The defendant submits that the claimant has conflated the issues of a claim's jurisdiction and admissibility, which were distinguished in *Swissbourgh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho* [2019] 1 SLR 263 ("*Swissbourgh*") and explained in *BBA and others v BAZ and another appeal* [2020] 2 SLR 453 ("*BBA*"). The defendant submits that what the claimant argues to be a jurisdictional issue regarding the spare parts claim is actually an admissibility issue and therefore the decision of the tribunal is not reviewable.

67 The defendant refers to [178(a)] of the Award where the Tribunal cited its decision in its earlier Jurisdiction Award dated 16 July 2021, as follows:

> 'The issue of whether the issue of spare parts is part of the Agreement as submitted by the [c]laimant or part of a separate contract as contended by the [defendant]' was 'something not to be decided summarily' at that stage. At that stage, the Tribunal also agreed with the [c]laimant's submission that 'unless there was something in the arbitration agreement that excludes spare parts, these would in the meantime come within the ambit of the arbitration. Final decisions on the factual, contractual and legal merits or demerits of the case are for a later stage.'

68 The defendant then refers to the Tribunal's decision at [178(b)] and [178(c)] of the Award where the Tribunal said that it had now considered the merits and full arguments of the parties' respective cases:

> Having perused the Agreement very carefully, as well as the facts concerning the spares, I do not find anything in the Agreement to support the [c]laimant's argument that the [defendant] agreed expressly or impliedly to supply spare parts.

69 On the basis that only objections targeted at the jurisdiction of the claim and not at the admissibility of the claim are reviewable, the defendant submits that the Tribunal has clearly reviewed the claim and then come to a considered decision that the spare parts claim simply fell outside the scope of the Agreement.

70 In any event, so far as the claimant's claim based on a breach of natural justice is concerned, the defendant submits that the Tribunal clearly considered parties' arguments and submissions regarding the spare parts claim before coming to its decision at [178] of the Award. The Tribunal specifically detailed the arguments of both parties and determined that the spare parts claim were new transactions and contracts made outside the Agreement. The defendant submits that the Tribunal's finding relates to the admissibility of the spare parts claim which is not reviewable on the authority of *Swissbourgh* and *BBA*.

71 The defendant refers to the fact that on the first day of the hearing, the Tribunal specifically directed parties to address the Tribunal on whether the spare parts claim was part of the Agreement and whether it can be part of the Arbitration. The defendant says that this dispenses with the claimant's contention that the Tribunal's decision to exclude the spare parts claim from the scope of the Arbitration was an outcome of which the claimant did not have notice, or on which the claimant did not have an opportunity to address the Tribunal. Having been directed to address the Tribunal on the spare parts claim, the claimant had an opportunity to present its case. If the claimant failed to do so, it did so to its detriment.

Discussion and decision

72 All three grounds on which the claimant seeks to challenge the Award are based on breach of the rules of natural justice. In relation to those grounds, the claimant says that the Tribunal disregarded and did not consider a substantial portion of the evidence, submissions and arguments raised by the claimant. The claimant in fact limits its case, certainly on the first two grounds, to documentary and witness evidence which it says the Tribunal failed to address and which arguably would have led the Tribunal to reach a different outcome in the Award.

73 In order to succeed on a claim that the rules of natural justice were breached because the Tribunal failed to consider certain evidence, the claimant would have to show, first, that there was relevant and material evidence which the Tribunal disregarded in coming to its decision. Having done that, the claimant would then have to show that this evidence, when considered in the context of the other evidence on that issue, would arguably have led the Tribunal to reach a different outcome in the Award. It is not sufficient to show that there was some evidence not taken into account. That evidence has to be of such importance that it would arguably have led to a different outcome. As has often been said, a challenge on natural justice grounds is not an opportunity to appeal the Tribunal's findings on fact or law; that is why the evidence must be of critical importance to the outcome in circumstances where the Tribunal has found to the contrary based on the other evidence.

74 I now turn to consider the three grounds.

Whether the 0.5MW Turbine was to provide all the power needs of the Sugar Plant

75 The claimant says, first, that the Tribunal failed to address the Technical Proposal in finding that the defendant had not undertaken to provide for all the electrical needs of the entire Sugar Plant other than for the sugar-producing (and/or jaggery-producing) operations of the Sugar Plant (see [15]–[16] above).

76 However, it is abundantly clear that the Tribunal did address the Technical Proposal and the claimant's submission based on that document. It cited the Technical Proposal in full at [48] of the Award, including Annexures III and IV which dealt with steam and power generation. In dealing with "Issue (C)" which asked "[d]id the [defendant] undertake that the equipment it provided under the Agreement will meet all the power requirements of the entire 300 TCD Plant?", the Tribunal set out the submissions of the claimant at [57] of the Award and, in particular at [57(c)], the Tribunal noted the argument, based partly on the Technical Proposal, that the obligation to supply the 0.5MW Plant consisting of a 6 TPH boiler and a 0.5MW turbine must be for the purpose of meeting all the power requirements of a 300TCD Sugar Plant.

77 There is therefore no basis for the claimant's contention that the Tribunal failed to address the Technical Proposal or the claimant's submissions based on it.

78 Secondly, the claimant says that the Tribunal failed to consider email and WhatsApp correspondence between the claimant and defendant prior to entering into the Agreement and prior to finalising the Technical Proposal which indicated that a 300 TCD sugar plant would require a 0.5MW turbine. The email

correspondence is that of 7, 14 and 15 December 2016 and the WhatsApp message is dated 16 January 2017 (see [17] above).

79 Again, it is simply not correct that the Tribunal did not consider the emails of 7 and 14 December 2016. The Tribunal cited the email of 7 December 2016 both at [53(c)] and [60(b)] of the Award and the email of 14 December 2016 at [60(c)] of the Award. The email of 15 December 2016 merely forwarded the Technical Offer made by the defendant on 14 December 2016 and the later WhatsApp message of 16 January 2017 merely stated "[w]e are almost done with the basic engineering of the 300 tcd plant" which added nothing to the 14 December 2016 reference to a 300 TCD plant.

80 Thirdly, the claimant says that the Tribunal failed to consider invoices issued by the defendant to the claimant which stated that the 0.5MW Turbine was being supplied for a "300 TCD Sugar Project" (see [18] above). Again at [57(c)] the Tribunal refers expressly to these invoices and deals with them at [68(4)] of the Award. There is no basis for this contention.

81 Fourthly, the claimant says that the Tribunal failed to consider the evidence during the cross-examination of the defendant's witness (see [19] above). The claimant refers to extracts from the transcripts and says that the defendant's witness agreed that if the Sugar Plant had been installed according to the Technical Proposal, the 0.5MW Turbine was in fact intended to supply enough power for the Sugar Plant. I do not so read the transcripts. The first question related to a hypothetical situation where the defendant had supplied a co-generation plant and all the other equipment for a 300 TCD plant; it was in the context of that situation that the defendant's witness accepted that the co-generation plant would have to provide enough power for that plant. The second

question was whether the 0.5MW Turbine was supposed to satisfy the power requirements for a 300 TCD sugar plant. The defendant's witness clearly did not agree but said "it all depends" and "[i]t's not a yes or no". Therefore, the evidence is not to the effect asserted by the claimant and the contention fails on that ground.

82 Fifthly, the claimant says that the Tribunal failed to consider the defendant witness's evidence, during cross-examination, that the Technical Proposal was tailor made for the claimant's requirements; while he did not accept that it meant that the 0.5MW Turbine would suffice for the needs of a 300 TCD sugar plant, the claimant argues that this was to be disbelieved (see [20] above). I have reviewed the transcript and can find nothing relevant or material to this issue or to lead to the conclusion that the defendant's witness is to be disbelieved.

83 Sixthly, the claimant says that the Tribunal failed to consider the Acceptance Certificate dated 15 May 2019 from the claimant stating that the defendant had "designed, manufactured, supplied, erected and commissioned our Organic Sugar Plant" (see [21] above). Again, the certificate is cited at [87] of the Award, the parties' submissions are set out at [88] and [89] of the Award and the Tribunal set out its conclusions on those submissions at [90(4)] and [90(5)] of the Award. There is therefore no basis whatsoever for the contention that Tribunal failed to consider the Acceptance Certificate.

84 Therefore, this ground fails on the initial premise because all the relevant and material evidence was, in fact, considered by the Tribunal. However, even if that had not been the case, the Tribunal's conclusion at [70] of the Award that "it was not provided, expressly or impliedly, in the Agreement" that the

defendant would provide sufficient power for all the electrical needs for the entire 300 TCD Sugar Plant was a matter of contractual interpretation, and there was nothing in this evidence which would arguably have altered this conclusion or the other conclusions of the Tribunal on this issue.

85 It follows that this ground fails.

Whether the defendant supplied what it had contracted to do

86 The claimant says that the Tribunal inexplicably found that the defendant had supplied what it had contracted to supply when it accepted at [101(1)] and [120(a)] of the Award that there was evidence that the 0.5MW Turbine was not able to achieve 0.5MW (see [23] above).

87 In arriving at its decision, the claimant contends that the Tribunal failed to account for various documents and/or arguments which the claimant raised in its Closing Submissions (see [24] above). However, it is important to distinguish between two points. The first point is whether the boiler/turbine combination achieved 0.5MW as to which the Tribunal found that "there were indeed problems with regard to the boiler and turbine achieving a load of 0.5 MW for the 300 TCD Sugar Plant" in [101(f)] and [120(a)] of the Award, as the claimant points out (see [23] above). The second point is why it did not achieve a load of 0.5MW.

88 As the defendant points out (see [54] above), the Tribunal's findings in [122] of the Award went to the issue of why the problems with the Sugar Plant were not the defendant's responsibility. First, the Tribunal said that the communications between the parties were not admissions that the problems were due to inadequacies and defects in the defendant's equipment but efforts

to work together with the claimant to try to resolve the problems of achieving sufficient power for the running of the 300 TCD Sugar Plant (Award at [122(1)]). Secondly, that the claimant had problems with cane feeding and provision of bagasse as fuel for the boilers to generate sufficient power for the Sugar Plant (Award at [122(2)]). Thirdly, that the claimant had not produced any reliable technical data or documents (such as log readings of the power generation equipment, amount of cane feeding or other data). This was needed not only to support the claimant's own allegations of inadequacies in the design or supply of the defendant's equipment, but also to rebut the suspicions that the equipment supplied by X Company could be over-sized and hence increased the electrical workload of the plant, or that the constraints in cane feeding and bagasse contributed to the shortfall in power being attained for the operations of the Sugar Plant (Award at [122(4)]). Ultimately, the Tribunal found that the claimant has not adduced any technical or scientific evidence nor any documents nor data to prove their allegations that the problems were due to under-capacity and shortcomings in the defendant's equipment (Award at [122(5)]).

89 It is in that context that the contentions of the claimant have to be considered.

90 First, the claimant says that there were numerous WhatsApp messages exchanged between the claimant and the defendant where the claimant complained that the Turbine was operating below capacity and highlighted that the 0.5MW Turbine kept stalling when it reached a power output of 400KW, and that a safe load for the 0.5MW Turbine was between 300KW and 350KW only, which the defendant never refuted (see [25] above). This goes to the first point on which the Tribunal found there were problems in achieving 0.5MW.

91 Secondly, the claimant refers to emails where the defendant acknowledged the inadequacy of the 0.5MW Turbine or did not refute the inadequacy of the 0.5MW Turbine (see [26] above). The Tribunal referred to emails of 17 and 18 June 2019 at [92] of the Award and these went, again, to the first point, the problems in achieving 0.5MW.

92 Thirdly, the claimant refers to the WhatsApp message sent by a representative of the defendant, in which he says, "let us search for a suitable turbine" (see [27] above). The claimant submits that this was a clear admission that the 0.5MW Turbine was not suitable. The Tribunal, however, considered communications between the parties and held that they were not admissions that the problems were due to inadequacies and defects in the defendant's equipment but efforts to work together with the claimant to try to resolve the problems of achieving sufficient power for the running of the 300 TCD Plant.

93 Fourthly, the claimant refers to and relies on a report from Y Entity stating that the 0.5MW Turbine was only capable of generating an average power of 400KW to 425KW not 500KW (see [28] above). This again goes to the first point. In any case, this was referred to by the Tribunal at [113(c)] of the Award and there can be no suggestion that the Tribunal failed to consider the document.

94 Further it is clear that the claimant is now putting great emphasis on this document because the Tribunal rejected the evidence of its expert (Award at [130] and [132]). The Tribunal also rejected the evidence of the defendant's expert but stated at [131(a)] that the only useful part of his report was on the technical issue of "[w]hether the Steam Turbine supplied by [the defendant] is able to generate power of 0.5 MW", where he said:

> From the records available in the said Arbitration Proceedings, as the Boiler was under-utilised by [the claimant], the required steam to be supplied to the Steam Turbine could not be generated and thus the Steam Turbine was unable to generate the power of 500 KW. Unless the fuel (bagasse/wood) is available to operate the Boiler at its full capacity, no steam can be generated and thus the required power of 500 KW cannot be achieved.

95 It therefore is clear that the document relied on by the claimant as a "report" of Y Entity is very much promoted as evidence because the expert evidence on which the claimant had sought to rely was rejected, about which no complaint is or could be made.

96 As the defendant states, the "report" is, in fact, minutes of a meeting held between the claimant and Y Entity on 4 July 2021 (see [61] above). It reports results of a trial but does not contain details of why lower power was achieved. Given the position on expert evidence, there is nothing in this which would be relevant or material to the establishing the cause of the lower power.

97 Therefore, having reviewed the documents relied on by the claimant, it is clear that the emails and WhatsApp messages were either considered by the Tribunal and dealt with in [122(2)] of the Award, or were instead relevant to the issue of whether the 0.5MW Turbine in fact achieved 0.5MW and not the question of what caused the lower output. Y Entity's report was also considered by the Tribunal but went, again, only to the power output not the cause of that power output.

98 Accordingly, the claimant has not made out a case that the Tribunal failed to take account of relevant or material documents or that those documents would arguably have affected the outcome, given the Tribunal's reasoning. On that basis, this ground for challenge fails.

The spare parts claim

99 Whilst the defendant makes a point that the Tribunal's decision to exclude the spare parts claim from the Arbitration cannot be challenged on the basis of jurisdiction as it goes to admissibility (see [66]–[69] above), the basis for challenge by the claimant is not a lack of jurisdiction but a failure to comply with the rules of natural justice.

100 The claimant says that in the light of the Tribunal's Jurisdiction Award, its decision to exclude the spare parts claim from the scope of the Arbitration was an outcome of which it had no notice and which it could not address, and that it was so prevented from presenting its case (see [34] above).

101 That contention cannot stand in the light of the transcript of the first day of the hearing where the Tribunal expressly raised these points:

> On the matter of spares, although that's a relatively smaller part of the claims, there have been submissions by the parties, so one part that stands out in my mind is, are the claim for spares -- can they be part of this arbitration or not? Because, firstly, one question is whether they are part of the agreement. The next question is whether or not they are part of the agreement, can they be part of the arbitration? So you have to look at the arbitration clause closely to answer this.

102 On this basis, this completely defeats the claimant's case that the Tribunal's decision to exclude the spare parts claim from the Arbitration was an outcome of which it had no notice and which it could not address, and that it was so prevented from presenting its case. It was expressly raised by the Tribunal and the claimant was given the opportunity to deal with the point.

103 Accordingly, the claimant's challenge on natural justice grounds fails.

Conclusion

104 For the reasons set out above the claimant's challenge to the Award is dismissed.

105 In relation to costs, if the parties are unable to agree on costs within 14 days of this judgment, they are to apply to the court for directions.

Sir Vivian Ramsey
International Judge

Senthil Dayalan, Tharanii Thiyagarajan and Paul Aman Singh Sambhi (Dentons Rodyk & Davidson LLP) for the claimant;
Koh Choon Guan Daniel, Wong Hui Yi Genevieve and Smrithi Sadasivam (Eldan Law LLP) for the defendant.