**IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE**

**[2025] SGHC(I) 15**

Originating Application No 20 of 2024 and Summons No 12 of 2025

Between

DOI

… *Claimant*

And

(1) DOJ
(2) DOK
(3) DOL

… *Defendants*

---

# JUDGMENT

---

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

## TABLE OF CONTENTS

# DOI
# v
# DOJ and others and another matter

**[2025] SGHC(I) 15**

Singapore International Commercial Court — Originating Application No 20 of 2024 and Summons No 12 of 2025
Roger Giles IJ
25–26 February, 26 March, 16 April 2025

5 May 2025 Judgment reserved.

**Roger Giles IJ:**

## Introduction

1 In SIC/OA 20/2024 ("OA 20") the Claimant applies to set aside the award, by a majority ("the Majority"), in a Singapore seated arbitration. Its case, in summary, is that the Majority did not apply their mind to the evidence and arguments in the arbitration but came to their decision with a closed mind, as shown in particular by what it said was the cut-and-paste copying in the award of the contents of the awards in prior related arbitrations. In its witness statement in support of OA 20, it said that the award should be set aside on one or more of:

(a) Ground 1: breach of the rules of natural justice in connection with the making of the award by which its rights were prejudiced,

pursuant to s 24(*b*) of the International Arbitration Act 1994 (2020 Rev Ed) ("the IAA");

(b) Ground 2: inability to present its case, pursuant to Art 34(2)(*a*)(ii) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") as given the force of law by s 3(1) of the IAA;

(c) Ground 3: adoption of an arbitral procedure not in accordance with the agreement of the parties, pursuant to Art 34(2)(*a*)(iv) of the Model Law; and

(d) Ground 4: the award being in conflict with the public policy of Singapore, pursuant to Art 34(2)(*b*)(ii) of the Model Law.

2 By a late grant of permission, the Defendants say that the Claimant is precluded from seeking and/or has waived its right to seek to set aside the award on the basis of the alleged copying of the awards in the prior related arbitrations. They otherwise say, again in summary, that the Majority applied its mind to all essential issues in the arbitration, that there is no basis to the grounds for setting the award aside, and that the Claimant is engaged in an impermissible attempt to appeal on the merits of the award.

3 In these reasons I will first consider whether the award should be set aside, passing over whether the Claimant is precluded from and/or has waived its right to seek to set it aside. I will then give the reasons for granting the permission above-mentioned to the Defendants, over the Claimant's opposition: the explanation may be better understood in the light of the preceding consideration. I will then consider whether the Claimant is indeed precluded from and/or has waived its right to seek to set the award aside.

4 Orders sealing the file in OA 20 and for redacted publication have been made, and these reasons are written accordingly. They will explain that the Claimant is not disentitled from seeking to set the award aside, and that the award should be set aside on Ground 1. Although the other grounds become unnecessary, some brief consideration is then given to them.

## Background to the arbitration

### *The CTP-11 Contract*

5 The Claimant is a special purpose vehicle formed under the laws of India for the construction and operation of dedicated freight corridors, being a network of railways in India for the exclusive use of freight trains. The Defendants are three companies associated in an unincorporated consortium for the contract next mentioned. One is a Japanese company; the others are Indian companies.

6 By a contract dated 10 November 2016 ("the CTP-11 Contract"), the Claimant engaged the Defendants as the contractor to undertake works for a section of one of the dedicated freight corridors. The CTP-11 Contract was a Design and Build Lump Sum Contract, incorporating the FIDIC Conditions of Contract for Plant and Design Build (First Edition, 1999), as amended by the Particular Conditions of Contract and the Appendix to Bid. The governing law of the CTP-11 Contract was Indian law. The provisions of the CTP-11 Contract relevant to the dispute are identified, so far as necessary, in the course of these reasons.

7 The CTP-11 Contract provided for reference of disputes to a Dispute Adjudication Board ("the DAB"), and if not settled amicably or by a binding decision of the DAB for settlement by arbitration. Through one of the

Defendants being a "foreign contractor", the arbitration was to be in accordance with the rules of arbitration of the International Chamber of Commerce ("the ICC"), and by a selection forming part of the contractual documentation was to be seated in Singapore.

***The dispute***

8 Under Indian law certain classes of workers are entitled to a rate of minimum wages, which is subject to periodical adjustment by the Ministry of Labour and Employment ("the MLE"). In January 2017 the MLE issued a notification increasing the rate of minimum wages for a number of categories of employees ("the January 2017 Notification"), which it followed up in March and April 2017 with a confirmatory notification and order. The Defendants claimed that the January 2017 Notification revised the minimum rate of wages on which they had tendered, resulting in a significant increase in their labour cost for the works beyond that originally anticipated, and sought to recover the alleged increase in labour cost from the Claimant.

9 The Defendants rested their claim on cl 13.7 of the CTP-11 Contract, a FIDIC clause as amended by the Particular Conditions of Contract. It provided that the contract price should be adjusted to take account of any increase or decrease in "Cost" (defined in terms of all expenditure reasonably incurred or to be incurred by the Defendants) after the "Base Date" (defined with reference to the tender date) resulting from, *inter alia,* "a change in the Laws of the Country [*ie*, India] (including the introduction of new Laws and the repeal or modification of existing Laws)". The clause provided that the Defendants should give notice to the Engineer, that they would be entitled "subject to Sub-Clause 20.1" to *inter alia* "payment of any such Cost, which shall be included in the Contract Price", and that the Engineer would determine the matter.

10 The qualifying reference to cl 20.1 was to part of the FIDIC general claims provision. By the clause, any notice to the Engineer claiming additional payment "shall be given as soon as practicable", "describing the event or circumstance giving rise to the claim", and "not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance". It provided that if notice of a claim was not given within the 28 days "the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim". As well, it provided that the "Contractor shall keep such contemporary records, as may be necessary to substantiate any claim …"

11 Another clause of the CTP-11 Contract, cl 13.8, was also concerned with adjustment of the amount payable to the Defendants. It provided for adjustment for rises or falls in the cost of labour, goods and other inputs to the works according to a "table of adjustment data" setting out various circumstances and formulae for arriving at the particular adjustment, with the proviso that "[t]o the extent that full compensation for any rise or fall in Costs [*sic*] is not covered by the provisions of this or other Clauses, the Accepted Contract Amount shall be deemed to have included amounts to cover the contingency of other rises and falls in costs".

12 In a course of correspondence between the Defendants and the Engineer, the Defendants made claims for their increased labour cost and the Engineer rejected the claims. The first intimation of a claim was in May 2017, more than 28 days after the January 2017 Notification. A claim was then made more specifically, and was rejected in November 2017 on the grounds that the revision of minimum wages did not constitute a change in law for the purposes of cl 13.7 and that any increase in labour cost was already covered under cl 13.8.

13 The Defendants contested the rejection and requested reconsideration, and in April 2018 the Engineer responded maintaining its rejection. After a period of silence, in February 2020 the Defendants made a further claim with a quantified "interim" amount to the end of December 2019, which the Engineer rejected in June 2020 noting its earlier rejections but after fresh consideration coming to the same conclusion. The Engineer's letters included that the claims had been made outside the 28 days in cl 20.1.

14 The Defendants took the rejection of their claims to the DAB. After hearing the parties, it decided adversely to the Defendants on the ground that the periodic revision of wages could not be considered a change in law, with reference to cl 13.8 as the provision for price escalation. A subsequent meeting in the presence of the Engineer failed to resolve the matter amicably. The Defendants then took the matter to arbitration.

**The arbitration**

15 The Defendants filed their Request for Arbitration ("the RFA") with the ICC on 2 December 2021. In the RFA, they nominated Judge A as their party-appointed arbitrator. The Claimant nominated Judge B as its party-appointed arbitrator, and the tribunal was constituted by the joint nomination by Judge A and Judge B of Judge C as the presiding arbitrator, confirmed by the ICC Secretariat on 19 April 2022. Each of Judge A, Judge B and Judge C was a retired Indian judicial officer.

16 There were procedural hearings and completion of the pleadings, then the hearing of arguments spread over the period May to September 2023 and the filing of written notes of submissions at the end of October 2023. The proceedings were declared closed on 10 November 2023.

17 The award in the CTP-11 arbitration ("the Award") was issued on 5 June 2024. As earlier noted, the award was by a majority, being the presiding arbitrator Judge C together with Judge A. Judge B issued a dissenting opinion dated 28 May 2024; she signed the Award, but with the note that she "has expressed her views separately in her Dissenting opinion".

***The issues in the arbitration***

18 As recorded in the Award, the Defendants as claimants sought the relief, in summary:

(a) a declaration that the January 2017 Notification constituted a change in law "as per Clause 13.7" and that the Claimant should accordingly pay "the increase in cost arising from the same" on a monthly basis;

(b) an award of Rs 100,84,39,906 towards that increased cost due to the increase in minimum wages, calculated to 30 September 2021, together with applicable tax;

(c) a declaration that the Claimant was further liable to pay the increased cost due to the increase in minimum wages from 1 October 2021 onwards, together with applicable tax;

(d) an award of Rs 6,26,44,043 towards interest;

(e) an award of pre- and post-award interest;

(f) an award of the costs of the arbitration; and

(g) further or other relief as the tribunal felt just and appropriate.

19 In the Terms of Reference agreed between the parties ("the TOR"), the particular issues to be determined were:

> i. Whether the Claim of the Claimants for adjustment of Contract Price due to an increase in cost is barred under limitation as provided under Clause 20.1 of General Conditions of Contract (GCC)?
>
> ii. Whether the Claim of the Claimants for adjustment of Contract Price due to an increase in cost is covered under Clause 13.8 of the General Conditions of Contract (GCC), that is, Adjustments for Changes in Cost?
>
> iii. Whether the Notification dated 19.01.2017 amounts to change in law as per Clause 13.7 of the PCC [*sic*]?
>
> iv. Whether the Claimants are entitled to an adjustment of Contract Price due to increase in minimum wages as a result of the Notification dated 19.01.2017 which is payable by the Respondent to the Claimants on monthly basis?
>
> v. Whether the Claimants are entitled to Rs. 92,31,18,812/- towards adjustment of Contract Price due to increase in cost incurred by [the Defendants] due to increase in minimum wages calculated till 30.09. 2021 along with applicable tax?
>
> vi. Whether [the Defendant] is further liable to pay the adjustment of Contract Price due to increase in cost to be incurred by [the Claimants] due to increase in minimum wages from 01.10.2021 along with applicable tax?
>
> vii. Whether the Claimants are entitled to the award of an amount of Rs.5,99,04,542/- towards interest calculated till 30.09.2021?
>
> viii. Whether the Claimants are to be awarded interest on any awarded sums from 01.10.2021 and at what rate?
>
> ix. Whether the Claimants are entitled to be awarded pendente lite and post award interest and at what rate and from which date(s)?
>
> x. What relief and costs?

20 The issues may be categorised as going to liability (issues 1 to 4), to quantum (issues 5 and 6), and to interest and costs (issues 7 to 10).

***The parties' positions***

21 On liability, the central question was whether cl 13.7 of the CTP-11 Contract applied with the January 2017 Notification being a change in law, or whether the Defendants' entitlement to adjustment of the contract price was confined to the operation of cl 13.8. The rate of minimum wages in India comprised two components, the Basic Rate of Wages ("BRW") and a special allowance referred to as the Variable Dearness Allowance ("VDA"). The Defendants contended that cl 13.8 dealt with price adjustment when the change in cost was caused by inflation, more specifically, only with change in cost from the VDA component, and did not apply to change in cost caused by a change in law changing the BRW component which was governed by cl 13.7. With reference to the definition of "Laws", they said that "change in law" included minimum wage notifications and that the January 2017 Notification was a change in law within that clause. The Claimant contended that the increase in the rate of minimum wages as a result of the January 2017 Notification fell within cl 13.8 as a rise in the cost of labour, and that as a special provision it prevailed over cl 13.7. It said as well that the January 2017 Notification was not a change in law, because it did not amend or repeal an existing law or introduce a new law but was a revision of minimum wages under Indian statute, and also because having regard to other provisions of the CTP-11 Contract, "change in law" could not be construed to include a rise in minimum wages. It said that in any event the January 2017 Notification did not apply to the CTP-11 Contract because it only applied to work on "roads or runways or in building construction" and the CTP-11 Contract was for the construction of railways.

22 On the issue of the cl 20.1 time bar, as well as relying on failure to claim within the 28 days, the Claimant contended that the Defendants were estopped from bringing their claim or had waived their right to do so because they had

not challenged the Engineer's decisions in 2017 and 2018 before the DAB. The Defendants contended that cl 13.7 was "self-operative" and not subject to cl 20.1; that the change in the rate of minimum wages had a "continual impact" and their "cause of action" was "continual in nature" and they were not limited to making only one claim within the 28 days; and that if cl 20.1 did act as a time bar to their claims, it was void and invalid under s 28 of the Indian Contract Act 1872 (Act No 9 of 1872) (India) ("the Indian Contract Act").

23 On quantum to 30 September 2021, the Defendants did not furnish proof of actual additional expenditure, but took a notional formula using coefficients of labour from the table to cl 13.8. The Claimant did not provide its own quantification, but contended that the Defendants' formula had no basis in the contract and had a number of errors; but more fundamentally, the Claimant said that cl 13.7 required substantiation of the claim from contemporary records (a contention which it supported by reference to statutory and contractual obligations to maintain records of payment of wages) but no such proof had been provided by the Defendants. It contended also that the Defendants had not taken account of other amendments, such as Employees Provident Fund and Employee State Insurance Contribution, which may have resulted in reduction of the impact of the change in minimum wages.

24 The positions for the period after 30 September 2021 followed from the preceding issues; the Defendants contended for a declaration of their future entitlement, the Claimant said that there was no entitlement.

25 Finally, as to interest and costs, the Defendants contended for pre-award interest of 8% per annum compounded monthly and post-award interest similarly calculated, and for the entire costs of the arbitral proceedings. The Claimant said that since the Defendants were not entitled to any adjustment of

the contract price, there was no entitlement to interest, and that their claims should be dismissed with costs to the Claimant.

**The Award**

26 In the Award, the Defendants were substantially successful.

27 The Award was described as an award "(Per Justice [C], President) (For himself and Justice [A]) – Majority view", but as earlier indicated was signed by Judge B with a note referring to her dissenting opinion. It comprised 340 paragraphs. The first 68 paragraphs were essentially procedural, a summary of the parties' positions, and the statement of the issues for determination. The issues were then dealt with sequentially, generally in the form of briefly setting out the claimant's position and the respondent's position and then explaining the tribunal's reasoning and analysis: issue 1 in paragraphs 69 to 125; issue 2 in paragraphs 126 to 171; issues 3 and 4 together in paragraphs 172 to 230; issues 5 and 6 together in paragraphs 231 to 290; and issues 7, 8 and 9 together in paragraphs 291 to 332. The remaining paragraphs 333 to 340 were essentially dispositive in accordance with the previous paragraphs.

28 On the central question, the Majority held in a complex analysis that cl 13.8 had the limited purpose of compensating the Defendants when there was a variation in the VDA, an inflation-related allowance being only one component of the rate of minimum wages. The January 2017 Notification was a variation in the other component, the BRW, and the Majority held that it was a change in law for the purposes of cl 13.7. They held that the Defendants were entitled to an upwards adjustment of the contract price due to the increase in minimum wages, including accepting that the January 2017 Notification applied to the CTP-11 Contract.

29 The Majority held that the Defendants' claim was not barred pursuant to cl 20.1, because its notice requirement was "directory" and not mandatory, and that even if it had been mandatory it would be void pursuant to s 28 of the Indian Contract Act. They held further that the impact of the January 2017 Notification had been continuing, so that the Defendants had "a continuing or a recurring cause of action" and they could raise successive claims for the Engineer's determination. For that reason, the Majority also rejected the Claimant's contentions of estoppel and waiver.

30 As to quantum, the Majority held that it was not necessary for the Defendants to provide "proof of exact or actual costs incurred". The Majority described the Defendants' method of calculating their claim based on standard book data as "reasonable, practical and permissible", but did not adopt the Defendants' calculation leading to Rs 92,31,18,812. Instead, the Majority made their own calculation of an adjustment based on a 40% increase in the minimum wages, arriving at an amount of Rs 80,29,92,737 to 30 September 2021.

31 The Majority held further that the Defendants would be entitled to additional costs on account of the increase in the rate of minimum wage for the period from 1 October 2021 onwards "as per the findings arrived at by the Tribunal in Issues (ii), (iii), (iv), (v) and (vi)".

32 Referring to the Indian Arbitration and Conciliation Act 1996 (No 26 of 1996) (India) ("the Indian Arbitration Act") and the Indian Interest Act (No 14 of 1978) (India) ("the Indian Interest Act") and Indian authorities, the Majority held that the Defendants were entitled to pre-award interest at 8% compounded monthly on the Rs 80,29,92,737 from 27 March 2020. Again with reference to Indian law, the Majority awarded post-award interest on the total of the

Rs 80,29,92,737 and the pre-award interest at 7.5% from two months from the date of the Award.

33 Finally, as to costs, the Majority referred to the Indian Arbitration Act and Indian authorities in holding that the Defendants were entitled to 80% of their costs and of the costs of the arbitration, on the basis that the successful party should be entitled to receive costs and 80% reflected the extent to which the Defendants had succeeded in their claims.

34 In her dissent, Judge B held that the Defendants' claim was barred pursuant to cl 20.1 of the CTP-11 Contract, and also by estoppel; and that had it not been barred, while the January 2017 Notification fell within cl 13.7 and was a change in law, the Defendants would only have been entitled to their proved actual expenditure rather than a claim calculated on a notional basis, and would only have been entitled to Rs 34,26,32,848. She held further that the Defendants would not have been entitled to pre-award interest but would have been entitled to post-award interest at 7.5%, and that the parties should each bear their own costs.

**The prior related arbitrations**

35 The Claimant entered into three other contracts for works for sections of a dedicated freight corridor. In each case the contractor sought to recover in an arbitration the increase in labour cost resulting from the January 2017 Notification. The contracts were in largely similar terms to the CTP-11 Contract, although containing some differences.

36 The first contract in order of the ultimate award was dated 29 August 2016 ("the CP-301 Contract"). The contractor was a consortium of two Indian companies, one being one of the Defendants, and was governed by Indian law.

The arbitration was commenced on 17 May 2021, and in accordance with the CP-301 Contract was conducted under the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi and seated in New Delhi. The three-member tribunal comprised the two appointees of the respective parties, together with Judge C as the presiding arbitrator. The hearing was over the period December 2021 to May 2022, and the last submissions were received in February 2023. The award ("the CP-301 Award") was issued on 1 July 2023.

37 The second contract in order of the ultimate award was dated 29 August 2016 ("the CP-302 Contract"). The contractor was another consortium of two Indian companies, one being one of the Defendants, and was governed by Indian law. The arbitration was commenced on 14 October 2021, and again in accordance with the CP-302 Contract was an International Centre for Alternative Dispute Resolution arbitration seated in New Delhi. The three-member tribunal comprised the two appointees of the respective parties, one being the same as that party's appointee for the CP-301 arbitration, again together with Judge C as the presiding arbitrator. The hearing was over the period July 2022 to November 2022, and the last submissions were received in January 2023. The award ("the CP-302 Award") was issued on 23 August 2023.

38 The third contract in order of the ultimate award was dated 18 August 2015 ("the CTP-13 Contract"). The contractor was a consortium of the same companies as in the CTP-11 Contract, *ie*, the Defendants. The arbitration was commenced on 16 December 2021, and in accordance with the CTP-13 Contract was an ICC arbitration seated in Singapore. The three-member tribunal comprised an appointee of the respondent (*ie*, the Claimant) and Judge A as the claimant's (*ie*, the Defendants') appointee, and again Judge C as the presiding arbitrator. The hearing was over the period November 2022 to April 2023, and

the closing submissions were received in May 2023. The award ("the CTP-13 Award") was issued on 24 November 2023.

39 As a reminder, the arbitration in the present case was commenced on 2 December 2021 as an ICC arbitration. The hearing was over the period May 2023 to September 2023, and the closing submissions were received at the end of October 2023/early in November 2023. The Award was issued on 5 June 2024.

40 In all four arbitrations the claimants (and so the Defendants as claimants in the CTP-11 arbitration) were represented by essentially the same team of counsel. The Claimant as respondent in the arbitrations was represented by essentially different teams of counsel; its team in the CTP-11 arbitration was without any counsel from the prior arbitrations.

41 Judge C was the presiding arbitrator in all four arbitrations, and when he came to his decision together with Judge A in the Award he had given decisions in the three prior arbitrations. At the close of submissions in the CTP-11 arbitration the awards in the first two arbitrations had been issued, and the award in the CTP-13 arbitration was imminent. Judge A was a member of the tribunal in both the CTP-11 arbitration and the immediately preceding CTP-13 arbitration, and when he joined with Judge C as the Majority in the Award, he had earlier joined with him in the decision in that arbitration.

42 The contractors were substantially successful in all three prior related arbitrations. In the Claimant's case in OA 20, the cut-and-paste copying was from the awards in these arbitrations, particularly from the CTP-13 Award.

43 It should be said that the CTP-13 Award has been set aside, on the Claimant's application: see *DJO v DJP and others* [2024] SGHC(I) 24 ("*DJO (HC)*"). The Claimant applied on similar but not identical grounds to those in the present application, and mounted a similar but not identical case to that which it seeks to make out in OA 20. It was held that the award should be set aside because it was made in breach of the rules of natural justice. The Claimant submitted that the facts of the present case fell within the facts of *DJO (HC)* and that the Award bore "practically identical" concerns as the CTP-13 Award, and said that the Award should similarly be set aside.

44 While appropriate regard may be had to *DJO (HC)*, the challenge to the Award must be addressed on an examination of its own merits. *DJO (HC)* was under appeal, the appeal having been heard in January 2025 with the decision not yet issued. Deferring my decision in these proceedings until the decision on appeal was issued, for the likely assistance then available, was raised with the parties. The Claimant was agnostic, the Defendants opposed that course, and in the circumstances I considered that I should give my decision in the ordinary course.

45 These reasons were completed and being prepared for release when, on 8 April 2025, the judgment of the Court of Appeal was released: *DJP and others v DJO* [2025] SGCA(I) 2 ("*DJO (CA)*"). The appeal was dismissed. I invited the parties to provide supplementary written submissions on the significance of the Court of Appeal's decision, which were received on 16 April 2025. My decision remained the same. I have addressed the Court of Appeal's decision and the submissions in an addendum to these reasons.

**The Claimant's complaints**

46 The primary focus of the Claimant's case was on its Ground 1, breach of the rules of natural justice, more specifically those against apparent bias in the form of prejudgment and against failure to give a fair hearing. It put forward a number of matters, which I will call its complaints, in support of Ground 1, and relied on the same or most of the same matters for the other Grounds 2, 3 and 4. It is convenient first to describe the complaints.

***Copying from the awards in the prior related arbitrations***

47 The overarching complaint, on which the further complaints built, was that the Majority had used the CTP-13 Award (which was itself copied from the CP-302 and CP-301 Awards) by copying from it as a template for its reasoning and analysis of the issues in the Award. By "template" was not meant just form, but reproduction of substance. The Claimant said that the Majority's reasoning and analysis across all ten issues in the Award spanned 176 paragraphs, and with an extensive comparative schedule that 157 paragraphs out of the 176 had been reproduced from the CTP-13 Award, in many cases stemming from the CP-301 and CP-302 Awards also, either verbatim or with what it called minor modifications.

48 The parties traded numbers of paragraphs, and the Defendants produced a commentary on the schedule. The Defendants did not and could not contest that there was extensive reproduction in the Award from the CTP-13 Award, and through it from the earlier awards: some more detail of this appears in the consideration of the further complaints. The Defendants' response was for the most part that they did not accept that the paragraph in the CTP-11 Award was common to or a reproduction of one or more of the earlier awards as the wording and/or phrasing was different, saying that at least 135 of the 157 paragraphs

contained differences from the corresponding paragraphs in the prior related awards and that at least 39 of the 157 were legal propositions or the citation of texts or authorities.

49 It is impractical to go through the paragraphs in the awards in these reasons, nor is it necessary to resolve a precise number of paragraphs or classify the minutiae of the changes in wording and/or phrasing. It is correct that in some instances there is a change in the wording or phrasing, but the change is editorial only and emphasises rather than negates the otherwise reproduction of the paragraph from the prior related award. It is apparent that the Award was written with the CTP-13 Award, and perhaps the earlier awards, before the writer, and clear that in the Majority's reasoning and analyses the CTP-13 Award was largely used as the basis for the Award, with some textual amendment but extensive reproduction of the substance of its paragraphs.

50 The complexion to be put on the reproduction is considered later in these reasons, and is informed by regard to the Claimant's other complaints. It can be said now, however, that the use of the CTP-13 Award as the basis for the Award was at the least problematic. There was at the least the risk of the appearance and the actuality of the Majority coming to its decision in the CTP-11 arbitration without proper regard to the facts and the submissions in that arbitration.

### *Copying and relying on contractual provisions not found in the CTP-11 Contract*

51 The Claimant pointed to three instances in which the Majority referred to and relied on the wrong contractual provision; the significance, it said, was not just the errors, but that they indicated that the Majority had used the CTP-13 Award as the template for the Award (in the sense indicated above) without properly applying their minds to the relevant issue.

*The wrong cl 13.8*

52 For issue 2, cl 13.8 of the CTP-11 Contract was a central provision; the Claimant relied on it as the provision applicable to the increase in the minimum rate of wages. In their decision of issue 2 the Majority held that it applied only to the VDA, and accordingly that the Defendants were entitled to an adjustment pursuant to cl 13.7. In the course of a complex analysis they set out in paragraph 150 of the Award a price adjustment formula as the formula in cl 13.8 of the CTP-11 Contract.

53 However, the formula set out in paragraph 150 of the Award was not the formula in cl 13.8 of the CTP-11 Contract. Paragraph 150 was a verbatim copy of paragraph 275 from the CTP-13 Award, which was a verbatim copy of a paragraph from the CP-302 Award which was a verbatim copy of a paragraph from the CP-301 Award. The formula was in fact the formula in the CP-302 Contract and the CP-301 Contract: indeed, when set out in paragraph 275 of the CTP-13 Award it was incorrect as a citation from cl 13.8 of the CTP-13 Contract, having been copied from the CP-302 Award or the CP-301 Award. (The Claimant pointed to *DJO (HC)* at [71] noting this as a "clear demonstration that the Tribunal were drawing upon the submissions made to, and the labours of, the Tribunal in the CP-301 Arbitration rather than focusing on the submissions made to them in [the CTP-13 Arbitration]".) The differences in the formula were significant, in the sources from which some components of the formula were to be obtained.

*The wrong adjustment data*

54 In the same analysis involving cl 13.8 of the CTP-11 Contract, at paragraph 160 of the Award the Majority referred to "Schedule 1: Schedule of Adjustment Data" and said that it provided the values for a number of cost

indices in the formula in cl 13.8 for adjustment for changes in cost. The Majority said in the same paragraph that the labour component, being two of the cost indices, was "clearly defined to be based on the All India Consumer Price Index as published by the Labour Bureau, Ministry of Labour, Government of India".

55 In both respects, this was incorrect for the CTP-11 Contract. Paragraph 160 was a verbatim reproduction of paragraph 288 in the CTP-13 Award, which had corresponding antecedents in the two earlier awards. Paragraph 288 in the CTP-13 Award was correct for the CTP-13 Contract, but Schedule 1: Schedule of Adjustment Data in the CTP-11 Contract did not include values for the cost indices identified in the paragraph; further the cost indices during the project implementation were to be taken from those published by the Reserve Bank of India.

56 The incorrect reference to the indices published by the Government of India, as opposed to those published by the Reserve Bank of India, was repeated in each of paragraphs 151, 153, and 159 of the Award. Those paragraphs were reproductions of paragraphs 276, 279 and 287 of the CTP-13 Award, each itself reproducing paragraphs in the earlier awards, with an immaterial change between paragraphs 279 and 153 ("it is evincible that" to "it is seen that", typical of the editorial differences on which the Defendants relied as noted at [48] above).

*The non-existent annexure*

57 In their analysis for issues 5 and 6, in paragraph 279 of the Award the Majority came to finding it "appropriate and reasonable to adopt the method of computation used by the Claimants". They continued, "For the said purpose, it is first requisite to allude to Annexure 1 of the Appendix to the Tender, which

contains the coefficient of labour in each cost centre (work types) that has been agreed between the Parties in terms of Clause 13.8 of PCC". A table of the coefficients of labour was then set out.

58 The CTP-11 Contract did not contain an Annexure 1 of the Appendix to the Tender. Paragraph 279 of the Award down to setting out the table was a reproduction of paragraphs 388–389 of the CTP-13 Award, which was correct for the CTP-13 Contract and which again had antecedents in the earlier awards. In the CTP-11 Contract, cl 13.8 provided that the relevant coefficients of labour were to be found at "Section 6, Financial Submission, Schedule 1". It should be said, however, that while there was reference to a non-existent annexure as its source, it appears that the table then set out in paragraph 279 of the Award was of the labour coefficients found as provided in the CTP-11 Contract (the Defendants so stated, the Claimant did not say otherwise, and the CTP-11 Contract in evidence was incomplete in this respect).

59 In their submissions, the Defendants described these errors as "clerical or typographical". That cannot be accepted. They were plainly not clerical or typographical errors, but came from the reproduction of the paragraphs from the earlier awards, not always cut-and-paste but substantially so and part of the extensive reproduction earlier described.

***Placing weight on arguments which the parties did not raise in the arbitration but were copied from the prior related awards***

60 The Claimant complained of four instances in which, it said, in their analysis the Majority had adopted or considered arguments which the parties had not raised, but for which their analysis was a reproduction from the prior related awards.

*Purposive construction and directory not mandatory*

61 These instances are conveniently dealt with together. They concern issue 1 in the arbitration, whether the Defendants' claim for adjustment of the contract price due to an increase in cost was barred under the limitation as provided in cl 20.1 of the CTP-11 Contract. Clause 20.1 was in the terms that the notice to the Engineer "shall be given" within 28 days of becoming aware of the event or circumstance, and as earlier described the Claimant relied on failure to claim within the 28 days but the Majority held that the notice requirement was directory and not mandatory.

62 The Claimant's complaint ran as follows:

(a) in its submissions, the Claimant contended for the requirement being mandatory on a "bare perusal" of the contract;

(b) in their submissions, the Defendants said that "on a bare reading of the Contract" no notice to the Engineer was required, because cl 13.7 provided that the contract price "shall be adjusted" and this was "a self-operative clause";

(c) neither party submitted that there was ambiguity calling for purposive interpretation of cl 20.1, or raised purposive interpretation; and more particularly the Defendants did not submit that on a purposive interpretation, or at all, "shall" in cl 20.1 was directory rather than mandatory;

(d) but the Majority applied the purposive rule of interpretation to the CTP-11 Contract, and on that interpretation held that "shall" in cl 20.1 was directory rather than mandatory;

(e) the paragraphs in the CTP-11 Award containing the Majority's analysis in these respects were reproductions, with minor editorial changes, of paragraphs in the CTP-13 Award, which were in turn reproductions from the two earlier awards.

63 In substance, then, the Claimant's complaint was that the Majority's dismissal in this way of its reliance on cl 20.1 had been lifted without notice from the CTP-13 Award.

64 I do not think that the Defendants contested that the Majority came to the conclusion that cl 20.1 was directory rather than mandatory of their own initiative, as it were, in the Award. In their written submissions, they suggested that the Majority had sought to arrive at a commercially sensible construction so as to give effect to the intention of the parties. Their answer to the Claimant's complaint was that an arbitral tribunal is entitled to "adopt reasonable inferences, findings of fact or lines of arguments even if these have not been specifically addressed by the parties" and "to arrive at conclusions that are different from the views adopted by parties" (referring to *Song Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [65(e)]), and that the construction of cl 20.1 was "very much in play" and it was not open to the Claimant to complain that the Majority relied on accepted principles of contractual interpretation to construe the clause. But this missed the Claimant's point: not that the Majority had gone outside the parties' submissions to reasoning of their own, but that they had done so by substantial, untelegraphed and unattributed reproduction of the Majority's analysis on the same issue in the CTP-13 Award (with its antecedents in the earlier awards), indicative of prejudgment with a mind closed to the parties' submissions.

*Statutory limitation*

65 Again in relation to issue 1, at paragraph 113 of the Award the Majority opined that the increased costs incurred by the Defendants were "not a one-time instance but are continuous in nature", and continued:

> For these reasons, the Tribunal is unable to accept the contention of the Respondent that invocation of arbitration by the Claimants on 02.12.2021 much after the expiry of 3 (three) years from 19.01.2017 (the Date of the Notification) is barred by limitation. In the view of the Tribunal, the Claimants were entitled to raise successive claims before the Engineer on account of this continuing cause of action since each separate claim arose from the continuing cause of action.

66 The Majority went on to refer, in paragraph 115, to the rejection of the Defendants' claim by the Engineer and the filing of the RFA as well within the period of three years being the period of limitation from the accrual of the cause of action; and in paragraphs 116 and 117 they referred to authorities for when a cause of action accrued, with the conclusion that the period of limitation would start running from when the final bill under the contract ought to have been paid. Paragraphs 116 and 117 were reproductions of the corresponding paragraphs in the CTP-13 Award.

67 However, the Claimant said, it had not in the arbitration raised an argument of a statutory limitation period of three years. Its case was founded on the contractual limitation of 28 days in cl 20.1 of the CTP-11 Contract, and issue 1 was framed accordingly – whether the Defendants' claim was "barred under limitation as provided under Clause 20.1 …". The apparent explanation for the Majority's extraneous attribution to it and rejection of a defence of statutory limitation, the Claimant said, was that they were copying from the CTP-13 Award, where statutory limitation was argued because in that arbitration the

claimants did not raise a claim to the Engineer until three years after the January 2017 Notification.

68 The Defendants submitted that the Claimant had in fact raised statutory limitation in the arbitration, referring to a plea in its Defence that the Defendants' claims were "barred by limitation" and not maintainable "in law". They said also that they had raised statutory limitation, referring to their Statement of Rejoinder in which they had said that the Claimant had "failed to point out any provision of the limitation act [*sic*] under which it contends that the claim is barred by limitation", and to their Opening Submissions in which they had attributed to the Claimant a contention that their claim was "barred by the law of limitation under Article 137 of the Limitation Act, 1963" because the arbitration had been commenced more than three years after 19 January 2017.

69 The words in the Claimant's pleading must be taken together with the framing of issue 1, and the Defendants did not point to any other pleading or any submission to the tribunal by the Claimant, or by themselves, raising statutory limitation or showing it as a live question. However, while the Majority's paragraph 113 bears a relationship with the corresponding paragraph 127 in the CTP-13 Award, it is not a reproduction or even a reproduction with textual changes, and from the Claimant's table paragraph 115 does not have a corresponding paragraph in the CTP-13 Award. This suggests that, although it was an incorrect attribution, the Majority took up the Defendants' attribution to the Claimant of limitation because of the three years between the January 2017 Notification and the commencement of the arbitration. I do not think that this can be confidently excluded.

70 To its full extent, therefore, I do not think that the Claimant's complaint can be accepted, although as earlier stated paragraphs 116 and 117 in the Award

were reproductions of the corresponding paragraphs in the CTP-13 Award. What remains is that, if the Majority thought that issue 1 included statutory limitation as well as the limitation of 28 days, it seems that they came to their decision on that matter without either party having provided submissions for or against, influenced by and in part copying from the CTP-13 Award.

*Calculation of quantum*

71 As earlier described (see at [30]), the Majority did not adopt the Defendants' calculation leading to Rs 92,31,18,812, but made their own calculation of an adjustment based on a 40% increase in the minimum wages to arrive at an amount of Rs 80,29,92,737. Neither party had made submissions for or against that way of calculating the adjustment. The Majority was evidently conscious of this, saying with citation of authority at paragraph 273 of the Award:

> It is well settled law that computations can be carried out in the absence of evidence and would also depend on the correspondence and communications between the parties, and, further, that the computation of the claim, the adoption of the formula and the determination of the quantum, accordingly, would be the matter of the domain of the arbitrator.

72 The Claimant's complaint, however, was not just that the Majority had made the calculation according to its own formula, without reference to the parties. It was that the formula was copied from the CTP-13 Award (as was paragraph 273 of the Award, although with varied citation of authority). On a comparison of the analyses explaining the calculations, while necessarily with different inputs and results the paragraphs containing the analysis in the Award are in similar and sometimes identical terms to those in the CTP-13 Award, such that the description of copying is well warranted.

73 The Claimant added to its complaint that, because of what it called "mechanical replication", the Majority had "ignored crucial arguments and points which [it] had raised during the Arbitration to refute [the Defendants'] quantification of its claims". Since the Majority had not adopted the Defendants' calculation, so far as it was meant that the Majority had not paid regard to the Claimant's arguments and points in making its own calculation, this is subsumed within the complaint of copying from the CTP-13 Award; that is, the "mechanical replication" instead of regard to the parties' arguments.

74 The Defendants submitted that the Majority had in substance rehearsed the parties' arguments, and referred to a number of its holdings (for example, that they did not accept that the Defendants had to prove its actual cost incurred and that the Defendants' method of computation was a reasonable method); they said that the Majority had "attempted to understand [the Claimant's] case on the issue". They said that it "cannot be said that the parties could not have foreseen the possibility of the Majority's formula and compensation nor … that the Majority's formula and computation represents a dramatic departure from the parties' cases or is wholly at odds with the established evidence". And they said that the Majority was entitled to take its own course without informing the parties of their provisional thinking or inviting submissions on every point necessary for their decision. These, and some like submissions which it is unnecessary to relate, again missed the point of the Claimant's complaint, which was (to repeat some earlier words) of untelegraphed and unattributed reproduction from the CTP-13 Award in the decision of the issue.

***Cut-and-paste reliance on authorities not raised or the subject of submissions in the arbitration***

75 Referring to a table of the authorities and the paragraphs in the Award in which they were cited, in its written submissions the Claimant said that almost 50 authorities (texts and judicial decisions) cited by the Majority in their analyses had not been raised or relied on by either party, but had been reproduced from the CTP-13 Award and in most cases reproduced in that award from the earlier awards. The authorities were cited, it said:

(a) in support of applying the purposive rule of construction;

(b) in support of construing cl 20.1 as directory;

(c) in characterising the Defendants' claim as a continuing cause of action;

(d) in holding that the Defendants' claim for its increased labour cost did not fall within cl 13.8;

(e) in holding that the January 2017 Notification was a change in law; and

(f) in holding that the January 2017 Notification applied to the CTP-11 Contract.

76 The table was not constructed in accordance with these topics, but according to the issues stated in the TOR: twenty authorities for issue 1; eight authorities for issue 2; ten authorities for issues 3 and 4; seven authorities for issues 7, 8 and 9; and four authorities for issue 10. However broken down, there was extensive citation of authorities on important questions in the arbitration, and the Claimant's complaint was again not just that the authorities had been

cited by the Majority although not raised or relied on by either party (and it said that it had therefore not had the opportunity to address the tribunal on the authorities): the greater complaint was that they had been cited by wholesale reproduction from the awards in the earlier related arbitrations.

77 The Defendants did not seriously contest this reproduction of authorities not raised by the parties, which in their written submissions they called "the Alleged Extraneous Authorities". They said that some of the authorities were for legal propositions found in, or consistent with, authorities which had been raised by the parties, and that others were "largely repetitive of trite propositions of law and did not add any novel legal reasoning". In a table of their own they categorised the authorities in the Claimant's table in one or other of these ways. They said that the Majority's decision was supported by the other authorities cited (although they may have limited this to the liability issues), and would have remained the same even if the citation of the alleged extraneous authorities had been excluded. It must be said, again, that this missed the point of the Claimant's complaint – it was the reproduction, indicative of prejudgment.

***Copying the decisions on interest and costs***

78 In the RFA the Defendants had claimed interest at 8% compounding monthly pursuant to cl 14.8 of the CTP-11 Contract, which provided that failure in payment gave an entitlement to receive financing charges, compounded monthly on the amount unpaid during the period of delay, at a rate three percentage points above the discount rate of the central bank in the country of the currency of payment.

79 The Majority awarded the pre-award interest on Rs 80,29,92,737 at 8% compounded monthly on the basis that s 31(7)(*a*) of the Indian Arbitration Act

provided that "[u]nless otherwise agreed by the parties" the arbitral tribunal was empowered to award pre-award interest; that cl 14.8 of the CTP-11 Contract was an "otherwise agreement"; and, referring to Indian authorities, that the settled position was that the agreement was decisive, the tribunal was bound by it, and interest had to be awarded in accordance with that agreement. The relevant paragraphs of the Award, paragraphs 296 to 304, were a reproduction of the corresponding paragraphs in the CTP-13 Award, with immaterial changes in some words in three of the paragraphs and the different amount and commencing date in the final paragraph. The paragraphs in the CTP-13 Award were similarly all but identical with the corresponding paragraphs in the CP-301 and CP-302 Awards.

80 The application of s 31(7)(*a*) of the Indian Arbitration Act was incorrect. The arbitration was seated in Singapore, and Singapore law governed the award of pre-award interest: it should not have been decided by application of Indian law. The reproduced analysis from the earlier awards had correctly applied Indian law in the cases of the CP-301 and CP-302 Awards, where the arbitrations were seated in India, although it had been incorrect in the case of the CTP-13 Award, which was also seated in Singapore – a matter noted and part of the reasoning to setting aside the CTP-13 Award in *DJO (HC)* (see at [87] below).

81 The Defendants did not dispute that the application of Indian law was incorrect. They said that the Majority was clearly alive to the fact that the seat of the arbitration was Singapore, as shown by their citation at paragraph 9 of the Award of cl 20.6 of the CTP-11 Contract as governing the arbitration and their noting at paragraph 12 of the Award of Singapore as the seat. They said that the Claimant had had the opportunity to make submissions on the applicable law, but had submitted only that no interest should be awarded because the

Defendants' claim should be dismissed, and that the error was at best one of law, which was not a ground for setting aside the Award. (It should be said that here and elsewhere the Defendants also made submissions as to the absence of prejudice to the Claimant; I will come to that later in these reasons, see at [124] –[133] below.)

82 The Defendants' response again missed the point of the Claimant's complaint in relation to breach of the rules of natural justice. The Claimant's submission was that the wholesale erroneous reproduction of the paragraphs from the prior awards showed that the Majority had not given independent consideration to the position in the arbitration, but had come to their decision on interest (as in the Claimant's submission they had generally) with prejudgment from the decision in the earlier arbitrations; that point, it could be said, was underlined by the disconnect between the early recognition that the arbitration was seated in Singapore and the failure to give effect to that recognition when addressing the award of interest. While the tribunal was not assisted by submissions on the applicable law, it was a necessary question and the application of the law of the seat is well established: the Claimant's point was well made.

83 Going to post-award interest, the position is much the same and can be dealt with more concisely. The Majority's analysis was in paragraphs 305 to 310 of the Award. Applying s 31(7)(*b*) of the Indian Arbitration Act and citing two Indian authorities, they held that under s 31(7)(*b*) the post-award interest was on the sum awarded, which included the pre-award interest, and they applied s 2 of the Indian Interest Act in arriving at the interest rate of 7.5%. This was incorrect. The paragraphs in which the Majority expressed this decision on post-award interest were in precisely the same words as the corresponding paragraphs in the CTP-13 Award, which but for a few words of no materiality

were in the same words as the corresponding paragraphs in the CP-301 Award and the CP-302 Award. The point of the Claimant's complaint and the Defendants' response were as above.

84 The Majority dealt with costs at paragraphs 316 to 330 of the Award. They applied s 31A of the Indian Arbitration Act in expressing an established principle that cost should follow the event and applying a proportionality test by determining the sums awarded as a percentage of the claims made and applying that proportion to the costs claimed. They awarded the Defendants 80% of the costs of the arbitration as the extent to which they had succeeded having regard to claimed Rs 100,84,39,906 and awarded Rs 80,29,92,737. The award of costs was entirely with regard to the Indian Arbitration Act and Indian authorities on its application. Again this was incorrect, because Singapore law governed the award of costs. The Majority's dispositive analysis was a reproduction of the corresponding paragraphs in the CTP-13 Award, themselves largely taken from the earlier awards, save for different figures in arriving at the figure of 80%.

85 The point of the Claimant's complaint was the same. The Defendants' response was to the same effect as their response to the awards of interest, with a faint quibble over whether the Majority considered that Indian law required the proportionality test and reference to the International Chamber of Commerce Arbitration Rules 2021 ("the ICC Rules") for the discretion as to costs.

86 From the Majority's brief summaries of the Defendants' position, the Defendants did not refer the tribunal to Indian law or make submissions on the applicable law in relation to interest or costs; in their submissions before me, the parties did not suggest that they had. The copying from the earlier awards

had no basis in any submissions made to the tribunal; it was a straightforward lifting from the earlier awards.

87 I have referred to *DJO (HC)* at [43] above, in which there were similar questions. The CP-301 arbitration was seated in New Delhi, and in the CP-301 Award interest and costs were correctly addressed under Indian law; but in the CTP-13 Award, where the arbitration was seated in Singapore, interest and costs were decided in reproduced passages from the earlier award. Simon Thorley IJ said (at [74]) that, although reference had been made to the provisions of the ICC on costs, he accepted the contention:

> … that the thinking and approach of the Tribunal was influenced and guided by events remote from those in the Arbitration. It is not the fact that the Tribunal may have made an error of law in its approach (which would be irrelevant to a setting aside application), but the knowledge, reliance upon and adoption of the reasoning in the earlier awards that casts doubt on their independence of thought.

***Failure to deal with arguments raised in the arbitration***

88 The Claimant suggested instances of its arguments put to the tribunal which were not dealt with in the Award. They concerned its arguments, in summary, of the irrelevance to cl 20.1 of a continuing cause of action and of when the Defendants became aware of the cost implications of the change in law; of the support for its construction of cl 13.8 of the contractual provision that the Defendants were fully responsible for the provision of labour and personnel; of a number of reasons why the Defendants had to show their actual expenditure as opposed to notional expenditure; and of a number of criticisms of and errors in the Defendants' method of calculating their claim. The Claimant recognised that the Majority had said that, as a result of using their formula, the Claimant's "contention … with respect to discrepancies in computation of the claims by the Claimants do not survive" (paragraph 282), but said that this was

a blanket statement used to superficially sweep away those contentions which had not been raised in the earlier arbitrations and that, having prejudged the matter, the Majority did not meaningfully engage with them.

89 The tribunal did not have to engage with every argument put to it: it was obliged to deal with all essential issues, but if its decisions made other arguments irrelevant or of little significance it did not have to deal with them: *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [58]–[60]. For some of the arguments this appears to have been the case, and the complaint was not so much that the arguments had not been dealt with, but that the decisions which made them irrelevant or of little significance had been come to in breach of the rules of natural justice as found from the preceding complaints. The complaint really depends on otherwise being satisfied of the breach of the rules of natural justice, and it is preferable not to go into the arguments and their possible significance to the decisions as that would move into review of the merits of the decisions. As will appear, in the view I take it is not necessary to do so or to include this complaint when considering the Claimant's grounds.

***No opportunity for submissions***

90 As a more general complaint, the Claimant said that because of the reproduction from the earlier awards it had not had the opportunity to make submissions on the reasoning and authorities in the Majority's analyses. This went more particularly to failure to give a fair hearing, to which I will come (see at [134]–[140] below).

**Ground 1: breach of the rules of natural justice**

91 Section 24(*b*) of the IAA provides that an award may be set aside if "a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced".

***Arbitrations and the rules of natural justice***

92 The principle of minimal curial intervention in arbitral proceedings is well established. It is founded on encouragement of finality in arbitrations and the acceptance of the parties, when they go to arbitration, of the limited recourse to the courts under (in a case such as this) the IAA and the Model Law: see for example *Soh Beng Tee* at [65(c)]. But that makes the avenues of recourse all the more important to achieving justice. As is said in *CJA v CIZ* [2022] 2 SLR 557 at [1], "parties to an arbitration do not have the right to a 'correct' decision from an arbitral tribunal … , but only the right to a decision that is within the ambit of their agreement to arbitrate, and that is arrived at following a fair process". The due process rights must therefore be stringently upheld. On the other hand, care must be taken lest due process complaints be used improperly to challenge awards when the matter complained of is within the tribunal's discretion or otherwise a course open to it. The threshold for finding a breach of natural justice is a high one, and it is only in exceptional cases that a court will find that threshold crossed: *Soh Beng Tee* at [54]; *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 ("*China Machine*") at [87].

93 In *Soh Beng Tee* at [43] the Court of Appeal said that Marks J in *Gas & Fuel Corporation of Victoria v Wood Hall Ltd & Leonard Pipeline Contractors Ltd* [1978] VR 385 at 396 had "helpfully distilled the essence of the two pillars of natural justice" in the terms:

> The first is that an adjudicator must be disinterested and unbiased. This is expressed in the Latin maxim – *nemo judex in causa sua.* The second principle is that the parties must be given adequate notice and an opportunity to be heard. This in turn is expressed in the familiar Latin maxim – *audi alteram partem.* In considering the evidence in this case, it is important to bear in mind that each of the two principles may be said to have sub-branches or amplifications. One amplification of the first rule is that justice must not only be done but appear to be done (Lord Hewart, C.J. in *R v Sussex Justices; ex parte McCarthy,* [1924] 1 K.B. 256 at p 259; [1923] All E. R. Rep. 233). Sub-branches of the second principle are that each party must be given a fair hearing and a fair opportunity to present its case. Transcending both principles are the notions of fairness and judgment only after a full and fair hearing given to all parties. [emphasis in original omitted]

94 A party challenging an 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: *Soh Beng Tee* at [29]; *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 ("*L W Infrastructure*") at [48].

95 As earlier noted, here the two sub-rules of natural justice on which the Claimant relied were apparent bias in the form of prejudgment and failure to give a fair hearing.

***Breach by apparent bias***

96 There may be breach of the rules of natural justice not only where the arbitrator is actually biased, but also (as is inherent in the well-known statement from *The King v Sussex Justices, ex p McCarthy* [1924] 1 KB 256*,* at [93] above) where there is apparent bias. That is governed by the "reasonable suspicion" test: whether there are circumstances that would give rise to a reasonable

suspicion or apprehension of bias in the fair-minded and informed observer (who I will hereafter refer to simply as "the observer").

97 In *BOI v BOJ* [2018] 2 SLR 1156 ("*BOI*") at [103] the amplification of this included:

> …
>
> (b) As the test for apparent bias involves a hypothetical inquiry into the perspective of the observer and what the observer would think of a particular set of circumstances, the test is necessarily objective …
>
> (c) 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 … But adopting a standard of possibility rather than probability furthers the vital public interest of ensuring that the administration of justice is beyond reproach from the perspective of reasonable members of the public …
>
> (d) In establishing whether the observer would harbour a reasonable suspicion of bias, 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 (*ie*, detailed knowledge of the law and court procedure, or insider knowledge of the inclinations, character or ability of the members of the court or adjudication body) … 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. He or she would know the traditions of integrity and impartiality that administrators of justice have to uphold, and would not jump to hasty conclusions of bias based on isolated episodes of temper or remarks taken out of context …
>
> …
>
> [emphasis in original]

98 Particularly material to the Claimant's complaints, prejudgment can be a form of apparent bias: see *BOI* at [108] where a number of cases are cited

where prejudgment has been said to amount to apparent bias or to be a form of apprehended bias. After citing the cases, the court continued, at [109]:

> To establish prejudgment amounting to apparent bias, therefore, it must be established that the fair-minded, informed and reasonable observer would, after considering the facts and circumstances available before him, suspect or apprehend that the decision-maker had reached a final and conclusive decision before being made aware of all relevant evidence and arguments which the parties wish to put before him or her, such that he or she approaches the matter at hand with a closed mind.

99 At the heart of prejudgment as a form of apparent bias is the observer's reasonable suspicion that the decision-maker has approached "the matter at hand", that is, the issue or issues before him or her for decision, with a closed mind. Too much weight cannot be given to the words that the decision-maker has reached a final and conclusive decision *before being made aware of all relevant evidence and arguments*; those words may come from a decision being given at the close of evidence and argument, but where the decision is reserved, the critical time is when the decision-maker comes to his or her decision as found in the later rendered judgment or award. In the Defendants' written submissions the question was reframed in terms of reaching a final and conclusive decision on the issues *before considering the evidence and arguments* put before him or her, another way of expressing coming to the decision of the issues with a closed mind and one which may be thought more helpful.

***There was breach by prejudgment amounting to apparent bias***

100 I go first to the copying from the awards in the prior related arbitrations, the subject of the Claimant's overarching complaint. A number of cases, although on different facts and in different contexts, illustrate that reproduction can be seen and has been seen as showing failure of the decision-maker to apply

his or her mind to the evidence and arguments before him or her, and that this can amount to apparent bias.

101 *Yap Ah Lai v Public Prosecutor* [2014] 3 SLR 180 ("*Yap Ah Lai*") was a sentencing appeal. Sundaresh Menon CJ held that he was entitled to consider the sentencing anew because the District Judge had "erred in failing to fully appreciate the material that was before him in each case" (at [73]). "Each case" was the case that was the subject of the appeal and another case decided by the District Judge, and the error was found in the District Judge's reproduction of the same crucial passages of reasoning in the two cases. The Chief Justice said of this (at [69]–[70]):

> 69 … In my judgment, a sentencing judge runs a considerable risk when he reproduces entire passages either from the submissions of the parties or, as in this case, from another of his decisions without attribution or explanation. It is one thing to cite submissions or cases at length while making it clear why they are being cited and how they might or might not be relevant *to the case at hand*. However, it is quite another thing for a judge to reproduce whole passages from another case or matter which he has decided, with neither attribution nor explanation. The main objection is that when the similarities are discovered the parties and other readers are left with the impression, whether or not this was intended, that the judge had not after all considered each matter separately, thoroughly or even sufficiently. …
>
> …
>
> 70 What appearance is conveyed when a judge has reproduced the same crucial passages of reasoning in two judgments dealing with what seem on the face of it to be fairly similar cases? In my judgment, in this instance, the reasonable and impartial observer would think that in *neither* case had the judge properly applied his mind to the facts and circumstances of the case before him. It is impossible to tell which case the judge worked on first and so formed the model for his approach to the other. The observer would therefore reasonably have come to the conclusion that the judge had extracted what he thought were the essential similarities of the two cases and then proceeded to decide them as if they raised identical issues.
>
> [emphasis in original]

102 *Lim Chee Huat v Public Prosecutor* [2019] 5 SLR 433 ("*Lim Chee Huat*") was also a sentencing appeal. The District Judge had reproduced 27 of the 43 paragraphs in the grounds of decision from the Prosecution's submissions, with some rearrangement and paraphrasing but even including a typographical error. Aidan Xu J said (at [49]) that the practice of copying to adopt submissions as the court's reasoning should not be undertaken, because it raised the concerns that the judge is biased or at least appears to be biased in favour of the party whose submissions are adopted, and because it creates substantial doubt about the judge's independent exercise of judgment and discernment. He said (at [52]):

> Considering the extent of the copying of the Prosecution's submissions in the District Judge's GD, which included a typographical error present in the submissions, and the absence of any part in the GD indicating an assessment of the submissions from both sides, particularly any weighing of one side against the other, I do not find that the District Judge here was shown to have exercised his mind on the matters before him. This was not merely an error of the exercise of judgment but a judgment in name only that was not the exercise of any consideration and weighing. …

103 *Newton, David Christopher v Public Prosecutor* [2024] 3 SLR 1370 ("*Newton*") was also a case of reproduction of the Prosecution's submissions. In addition to *Yap Ah Lai* and *Lim Chee Huat,* Sundaresh Menon CJ referred at [37] to a Canadian case (*Cojocaru v British Columbia Women's Hospital and Health Centre* [2013] 2 SCR 357), at [38] to a Hong Kong case (*Nina Kung v Wong Din Shin* (2005) 8 HKCFAR 387) and at [39] to an English case (*IG Markets Ltd v Declan Crinion* [2013] EWCA Civ 587) for criticisms of judicial copying from one side's submissions. The criticisms were respectively, as conveying the impression that the reasons for judgment do not reflect the judge's thinking but that of someone else; as raising serious questions as to whether the judge has abdicated his judicial function or at least as to whether

justice has been seen to be done by an independent judicial tribunal; and as risking creating the impression that the judge had abdicated his core judicial responsibility to think through for himself and had not performed his task of considering both parties' cases, independently and even-handedly. The Chief Justice said (at [40(a)] and [40(b)]) that reproduction of substantial portions of the submissions of one side "opens [the court] to the charge that it has failed to apply a judicious mind and has simply, and without sufficient consideration and discernment, adopted the submissions of one party", and that this in turn "opens the court to a complaint of actual and/or apparent bias". However, his Honour declined to set aside the District Judge's decision on the ground of apparent bias: while being critical of what had occurred, on the facts as a whole he considered that the observer would not conclude that the District Judge "had a closed mind and was not open to being persuaded otherwise" (at [47(b)]).

104 In *Ler Chun Poh v Public Prosecutor* [2024] 6 SLR 410 there was again substantial reproduction of the Prosecution's submissions in the District Judge's decision, and despite some paraphrasing and reorganisation it was found on consideration of the circumstances as a whole that the District Judge had failed to apply his mind to the material before him in coming to his decision. The reasons of Aidan Xu J included (at [13] and [15]), after reference to [49] of *Lim Chee Huat* (at [12])*:*

> 13 Similarly, in the decision of *Newton*, Sundaresh Menon CJ explained that the reproduction of substantial portions of one party's submissions in the court's decision opens the court 'to the charge that it has failed to apply a judicious mind' and that this 'in turn open[s] the court to a complaint of actual and/or apparent bias' (at [40]).
>
> …
>
> 15 Where the judgment or grounds of decision appear to adopt wholesale the words of only one party as the judge's reasoning, there will be a ready and clear inference that the judge has not weighed, considered and decided the issue on his

> or her own. Sometimes the adoption may be inadvertent; sometimes there may be no other way of expressing the point succinctly. But where the scale of the adoption is large or almost complete, and there is little or no indication that the judge weighed the matter, such as by introducing his or her own lines of reasoning or addressing the counter-arguments of the other side in a different way, the conclusion will be that the judge gave no consideration to what the other side has put forward. It is an abandonment and abrogation of the judicial function.

105 In that case, however, while finding that the District Judge had failed to apply his mind to the matter, Aidan Xu J considered that apparent bias had not been made out, because the summary of the appellant's version of events showed that he did not shut his mind to the appellant's testimony and the notes of evidence showed that he "gave leeway to the appellant in his questioning of the victim and the prosecution's witnesses" (at [57]).

106 In short, reproduction can amount to apparent bias if on the reasonable suspicion test the decision-maker appears to the observer to have had (or can amount to actual bias because the court finds that the decision-maker had) a closed mind, a mind which was closed to a decision on the evidence and arguments before him or her: in that manner, prejudgment.

107 In the present case the reproduction was extensive and covered the Majority's reasoning in their analyses across all issues in the Award. From examination of the comparative schedule and commentary , I am satisfied that the limited textual amendments are no more than that, changes in wording or phrasing without any change in the reasoning or any substantive change in the expression of the reasoning. Having regard to all the circumstances including the Claimant's other complaints, and notwithstanding the Defendants' submissions to the contrary to which I will come, I have no doubt that the observer would have a reasonable suspicion of bias in the form of prejudgment

through the Majority coming to their decision with a closed mind, a mind which imported and imposed the reasoning and decision in the CTP-13 Award (often also in the earlier awards) rather than came to a decision on the evidence and arguments before them.

108 The Claimant's other complaints are telling. The Majority referred to and (except for the table in the annexure) acted upon contractual provisions not found in the CTP-11 Contract, but reproduced from the CTP-13 Award; the interpretation of cl 20.1 on a purposive construction as directory was not argued but was from the CTP-13 Award by reproduction; the question of statutory limitation was not argued but was in part disposed of by copying from the CTP-13 Award; the Majority's own calculation of quantum was a reproduction from the CTP-13 Award although with different inputs and results; the incorrect decisions on interest and costs had no basis in any submissions made to the tribunal, but were taken almost verbatim from the CTP-13 Award and its antecedents; and very many authorities cited by the Majority in expressing these decisions, not raised by the parties, were part of these reproductions from the CTP-13 Award. The whole picture must be looked at for the complexion to be put on the reproduction. The observer could not but be struck by these matters as showing the possibility – and only a possibility is needed, although in my view much more than that is shown – that the Majority's mind was directed to an award with like decisions to those in the earlier arbitrations, and closed to decisions on the evidence and arguments before them in the CTP-11 arbitration.

109 As indicated, in coming to this view I have considered but not found persuasive the submissions against it made by the Defendants. The submissions were, with respect, occasionally Delphic, and I have sought to encapsulate their substance.

110 In a preliminary submission going also to failure to give a fair hearing, the Defendants reminded from *China Machine* that the threshold for finding a breach of natural justice is a high one and that it is only in exceptional cases that a court will find that threshold crossed. They referred to warnings to the effect that the court should not be over-critical of an award or its expression, including that the court should not "assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process" (*Soh Beng Tee* at [65(f)]), and cautioning against a challenge based on alleged breach of the rules of natural justice being a disguised appeal on the merits of the award. I have borne these matters well in mind. I find that the threshold is crossed, without being overly critical of the Award, and the breach of the rules of natural justice in the form of prejudgment does not go to the merits but to the following of a fair process: it matters not whether the Majority was right or wrong, there was breach in the coming to their decisions.

111 What appeared to be the principal submission went to the circumstances in the knowledge of the observer. In the Defendants' oral submissions it was said that "context is everything". As I understand it the suggested context, as matters in the knowledge of the observer, was to the effect:

(a) The Claimant knew that Judge C had been the presiding arbitrator in the three earlier arbitrations, and that Judge A had been a member of the tribunal in the CTP-13 arbitration, but did not object to their appointments.

(b) The Claimant knew that similar, although not identical, issues arose in all four arbitrations, and that they were proceeding to an extent contemporaneously (see at [35]–[44] above).

(c) A reason for having the same arbitrator in related arbitrations is to avoid inconsistent results; parties want certainty.

(d) It is "simply not humanly possible for arbitrators to erase arguments and findings on similar issues from their mind", and unrealistic to say that the arbitrator has to come with an open mind.

(e) At the time of submissions in the CTP-11 arbitration, the CP-301 and CP-302 Awards had been issued. The Claimant would have known that in the CP-302 Award the majority, which included Judge C, had repeated the views of the tribunal, which included Judge C, in the CP-301 Award. When the CTP-13 Award was issued, the Claimant would have known that the same views had been repeated by the tribunal which included Judge C and Judge A.

112 From this, it was said in the written submissions that the observer would know or infer that the Claimant was "prepared to take the risk" (*scilicet,* at the time of their appointment or more particularly in the course of the CTP-11 arbitration) that Judge C and Judge A would be influenced on account of their involvement in the earlier arbitrations, and more strongly that "it would not be difficult for" the observer to conclude that the Claimant did not object in the interests of consistency in the treatment of the facts, the law and the issues. In oral submissions it was put that the Claimant:

> … must have understood and accepted that a tribunal that had earlier ruled may rule in the same way, and that the reproduction, there's nothing sinister about the reproductions. This was just the tribunal and [the Claimant] accepting that the tribunal could reproduce for the purposes of coming to the same conclusions.

113 The essence of the submission was that the observer, so informed, would not see prejudgment in the attainment of consistency by the Majority. This must be firmly rejected.

114 As the Defendants submitted, with reference to *CNQ v CNR* [2023] 4 SLR 1031 ("*CNQ*"), the same arbitrator may sit in two different arbitrations involving similar issues. In that case the same arbitrator heard two arbitrations between the same parties, in both arbitrations issuing an award in favour of the same party. In an application to set aside the award in the second arbitration, it was contended *inter alia* that the arbitrator had prejudged the issues "by displaying an unreasonable inclination to upholding his prior ruling in [the first award]" (at [55]). Andre Maniam J accepted that there was "nothing inherently wrong" in the arbitrator being asked to decide the same issues between the same parties (at [58]). Importantly, however, his Honour inquired into whether the arbitrator approached the issues in question with a closed mind. He found that the parties were given the opportunity to submit on the first award, that the unsuccessful party was given the opportunity to put forward new evidence and contentions, and that the evidence and contentions, new and old, had been considered by the arbitrator, and said (at [62]):

> There is nothing from which I can infer that the arbitrator had prejudged the issues in the Second Arbitration. Besides the treatment of new evidence and contentions from the Buyer in the Second Award, the arbitrator engaged with the Buyer's counsel and expert during the hearing … : this demonstrates that he attempted to understand the Buyer's case in the Second Arbitration, and that he had not prejudged the issues in the Second Arbitration.

115 That the same arbitrator may sit in two different arbitrations concerning the same issues, however, does not make out the submission presently under consideration. While parties to an arbitration may see some benefit in the tribunal's general familiarity with the subject-matter of the arbitration from an

earlier arbitration, that in no way carries with it acceptance that the tribunal will or may decide the parties' arbitration influenced by the evidence and arguments in the earlier arbitration and not on the evidence and arguments in their arbitration, still less acceptance of a decision for the sake of consistency if that was not warranted on the evidence and arguments in their arbitration. Having the same tribunal in related arbitrations does not give the tribunal license to carry over to one arbitration, without notice to the parties, the tribunal's reasoning in the other arbitration: rather, it requires the tribunal to be scrupulous in deciding on the evidence and arguments in each (as is inherent in the inquiry in *CNQ* into evidence of prejudgment), including if truly necessary arriving at inconsistent decisions. While the tribunal does not sit with an empty mind, it must not sit with a mind closed by one arbitration to proper consideration of the evidence and arguments in the other arbitration.

116 I do not accept that the observer would regard the Claimant as having taken the risk of influence in the decision of the CTP-11 arbitration from the decisions in the earlier arbitration, or as having accepted a decision for the sake of consistency with the decisions in the earlier arbitrations. Moreover, in the circumstances earlier described in these reasons there was much more than the Majority being "influenced" on account of their involvement in the earlier arbitrations. The extent of the reproduction spoke of, and to the observer would have spoken of, the Majority lifting reasoning and analyses, and so decisions, from the earlier awards without applying their minds to the evidence and arguments in the CTP-11 arbitration. It was not, and I do not think the observer would have taken it as, reproduction for the purposes of coming to decisions which the Claimant had accepted might be made under the influence of the earlier arbitrations or for consistency with their outcomes.

117 The further submission was that the Majority had in fact applied their mind to "the essential issues". There was some obscurity in the submission, particularly in the limitation to "the essential issues".

118 The Defendants pointed to the Majority's brief summaries of the parties' positions, and to instances where they said the Majority addressed new arguments raised by the Claimant in the CTP-11 arbitration. From the written submissions, instances appear to be estoppel and waiver in addition to barring under cl 20.1; the January 2017 Notification only applying to work on "roads or runways or in building construction"; and what the Defendants said was addressing the contractual and statutory obligations to maintain records of payment of wages, although I doubt the last of these. In oral submissions, the Defendants handed up yet another schedule part of which, they said, identified in red new arguments made by the Claimant or the Defendants unique to the CTP-11 arbitration and in red and black where the Majority dealt with them (so far as essential), the red in the Majority's dealing being said to be reasoning unique to the Award. While a more elaborate presentation than that in the written submissions, the red is on the same matters of estoppel and waiver because the Defendants did not challenge the decisions of the Engineer and the January 2017 Notification not applying to railways as were in the written submissions, plus a new matter being some paragraphs relating to the calculation of quantum.

119 The last-mentioned paragraphs in the Majority's dealing provide little support for the submission: quite the reverse. Of the seven paragraphs identified, running from paragraph 266 to paragraph 281, two are identical with the corresponding paragraphs in the CTP-13 Award; one is all but identical with the corresponding paragraph but having some minor changes; one is best described as a rework of the corresponding paragraph; and three are identical, but with

different inputs from figures or other data from the respective contracts (one, paragraph 279, is the paragraph referring to the non-existent annexure; see at [57] above). The relevant paragraphs preceding the identified paragraphs and the paragraphs between the identified paragraphs are generally reproductions from the CTP-13 Award. The picture is not that the Majority applied their mind, but rather that the CTP-13 Award was unthinkingly used as a template in the manner earlier described.

120 The limited addressing of new arguments does not in my view detract from the reproduction from the earlier awards encompassing the analysis and decision of the issues in the CTP-11 arbitration. The Defendants did not point to any other significant basis for finding that the Majority applied their mind to the issues as they should have, and I do not think that the observer would consider that they did.

121 The emphasis on "the essential issues" appeared to bring a submission to the effect that for breach of the rules of natural justice, the Claimant's complaints should be discounted where they went to an inessential issue: for example, any denial of the opportunity to address the tribunal on mandatory/directory did not matter because the holding that a mandatory provision would be void would dispose of the issue. If a submission to this effect was intended, it is difficult to reconcile it with the Defendants' identification of instances where they say the Majority addressed new arguments raised in the CTP-11 arbitration; but of more importance, reproduction from the earlier awards in the analysis and decision of a so-called inessential issue is just as significant in considering apparent (or actual) bias by prejudgment as reproduction from the earlier awards in the analysis and decision of essential issues.

122 Finally, the Defendants made a submission with particular reference to failure to give a fair hearing, but at one point said to relate also to apparent bias. It was to the following effect. Before the close of submissions in the CTP-11 arbitration at the end of October 2023/early in November 2023, the CP-301 and the CP-302 Awards had issued. From those awards, the Claimant would have known how the tribunals had decided issues similar to those in the CTP-11 arbitration, for example that the tribunal had decided issue 1 *inter alia* on the basis that cl 20.1 was directory not mandatory and had decided other issues having regard to the almost 50 authorities the subject of the Claimant's complaint in OA 20. After the close of submissions in the CTP-11 arbitration, but before the Award was issued, the CTP-13 Award was issued, from which the Claimant would have known that the tribunal had decided the similar issues in the same way. Yet the Claimant did not put submissions to the tribunal in relation to these decisions in the prior related arbitrations or apply to reopen the CTP-11 arbitration in order to do so, for example by submitting that cl 20.1 was not directory and that the almost 50 authorities did not have the consequences in law found by the tribunal. The Claimant could not complain of failure to give a fair hearing, it was said, when it had had the opportunity to put submissions on all aspects of the dispute in response to the awards in the prior related arbitrations. The Defendants said that the observer would know "that these points had been drawn to their attention" but the Claimant had chosen not to take them up, and asked rhetorically, although not further explaining, "where is the apparent bias"?

123 It is difficult to see how the submission relates to apparent bias by prejudgment, but in any event it also should be firmly rejected. Assuming that the Claimant, with its new team of counsel, was entitled to have regard in the CTP-11 arbitration to the awards in the prior related arbitrations (and questions

of arbitral confidentiality may have constrained it), so also were the Defendants. The Defendants could have taken up how the issues had been decided in the earlier arbitrations, to follow through the examples by submitting that cl 20.1 was directory not mandatory or by referring the tribunal to the almost 50 authorities, but in the exercise of party autonomy they did not do so. Perhaps the tribunal could have raised with the parties matters found in the earlier awards, again to follow through the examples by inviting submissions on whether cl 20.1 was directory or apprising the parties of the authorities, but the tribunal did not do so. The tribunal was obliged to decide the CTP-11 arbitration on the evidence and arguments placed before it and raised before it in that arbitration. It is not correct that the Claimant should for itself have made submissions to the tribunal responding to matters found in the earlier awards but not part of the Defendants' case in the CTP-11 arbitration and not otherwise raised in that arbitration.

***The breach of the rules of natural justice prejudiced the Claimant's rights***

124 In s 24(*b*) of the IAA, the breach of the rules of natural justice must be one "by which the rights of any party have been prejudiced". The Claimant said that its rights had been prejudiced by the prejudgment itself, but that in any event there was prejudice demonstrated by the dissenting opinion of Judge B. The Defendants did not directly engage with prejudice by the prejudgment itself, but in its written submissions said on a number of occasions that the Claimant had not suffered any "actual or real prejudice".

125 In *Soh Beng Tee* the Court of Appeal did not accept that breach of the rules of natural justice itself created a prejudice suffered by the party who had been deprived of its rights: that would mean that the words in s 24(*b*) "by which its rights were prejudiced" were superfluous. It was held, at [91], that the party

must "persuade the court that there had been some actual or real prejudice caused by the alleged breach", something more than "technical unfairness": the breach of the rules of natural justice "must … have actually altered the final outcome of the arbitral proceedings in some meaningful way".

126 This was elaborated upon in *L W Infrastructure*. It was said (at [51]) that it is not necessary that the party demonstrate affirmatively that a different outcome would have ensued but for the breach of natural justice; rather (at [54]):

> … To say that the court must be satisfied that a different result would definitely ensue before prejudice can be said to have been demonstrated would be incorrect in principle because it would require the court to put itself in the position of the arbitrator and to consider the merits of the issue with the benefit of materials that had not in the event been placed before the arbitrator. Seen in this light, it becomes evident that the real inquiry is whether the breach of natural justice was merely technical and inconsequential or whether as a result of the breach, the arbitrator was denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to his deliberations. Put another way, the issue is whether the material *could reasonably* have made a difference to the arbitrator; rather than whether it *would necessarily* have done so. Where it is evident that there is no prospect whatsoever that the material if presented would have made any difference because it wholly lacked any legal or factual weight, then it could not seriously be said that the complainant has suffered actual or real prejudice in not having had the opportunity to present this to the arbitrator …
>
> [emphasis in original]

127 In *L W Infrastructure*, the alliance of technical/inconsequential and inquiry into making a difference in the arbitrator's deliberations was in the context of breach of the rules of natural justice in relation to evidence and arguments. An inquiry into making a difference in the arbitrator's deliberations does not readily apply to breach of the rules of natural justice constituted by apparent or actual bias. Applied analogously, the inquiry in such a case would be into whether, absent the apparent or actual bias, there could reasonably (not

would necessarily) have been a different result; but that could not be done without the court putting itself in the position of the arbitrator and considering the merits of the entire dispute, that is, applying an unbiased mind in place of the apparently or actually biased mind – which as is said in *L W Infrastructure* is incorrect in principle. That is even more so where the apparent or actual bias is in the form of prejudgment – in place of the prejudgment, there must be the court's own judgment.

128 That leaves the fundamental question of whether the breach was merely technical or inconsequential, and where the breach of the rules of natural justice is apparent or actual bias it cannot reasonably be said that the breach is only technical or inconsequential. In such a case, in my respectful view, it can be said that the breach itself creates the necessary prejudice, as an infringement of the party's right to due process which necessarily taints the arrival at the decision.

129 The Claimant did not put an argument in this way, but submitted that where there was a finding of apparent bias the existence of prejudice in relation to the award "can be readily inferred". In the decision to which it referred for this submission, *PT Central Investindo v Franciscus Wongso and others and another matter* [2014] 4 SLR 978 ("*PT Central Investindo*"), the comments of Belinda Ang Saw Ean J (as her Honour then was) on prejudice in the case of apparent bias included that "an inference of bias can be drawn from [an order to remove the arbitrator] *and hence the existence of prejudice in relation to any award made*" [emphasis added] (at [145]). Her Honour continued (at [146]–[148]):

> 146 As it was put in [*Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR(R) 85] at [103]:
>
> > Once a court has found that matters have been established which could give rise to a reasonable

> suspicion of bias, it would not be appropriate then to examine if it is to be isolated and treated as immaterial.
>
> 147 Similarly, the Supreme Court of Canada in *R v S (RD)* [1997] 3 SCR 484 … held (at 526) that:
>
> > [I]f a reasonable apprehension of bias arises, it colours the entire proceedings and it cannot be cured by the correctness of the subsequent decision.
>
> 148 The same comments on application can be made if a party using the same grounds challenges an arbitrator's impartiality or independence after the delivery of the arbitral award under Art 34(2)(*b*)(ii). Whilst prejudice is expressly stipulated in s 24(*b*) of the IAA, the inquiry in relation to prejudice is whether the breach of natural justice was 'technical and inconsequential' (see [*L W Infrastructure*] at [54]).

130 For my part, I do not think that this is an inference of prejudice, in the sense of an inference that there could reasonably have been a different result. It is a finding of prejudice from the effect of the apparent bias on the integrity of the award, regarded as more than technical or inconsequential, without inquiry into whether absent the apparent bias, there could reasonably have been a different result. I find support in this decision: in my view, that is an available and correct approach to prejudice in the present case of apparent bias in the form of prejudgment, and the breach of the rules of natural justice prejudiced the Claimant's rights.

131 If this be incorrect, I go to the occasions in the Defendants' submissions where it was said that the Claimant could not show "actual or real" prejudice because the matter complained of would not have made a difference in the Majority's deliberations. I have referred to one such occasion at [81] above in relation to the Majority's decision on pre-award interest: that no prejudice was caused to the Claimant because the relevant legal principles were substantially the same under Singapore law as under the Indian law applied by the Majority, so that the same outcome would have been reached had Singapore law been

applied: the same was said as to post-award interest and costs. Other occasions (in no particular order) were that the "clerical or typographical errors" in relation to cl 13.8 did not matter because the Majority applied cl 13.7; that the citation of the "Alleged Extraneous Authorities" did not prejudice the Claimant because the Majority's decision was fully supported by the other authorities cited, and because the Claimant had not explained what submissions it would have made in respect of those authorities; and that the Majority's decision that cl 20.1 was directory was not shown to have prejudiced the Claimant because it did not explain what further arguments it would have made against that decision. A more general proposition was that the Claimant had not shown actual or real prejudice because insofar as the Majority had reproduced reasoning and authorities from the earlier awards, the Claimant "has not in its witness statement identified a single argument that it says it was not able to address and which, if it had addressed, would have had a real as opposed to a fanciful chance of making a difference to the Majority's reasoning".

132 I do not identify every occasion, and it should be said that I do not accept that, for example, the same outcome would necessarily or even likely have been reached in relation to interest and costs. The Defendants' submissions underline that, where the vice is that the Majority applied a closed mind to the evidence and arguments before them, investigation of the result had the Majority applied an open mind to the evidence and arguments before them requires a full investigation of the merits. But it is enough that there could reasonably have been a difference in the result, and that is starkly shown by the dissenting opinion of Judge B. Judge B agreed with the Majority that the January 2017 Notification fell within cl 13.7 and was a change in law, but effectively as to all other issues was of a different view and would have dismissed the Defendants' claim or, had the claim not been barred pursuant to cl 20.1 of the CTP-11

Contract, would have awarded a different amount and different interest and costs.

133 In my opinion, therefore, the Award should be set aside for breach of the rules of natural justice by apparent bias in the form of prejudgment.

***Fair hearing***

134 As the Claimant's case was presented, this was consequential on the preceding discussion of apparent bias. The Claimant's principal contention was for infringement of the fair hearing rule because the Majority had failed to apply their mind to the essential issues arising from the parties' arguments in an independent, impartial, and fair manner; in its written submissions it submitted that "the test is whether the tribunal had complied with its obligation of independence and impartiality". The Claimant submitted that, for the reasons canvassed in relation to apparent bias, the Majority did not do so but instead "drew on extraneous matters in reaching its findings" by the reproduction of the earlier awards.

135 The failure to give a fair hearing, therefore, became a presentation of the Claimant's complaints not as making out apparent bias through the observer, but as an invitation to the court to conclude that the Majority had not given a fair hearing because they had approached deciding the issues before them with a closed mind. The difference from apparent bias should be made clear. The court's decision is not one of its own reasonable suspicion of bias in place of the reasonable suspicion of the observer, but one of itself coming to the conclusion that the Majority was biased because they decided the issues before them with a closed mind.

136 Failure to consider an essential issue in an arbitration is a breach of natural justice "because in such a case, the arbitrator would not have brought his mind to bear on an important aspect of the dispute before him" (*AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 at [46]). As the Defendants correctly submitted, the tribunal is not obliged to deal with every issue raised and every argument under an issue. But if it be concluded that the Majority approached deciding the issues before them with a closed mind, exploration of what was inessential and what arguments could be passed over falls away: failure to bring the Majority's mind to bear on the issues, essential or otherwise, must be a breach of natural justice. It must be remembered that the Claimant's overarching complaint is the reproduction using the CTP-13 Award as a template, and the other complaints are occasions where the reproduction is particularly indicative of a closed mind. It is sufficient to say that, regrettably, I am satisfied that the Majority infringed the fair hearing rule in the manner for which the Claimant contended.

137 The Claimant submitted also that there had been breach of the fair hearing rule because, in summary, it had not been given the opportunity to respond to the new arguments (an example is the argument as to cl 20.1 being directory), the reasoning (an example is as to the calculation of quantum), and the almost 50 authorities in the Award.

138 At the root of this was the same failure to give a fair hearing because the Majority approached deciding the issues before them with a closed mind – that was why the Claimant had not been given the opportunity. I do not think it necessary to add to these reasons by further discussion of the submission, save to note that the Defendants' answer to it was their submission, described at [111]–[113] above, that the Claimant had had the opportunity because it knew

the reasoning and decisions in the earlier arbitrations, but it did not take the opportunity. I have rejected the Defendants' submission.

139 In my opinion, therefore, the Award should also be set aside for breach of the rules of natural justice by failure to give a fair hearing.

140 The Claimant accepted that if it succeeded on Ground 1, it did not need the other grounds. For completeness and in case the matter goes further I will nonetheless go to them, although as to one to explain why it is not further considered and as to another in part inconclusively.

**Ground 2: inability to present a case**

141 Article 34(2)(*a*)(ii) of the Model Law provides that an award may be set aside if the party making the application furnishes proof that "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".

142 Although this ground was stated in the witness statement filed in support of OA 20, it did not receive separate attention in the Claimant's submissions. In the submissions on failure to give a fair hearing, it was said that the Majority's reliance on authorities which had not been raised or relied on by either party meant that the Claimant had not had the opportunity to address the tribunal on those authorities and had been deprived of the opportunity to fully present its case; this, it was said, was a breach of the fair hearing rule.

143 Failure to give a fair hearing has been upheld. In the circumstances, I see no point in giving further consideration to Ground 2.

**Ground 3: adoption of an arbitral procedure not in accordance with the agreement of the parties**

144 Article 34(2)(*a*)(iv) of the Model Law provides that an award may be set aside if the party making the application furnishes proof that:

> … the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law.

145 The Claimant's submissions extended to setting aside on the basis that the CTP-11 arbitration was not conducted in accordance with the Model Law, as well as not in accordance with the agreement of the parties. Some reference to conduct not in accordance with the Model Law will be made in the following paragraphs, but the witness statement filed as containing the grounds in support of the Claimant's application was limited to the adoption by the Majority of an arbitral procedure which was not in accordance with the parties' agreement, and the Claimant is confined accordingly.

146 In *Lao Holdings NV and another v Government of the Lao People's Democratic Republic* [2023] 1 SLR 55 ("*Lao Holdings*") the Court of Appeal adopted, at [98], the "basic framework" for the application of Article 34(2)(*a*)(iv) laid out by Vinodh Coomaraswamy J in *AMZ v AXX* [2016] 1 SLR 549 at [102]. There must have been an agreement between the parties on a particular procedure; the tribunal must have failed to adhere to the agreed procedure; the failure must be causally related to the tribunal's decision in the sense that the decision could reasonably have been different if the tribunal had adhered to the parties' agreed procedure; and the party mounting the challenge will be barred from relying on the ground if it failed to raise any objection during the proceedings before the tribunal.

147 The Claimant's submissions supported the ground at two levels. One was that the breach of the agreed procedure was because the Majority had applied Indian law in their decision on issues 7 to 10 (interest and costs). The other and wider submission was that the breach of the agreed arbitral procedure was because of what was called the lack of impartiality and independence of the Majority.

***Breach of agreed arbitral procedure because applying Indian law***

148 As earlier described (see [79] and [83]–[84] above), the Majority applied Indian law in coming to their decisions on interest and costs although, because the arbitration was seated in Singapore, the award of interest and the disposal of costs were governed by Singapore law. Teased out, the argument for the first two steps in the basic framework was that, because the parties had agreed that the arbitration should be seated in Singapore, they had agreed that Singapore law should be applied in the decisions on interest and costs; that this was an agreement on an arbitral procedure; and that in applying Indian law the Majority had not acted in accordance with the agreement.

149 I do not accept the argument.

150 First, the agreement upon the seat was not an agreement that Singapore law should be applied in the tribunal's decisions on interest and costs. That was a substantive consequence of the agreement, but not agreed in itself. A brave counsel could have argued for the application of Indian law, and the answer would have been not that the parties had agreed on the application of Singapore law, but that the application of Singapore law flowed as a substantive matter of law from the seat of the arbitration being in Singapore. In applying Indian law the Majority was making a substantive error, not an error in acting contrary to

an agreement of the parties, and as was succinctly said by Vinodh Coomaraswamy J in *CEF and another v CEH* [2021] SGHC 114 at [39], to which the Defendants drew attention, "Article 34(2)(*a*)(iv) cannot possibly apply to the *substance* of an award, *ie* to the *outcome* of the arbitral procedure which the tribunal adopted." [emphasis in original].

151 Secondly, if the agreement upon the seat was (contrary to the above) an agreement that Indian law should be applied in the tribunal's decisions on interest and costs, that was not an agreement on arbitral *procedure.* In *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] 4 SLR 672 at [39] Belinda Ang Saw Ean J gave as examples of procedural rules, rules on the timelines for submission of answers in response to the request for arbitration, the information required to be provided in the submissions, and notification to the parties of the names of the members of the arbitral tribunal. The examples were plainly not exhaustive, and it may be that arbitral procedure can extend to the conduct of the tribunal in coming to its decision (see at [153]–[160] below), but what law should be applied in determining a dispute cannot be regarded as a matter of procedure. If the tribunal errs in the law it applies, that is a substantive error.

152 In relation to breach of arbitral procedure in applying Indian law in the decision of issues 7 to 10, therefore, Ground 4 fails at the first two steps in the basic framework. It is not necessary to go to the parties' submissions on the remaining steps, and I will not make these reasons even longer by doing so.

***Breach of arbitral procedure in lack of impartiality and independence***

153 The Claimant referred to *PT Central Investindo.* In that case an application was made to remove the arbitrator on the basis that there were

justifiable grounds to doubt the arbitrator's impartiality; the arbitrator delivered the award before the application had been decided; and an application was then made to set aside the award. One question was whether, the award having been delivered, there was utility in continuing with the removal application. Belinda Ang Saw Ean J held that there was, one reason being (at [52]) that impartiality and independence is mandatory under the Model Law, and:

> Apart from the Model Law, the arbitrator's impartiality and independence in this case is embodied in r 9 of the 2007 [Singapore International Arbitration Centre ("SIAC")] Rules to form part of the parties' agreed arbitral procedure. For instance, r 9.3 reads:
>
> > 9.3 … Any arbitrator, whether or not nominated by the parties, conducting an arbitration under these Rules shall be and remain at all times *independent and impartial*. … [emphasis added]
>
> Hence, any finding made as to an arbitrator's impartiality or independence would have a bearing on a setting-aside application brought under Art 34(2)(*a*)(iv) of the Model Law with respect to the point that the arbitration was not conducted 'in accordance with the Law' or 'not in accordance with the agreement of the parties'.
>
> [emphasis in original]

154 Both the removal application and the set aside application were dismissed, but her Honour went on to express in *obiter* some views on whether disqualification by removal had the consequential effect of annulling or setting aside the final award. Those views included, at [134]:

> I am of the opinion that a challenge to an arbitrator's impartiality or independence is a ground for setting aside under Art 34(2)(*a*)(iv). In fact Norway's Comment [a comment in the course of drafting the Model Law] is a strong pointer that it was taken to be the case that justifiable doubt as to an arbitrator's impartiality or independence is not only a ground to challenge an arbitrator under Art 13(3) read with Art 12(2) but also a ground for setting aside under Art 34(2)(*a*)(iv) as well. As stated at [52] above, this is likely to be because of the fact that the requirement of impartiality or independence amounts to a

> mandatory provision implied under Art 12(2) the breach of which is 'not in accordance with this Law'.

155 While in this passage her Honour referred only to an arbitral procedure in accordance with the Model Law, the reasoning would appear to apply equally to an arbitral procedure in accordance with the agreement of the parties as adverted to in relation to the SIAC Rules in the prior passage at [52] of *PT Central Investindo*. The Claimant said that in the present case the equivalent agreement of the parties was to be found in Art 22(4) of the ICC Rules, to which the arbitration was subject. Article 22 is headed "Conduct of the Arbitration", and Art 22(4) provides that "[i]n all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case".

156 Again teased out, then, the Claimant's argument for the first two steps in the basic framework was that it had been agreed that the tribunal would act fairly and impartially and ensure that each party had a reasonable opportunity to present its case; that (on the authority of *PT Central Investindo*) this was part of the agreed arbitral procedure; and that the Majority had not acted in accordance with the agreement. The Majority's failure in this respect was at one point said to be their apparent bias, although the objectively found apparent bias is less than the Majority's actual conduct; it was otherwise referred to as the Majority's lack of impartiality and independence, a phrase no doubt taken from *PT Central Investindo*. The more correct asserted failure, reflecting Art 22(4) of the ICC Rules, would appear to be not acting fairly and impartially and ensuring that each party had a reasonable opportunity to present its case (which I will summarise as acting fairly).

157 The Defendants' submissions did not respond to the Claimant's case of breach of arbitral procedure in this respect, their submissions being confined to

breach of arbitral procedure in relation to the use of Indian law. The omission was noted in the course of the oral submissions, but was not remedied.

158 I respectfully have some difficulty with seeing an arbitrator's impartiality or independence as always part of the parties' agreed arbitral procedure. At least in the legal system relevant to these proceedings, an arbitrator must be impartial and exercise independence quite apart from any agreement, and one way in which the arbitrator does so is in coming to his or her decision impartially and independently – in his or her decision-making, not in a process with the parties. Similarly, an arbitrator must act fairly quite apart from any agreement, and while that may primarily be acting procedurally fairly, the unfairness on which the Claimant relies in the present case in order to bring itself with Art 22(4) is unfairness in the Majority's prejudgment in coming to its decision, in its own decision-making, not in a process with the parties. A breach of Art 22(4) of the ICC Rules or an equivalent such as that considered in *PT Central Investindo* may not always be procedural, and in this case the breach of the fair hearing rule, as earlier discussed, was because the Majority approached deciding the issues before them with a closed mind, which does not seem to be properly described as procedural; rather, it is a fault in the Majority's decision-making. Some point is given to this by the last step in the basic framework, that an objection to the departure from the agreed procedure must have been raised before the tribunal. It could not be raised until after the Award was issued.

159 These matters were not brought up in the hearing and were not the subject of submissions: the Claimant did not go beyond *PT Central Investindo* and the assertion of lack of impartiality and independence, and as I have said the Defendants did not respond. Whether and when acting fairly and its equivalents can be part of an agreed arbitral procedure for the purposes of Art

34(2)(*a*)(iv), and if so whether the Majority was in procedural breach, warrant deeper investigation. It being unnecessary to come to a concluded decision, I prefer not to do so, and will also not go to the further steps in the basic framework.

160 I do not think that the discussion of the ground would be advanced if the question was whether the arbitration had been conducted in accordance with the Model Law.

**Ground 4: conflict with the public policy of Singapore**

161 Article 34(2)(*b*)(ii) of the Model Law provides that an award may be set aside if the court finds that "the award is in conflict with the public policy of this State [*ie*, Singapore]".

162 The ground has often been described as narrow (for example, *BTN and another v BTP and another* [2021] 1 SLR 276 at [56]) and as setting a very high threshold (for example, *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 ("*Sui Southern Gas*") at [48]). In *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi*"), in a passage frequently cited, the Court of Appeal said (at [59]):

> Although the concept of public policy of the State is not defined in the Act or the Model Law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope. In our view, it should only operate in instances where the upholding of an arbitral award would 'shock the conscience' … , or is 'clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public … , or where it violates the forum's most basic notion of morality and justice …

163 This was further described by Judith Prakash J (as her Honour then was) in *Sui Southern Gas* (at [48]) in saying that the applicant there "had to cross a

very high threshold and demonstrate egregious circumstances such as corruption, bribery or fraud, which would violate the most basic notions of morality and justice".

164 The core of the Claimant's submissions in support of this ground, as expressed in its written submissions, was that public confidence in Singapore's legal institutions would be undermined if the Singapore courts failed to intervene when arbitrators display biased or partial conduct and fail to ensure due process in Singapore seated arbitrations. The Claimant referred to Singapore's place as a "key hub" for international arbitration and the need to safeguard its reputation as a jurisdiction in which, despite the principle of minimal curial intervention, the courts would intervene where a ground for doing so was made out. It said in substance that procedural fairness, including perceived fairness, is fundamental in Singapore's justice system and in arbitration alike, and (with submissions to the effect that the reproductions from the CTP-13 Award, and the earlier awards showed "a fundamental abandonment and abrogation of [the Majority's] decision-making function") that the breach of that central principle by the apparent bias on the part of the Majority was therefore a violation of Singapore's public policy. It said that upholding the Award would effectively condone the Majority's conduct and would:

> … undermine the public perception of international arbitration as a legitimate alternative to the judicial administration of justice in Singapore, and suggest that the Singapore courts, in their supervisory role, are not committed to protecting the fundamental right of due process of parties who opt for such alternative dispute resolution mechanisms. This would, in turn, plainly be injurious to the public good.

165 The Defendants' response rather under-played the Claimant's case in this respect, limiting it to a case of copying and submitting that copying in an arbitral award from a different source could not rise to the very high threshold

of egregious circumstances such as corruption, bribery or fraud which would violate the most basic nations of morality and justice. The Defendants pointed to *DJO (HC)* at [119]–[120], where Simon Thorley IJ described the Claimant's case there as "based on the broad assertion that plagiarism of any sort was fundamentally contrary to Singapore public policy" and said that he:

> … would not characterise what the Tribunal did as being the usual type of concealed dishonest plagiarism and certainly would not have held that what the Tribunal did crossed the very high threshold required for a finding of a breach of public policy.

166 It is not clear whether the Claimant's submission was that Singapore's public policy was offended simply because there was breach of the rules of natural justice in connection with the making of the award by which its rights were prejudiced, without looking to the circumstances or seriousness of the breach. If it was, I do not accept the submission. Breach of the rules of natural justice can occur in many ways, ranging from ignorance through human error to corruption, and can take many forms, and the prejudice may be of varying seriousness. Notwithstanding the importance of their due process rights to the parties to an arbitration, when considering offence to Singapore's public policy a closer consideration of the nature and circumstances of the breach must be made.

167 In that regard, the Claimant referred to *PT Central Investindo* at [52] for the proposition that want of impartiality or independence in the arbitral process may give rise to public policy concerns, and at [135] for her Honour's statement that she "had observed" that the rationale for its invocation to set aside an award under Art 34(2)(*b*)(ii) was that "lack of impartiality and independence of the tribunal … would certainly shock the conscience and be clearly injurious to the public good or wholly offensive to the ordinary reasonable, and fully informed member of the public". In the Claimant's submission, apparent bias and failure

in a fair hearing were implicitly equated with lack of impartiality and independence, so that breach of the rules of natural justice in those ways would offend Singapore's public policy.

168 However, what her Honour "had observed" should be noted. In *PT Central Investindo* at [135] her Honour was referring back to her decision in *Beijing Sinozonto Mining Investment Co Ltd v Goldenray Consortium (Singapore) Pte Ltd* [2014] 1 SLR 814 at [41], the fuller passage in that case being:

> Public policy is capable of covering a wide variety of matters. Erroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of s 31(4)(*b*). However, in the present case, the argument advanced is that the forum state's most basic notions of morality and justice would be violated if an arbitral award procured through fraud was enforced there; and 'fraud' in this context encompasses a showing of bad faith during the arbitration proceedings, such as bribery, undisclosed bias of the arbitrator, or wilful destruction or withholding of evidence. I agree entirely with what Chan Seng Onn J said in *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] 3 SLR(R) 871 (at [139]), that if a party bribes the tribunal into giving a decision in its favour, or does anything to corrupt, subvert or compromise the professional integrity, impartiality and independence of the tribunal, that would certainly shock the conscience and be clearly injurious to the public good or wholly offensive to the ordinary reasonable and fully informed member of the public. Judith Prakash J in *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 at [48]) appeared to share a similar view that an award obtained by corruption, bribery or fraud would violate the basic notions of morality and justice and amount to a breach of the public policy of Singapore.

169 It is evident that the Claimant's reference to *PT Central Investindo* does not support lack of impartiality and independence, or apparent bias and failure in a fair hearing if they be equated with impartiality and independence, as and of themselves amounting to offence against the public policy of Singapore.

Rather, more in the nature of fraud is necessary, and the nature and circumstances of the breach of the rules of natural justice must be considered.

170 As was noted in *VV and another v VW* [2008] 2 SLR(R) 929 at [17], it is necessary to identify the Singaporean public policy with which the Award is said to conflict. The Claimant's submissions summarised above did not clearly do so, but in essence it was said that it is part of the public policy of Singapore to be sure to set aside an award where the fundamentally important right to procedural fairness was violated, or on a more nuanced approach to do so where the violation involved the abandonment and abrogation of the decision-making function and apparent bias. No authority was cited in which such a public policy has been identified, and I have difficulty with it. Singapore's courts must set aside an award when a ground for doing so has been made out, including the natural justice ground, because that is the law. No doubt due administration and upholding of the law is a public policy, but that is not what Art 34(2)(*b*)(ii) of the Model Law, as explained in *PT Asuransi,* is about, and the submission comes close to saying that if any of the grounds for setting an award aside is made out, in Singapore it must also be set aside on the public policy ground. I do not think that is correct: the public policy ground is a separate ground on its own.

171 Guided by the explanation of Singapore's public policy in *PT Asuransi,* would upholding the CTP-11 Award, despite the findings of apparent bias and failure in a fair hearing because of suspicion or actuality that the Majority approached deciding the issues before them with a closed mind, come within the words or the intent of the formulations there found? I do not think so. There is no reason to find that the Majority's use of the CTP-13 Award as a template for its reasoning and analysis of the issues in the Award, in the manner earlier described, was dishonest or from actual partiality to the Defendants (and the

Claimant did not ask for any such finding). It was wrong, but so also were the judges wrong in *Yap Ah Lai* and *Lim Chee Huat* (referred to at [101] and [102] above) with vitiation of their decisions, and wrong in *Ler Chun Poh* (referred to at [104] above) although the decision survived. Putting aside dishonesty or actual partiality, such an error as an incident of the adjudication process, while to be deprecated, is not an "egregious circumstance" of the necessary kind. Even bearing in mind the importance of the due process rights of parties to an arbitration because of the principle of minimal curial invention, what occurred here has not been shown to cross the ground's high threshold.

**Permission to file a witness statement raising preclusion and waiver**

172 As described below, the Defendants applied for permission to file a further witness statement raising additional grounds on which they opposed OA 20. After hearing the parties, permission was granted, with reasons to be given in this judgment. These are the reasons.

***The application for permission***

173 In accordance with O 23 r 2(2) of the Singapore International Commercial Court Rules 2021 ("the SICC Rules"), as a proceeding under the IAA, OA 20 is decided on the statements adjudication track as modified by the provisions in O 23. Those provisions include that the Originating Application must be accompanied by a witness statement which must, amongst other things, "state the grounds in support of the application" and set out the evidence on which the claimant relies (O 23 rr 4(*a*) and 4(*c*)); and that the defendant must within 28 days from service file and serve a Defendant's Statement and, where the defendant does not dispute service or jurisdiction, file and serve together with the Defendant's Statement a witness statement "stating the grounds on which the defendant opposes the application" (O 23 rr 6(1), 6(2) and 6(9)).

174 The Claimant filed OA 20 on 3 September 2024, accompanied by a witness statement in which the grounds earlier described were stated. With an extension of the 28 days, the Defendants filed and served their Defendants' Statement and three witness statements on 26 November 2024. As again earlier described, their thrust was that the Claimant had not made out any of the grounds to set aside the Award but was engaged in a disguised attempt to appeal the Award on its merits.

175 The hearing of OA 20 was fixed for 25–26 February 2025, with written submissions to be exchanged on 11 February 2025. On 10 February 2025 the Defendants filed SIC/SUM 12/2025 ("SUM 12"), an application for permission to file and adduce into evidence a further witness statement. In an accompanying solicitor's witness statement, it was said that the purpose of the further witness statement was:

> … to make and raise to the Honourable Court, and bring to [the Claimant's] attention, additional arguments that the Defendants wish to make in relation to OA 20 i.e. that [the Claimant] is precluded from seeking and/or has waived its right to seek to set aside the Award on the basis of any alleged reproduction of the contents of the Parallel Awards in the Award.

176 The attached witness statement described the additional arguments. The arguments are more fully considered later in these reasons, and for present purposes it is sufficient that at their heart was the contention that the Claimant relied in its challenge to the CTP-13 Award substantially on reproduction in that award from the CP-301 Award and the CP-302 Award, which it said showed prejudgment and apparent bias, breach of the fair hearing rule, breach of agreed procedure, and offence to Singapore public policy; that if that were so then (in the words of the witness statement) "it would also have known that the Majority in this case would either do the same or had been allegedly influenced by the

Parallel Awards in the same way …"; and that the Claimant nonetheless did not challenge the Majority arbitrators or raise objections before the tribunal; and it was therefore precluded from or had waived raising the same grounds in OA 20.

177 It was said in the solicitor's witness statement that the additional arguments "were brought to the Defendants' attention by their newly instructed lead counsel Mr Davinder Singh S.C. at their first meeting with Mr Singh S.C on 7 February 2025"; and with reference to O 23 r 6(9) of the SICC Rules, it was said that as the additional arguments were not raised in the Defendant's witness statements filed in response to OA 20, "the Defendants require and are seeking permission to file a further witness statement in relation to these arguments". It was said that the additional arguments related to and turned on facts and documents already within the Claimant's knowledge from the parties' earlier witness statements in OA 20 plus a witness statement filed by the Claimant in earlier proceedings, and that the Defendants did not seek any adjournment, deferment or postponement of the exchange of written submissions on 11 February 2025 or of the hearing fixed for 25–26 February 2025. A course was proposed by which the further witness statement be filed and served "one day after the application is granted", any reply witness statement by the Claimant be filed five days thereafter, and supplementary written submissions be exchanged by 21 February 2025. This assumed immediate granting of the application and bringing the additional arguments into the hearing on 25–26 February 2025.

178 The Claimant took exception to this. By a letter dated 11 February 2025, it invited the Court to "dismiss[] [SUM 12] with costs at the outset", giving a number of reasons including lateness and that "even on a preliminary review of

the Application, the substance of the Application lacks merit" and the arguments were "clearly speculative and not borne out by the facts".

179 I declined either course. Directions were given whereby the hearing on 25–26 February 2025 would continue as planned on the existing materials, and SUM 12 would be heard at the conclusion of that hearing.

180 SUM 12 was heard on oral submissions on 26 February 2025. At the conclusion of the hearing, permission to file the further witness statement was granted. Directions were given by which the Claimant could file a responsive witness statement and for the exchange of supplementary written submissions on the additional arguments. The supplementary written submissions were filed on 26 March 2025.

***The discretion to grant permission***

181 There was disagreement over the approach to granting permission.

182 The requirements of the statements adjudication track are found in O 7 of the SICC Rules. Order 7 rr 3 and 4(1) provide for the claimant filing a witness statement setting out all the evidence on which it relies and the defendant filing a witness statement setting out all the evidence on which it relies. By O 7 r 4(2), subject to a rule concerning the claimant providing evidence in defence of a counterclaim, "a further witness statement must not (except with the permission of the Court) be filed after the witness statement or witness statements is or are filed and served by the defendant …". The Defendants submitted, and the Claimant agreed, that the power to grant permission to file the further witness statement was found in the words "except with the permission of the Court" in O 7 r 4(2).

183 That may not be entirely clear. Order 23 concerning IAA proceedings has in O 23 rr 4 and 6 its own provisions for the filing of witness statements, being witness statements which must set out not only the evidence on which the parties rely but also the grounds on which the application is supported or opposed. On one view it sets out its own scheme for witness statements in IAA proceedings. However, the differences in the content of the witness statements can be regarded as a modification to the statements adjudication track in O 7, so that while O 23 r 6 does not have an embargo on further witness statements similar to that in O 7 r 4(2), the embargo in O 7 r 4(2) and its proviso for permission is carried over to IAA proceedings in consequence of their allocation, subject to modification, to the statements adjudication track. I accepted that the power to grant permission is found in O 7 r 4(2).

184 The words "except with the permission of the Court" are not qualified, and confer a general discretion, albeit one to be exercised judicially. On what principles should it be exercised?

185 The Claimant submitted that it was necessary for the Defendants to show a "special case" for permission to file and rely on the further witness statement. It put forward two arguments.

186 The first argument was put forward in the Claimant's letter of 11 February 2025. It was not taken up in the Claimant's oral submissions, and may have been abandoned, but was addressed by the Defendants and should be dealt with.

187 For the first argument, the Claimant referred in the letter to Registrar's Circular No 1 of 2023 (Guide for the Conduct of Arbitration Originating Applications) ("the Circular") in which it is said, after reference to a defendant

filing an affidavit stating the grounds on which the defendant opposes an application, that "[e]xcept with the permission of the court, *which will be granted only in special cases*, no further affidavits may be filed after the defendant files the defendant's affidavit on the merits" [emphasis in original omitted; emphasis added in italics].

188 The Claimant's argument did not rest on the Circular itself, but came back to O 6 r 12(6) of the Rules of Court 2021 ("the ROC"), in the Circular identified as the basis of the special case requirement. Order 6 in the ROC is concerned with the commencement of proceedings, and where the proceedings are commenced by originating application provides in r 12 for service of the defendant's affidavit "if the defendant wishes to introduce evidence in respect of the originating application" and, in r 12(6), that "[e]xcept in a special case, no further affidavit may be filed after the defendant files the defendant's affidavit on the merits".

189 Neither the Circular nor the rule has any application in OA 20. Order 6 of the ROC applies only to proceedings in the General Division (and to all proceedings commenced by originating application, not only arbitration proceedings). In its paragraph 1, the Circular is specifically made applicable only to matters in the General Division of the High Court, and O 6 including O 6 r 12(6) to which it refers is not a rule applying to IAA proceedings in the SICC.

190 It was nonetheless proposed in the letter that the special case stipulation in the Circular is made applicable to IAA proceedings in the SICC because the Circular is referred to on the SICC website. The argument ran:

(a) The website includes a section headed "Applications under the International Arbitration Act 1994".

(b) After referring to the court's jurisdiction and to potential transfer of proceedings from the General Division, it is said that:

> The Rules governing IAA applications in the SICC may be found in Order 23 of the SICC Rules. For more information, please refer to the SICC Procedural Guide *and Arbitration Users Guide* …
>
> [emphasis added]

(c) The link to the Arbitration Users Guide is to the Circular.

191 Although not clearly stated, the proposition was that the Circular and its reference to a special case was thereby brought into the rules governing IAA applications in the SICC.

192 How a reference to the Circular on the website as a source of information could give it, or O 6 r 12(6) to which it referred, binding force which it did not otherwise have was not explained. It is curious that the Circular is referred to in relation to IAA proceedings in the SICC when in its terms it applies only to proceedings in the General Division. I did not accept that it thereby had any prescriptive force in relation to IAA proceedings in the SICC, or that by the reference to it on the website O 6 r 12(6) was transposed so as to apply to IAA proceedings in the SICC.

193 It is fair to say that in oral submissions the Claimant accepted that O 6 r 12(6) did not have any prescriptive force in OA 20.

194 The Claimant's second argument rested on O 1 r 11(3) of the SICC Rules, although also coming back to O 6 r 12(6) of the ROC. Order 1 r 11(3) is in the terms:

> Where there is no express provision in these Rules or any other written law on any matter, the Court may do whatever it considers necessary or desirable for the just, expeditious and economical disposal of any proceedings in the Court. In doing so, the Court may apply the domestic Rules of Court with such necessary modifications as the context requires.

195 The Claimant submitted that in the exercise of the discretion to apply the domestic rules, the court should apply O 6 r 12(6) and so bring the special case requirement into OA 20 in the SICC. It gave as the reasons that IAA proceedings could be brought in either the General Division or the SICC or transferred from the General Division to the SICC, and there should be uniformity; that in both Divisions the rules showed the intention that the parties should compendiously set out their evidence and grounds; and that the reference to the Circular on the SICC website evidenced that intention.

196 The options in O 1 r 11(3) are more than applying the domestic rules of court – whatever is necessary or desirable for the just, economic and expeditious disposal of the proceedings may be done. But even before coming to the exercise of the discretion, the submission is flawed. Regard to applying O 6 r 12(6) as a domestic rule of court shows the flaw.

197 There must be absence of express provision on a "matter" before there can be application of a domestic rule on that matter. If the matter be regarded globally as the witness statements to be filed by the claimant and the defendant, there is express provision in O 23 on that matter; if it be regarded more narrowly as the filing of a further witness statement, that is the subject of express provision in O 7 r 4(2), which states the gateway as the general discretion to

grant permission. That the discretion in O 7 r 4(2) is not qualified by criteria for its exercise does not mean an absence in the express provision: a general discretion, commonly encountered in the law, is complete in itself albeit with the principles on which it is exercised worked out in the cases. There is therefore no gap to be filled by applying the domestic rule in O 6 r 12(6) stipulating that permission will only be granted in a special case.

198 This can be put another way. If the domestic rule were to be applied with appropriate modifications (for example, "affidavit" to "witness statement"), it would be by stipulating that except in a special case, no further witness statement may be filed after the defendant files its witness statement. But that cannot stand together with O 7 r 4(2), stipulating that "a further witness statement must not (except with the permission of the Court) be filed after the witness statement or witness statements is or are filed by the defendant". The two stipulations deal with the same matter in different ways, in the case of O 7 r 4(2) in a way complete in itself as a general discretion, and it cannot be said that the domestic rule is needed to fill a gap because there is no express provision in the SICC rule.

199 It is unnecessary to go to the exercise of the discretion, but I would not have taken up O 6 r 12(6). If there were the absence of an express provision, it would have to be that (contrary to what I have said above) O 7 r 4(2) does not have a statement of criteria for the exercise of the discretion to grant permission. The SICC Rules and the ROC were closely contemporaneous; the presence of a special case requirement in one but not the other indicates a deliberate difference. The gap would have been filled by the different option of a just, economic and expeditious expedient, which is unlikely to have been the bald requirement of a special case.

200 I therefore did not accept either of the Claimant's arguments for a special case for permission to file the further witness statement. That still left the question of the principles guiding the exercise of the general discretion.

201 That is informed, in my view, by the nature of the further witness statement. It is not just evidentiary, and so far as it introduces new evidence that new evidence is limited to the witness statement filed by the Claimant in earlier proceedings and does not greatly impose on the Claimant. Nor is it just a case of extending the time for an act within the boundaries of an already defined dispute. The point of the further witness statement is to enable the Defendants to make their additional arguments, being entirely new arguments of preclusion and waiver whereby it is said that the Claimant is shut out from applying to set the Award aside on the grounds put forward quite apart from the merits of those grounds. OA 20 being on the statements adjudication track, there are no pleadings to define the dispute: it is meant to be defined by the respective statements of the grounds in support of the application and the grounds on which it is opposed. Permission to file the further witness statement means new grounds, and is akin to permission to amend to introduce new defences.

202 So viewed, for permission to file and rely on the further witness statement the principles governing amendment come into consideration. Those principles are well established. From *Ng Chee Weng v Lim Jit Ming Bryan and another* [2012] 1 SLR 457 ("*Ng Chee Weng*") at [22]–[27] can be taken:

> (a) an amendment which would enable the real issues between the parties to be tried should be allowed subject to penalties on costs and adjournment, if necessary, unless the amendment would cause injustice or injury to the opposing party which could not be compensated for by costs or otherwise;

(b) the rationale behind this is that the court should be extremely hesitant to punish litigants for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights;

(c) but all the circumstances must be considered, because justice cannot always be measured in terms of money;

(d) there is a difference between an amendment that merely clarifies an issue in dispute and one that raises a totally different issue at too late a stage; and

(e) procedural justice is an important aspect of "the holistic ideal and concept of justice itself", and there must be fairness in the procedure or manner in which the final outcome is achieved.

203 In *Ng Chee Weng* the court summed up that if there will be no injustice caused save some inconvenience that can be compensated by costs, and the amendment is in order, the court will lean favourably towards allowing the amendment: at [29]. This was subject to the qualification that the court will not allow the amendment if it is obvious that the amended pleading would be struck out at trial: at [106].

204 I considered that I should be guided by these principles in relation to permission to file the further witness statement.

***Permission is granted***

205 The Defendants submitted that if they were not permitted to make the additional arguments, they would be prejudiced because the arguments could have a material bearing on the outcome of OA 20. They submitted that a grant of permission would not cause any prejudice to the Claimant that could not be

compensated by an order for costs, because the additional arguments turned on facts and documents already within the Claimant's knowledge and the only new document they sought to rely on was the Claimant's own document, and that the Claimant could have full opportunity to respond to the additional arguments by a further witness statement if necessary and supplementary written submissions, without undue impact on when the decision in the Claimant's application was delivered following the hearing on 25–26 February 2025. If the court so determined, an appropriate costs order could be made in favour of the Claimant.

206 The Claimant submitted that the Defendants' application was made late, only days before the appointed hearing dates, and without justification for the lateness. The hearing dates of 25–26 February 2025 had been fixed at a Case Management Conference on 25 October 2024 as the earliest availability of the Defendants' then counsel Mr Francis Xavier SC, and with the extension of time for the filing of the Defendants' witness statements and the time after their filing there had been ample opportunity for the Defendants to consider their position and raise all grounds properly available to them. But, it was said, there had been no explanation for the late additional arguments beyond the itself unexplained late appearance of Mr Singh in place of Mr Xavier and his bringing the additional arguments to the Defendants' attention. The Claimant submitted that if the Defendants were permitted to raise the additional arguments, there would inevitably be delay in delivery of the decision in OA 20, from the time involved in any further witness statement, in provision of the supplementary written submissions, and in the court's consideration of the additional arguments: the Claimant went so far as to suggest that SUM 12 was a "dilatory tactic".

207 The Claimant further submitted that the additional arguments, even on a preliminary examination, were "hopeless", such that it would be unjust to permit

them to be raised at the last minute with the potential to delay the decision of OA 20. The nub of the Claimant's submission was that there was no proper basis to expect that the different tribunal in the CTP-11 arbitration would in rendering its award act similarly to the tribunal rendering the CTP-13 Award, and so no proper basis for a challenge to the Majority arbitrators or for raising objections before the tribunal. In any event, it was said, there could not be preclusion or waiver because under the Model Law independence and impartiality of an arbitral tribunal was mandatory.

208 The circumstances in which Mr Singh came to replace Mr Xavier were not explained, and it may be accepted that there had been plenty of time for the Defendants' legal representatives to apply their minds to the grounds on which OA 20 could be opposed. Nonetheless it is the fact that the additional arguments were raised at a late stage by Mr Singh; I saw no reason to find that the Defendants were engaged in a "dilatory tactic". It is not unknown for new counsel to bring a new approach to or a new matter into existing proceedings: a late thought may be a good thought, and is not to be dismissed simply because it is a late thought – that is only one factor.

209 My decision in OA 20, as heard on the existing materials, would be reserved (as I made known to the parties), and I considered that it would not be unduly delayed if the new arguments were brought into the proceedings with the opportunity for the Claimant to file a responsive witness statement and supplementary written submissions on a strict timetable. Subject to the question of the substance of the new arguments, in my view it was desirable that the Defendant be able to raise them in opposition to OA 20, and any prejudice to the Claimant could be compensated for in costs. I was not persuaded that the new grounds were completely without merit, and considered that there should be the opportunity for them to be fully developed and determined.

210 I therefore granted the permission sought, and gave the directions mentioned at [180] above. The Defendants accepted that they should pay the costs of SUM 12, and that was ordered. Costs were otherwise left for the ultimate consideration of costs.

**Preclusion and/or waiver**

211 A brief indication of the additional arguments has been given at [176] above; they and the Claimant's response were developed in the supplementary written submissions. The Defendants contended that the Claimant was precluded from and/or had waived applying to set aside the Award on each of Grounds 1, 3 and 4. Ground 2 was presumably seen as not requiring separate attention, as is the case.

212 As the factual basis for the arguments, the Defendants contended that at the latest on 26 February 2024 the Claimant knew all the material facts and circumstances on which it relied in OA 20 for apparent bias or breach of the fair hearing rule: at another point, it said that the Claimant "knew by the latest on 26 February 2024 that the Majority had prejudged the issues, closed its mind and would not give [the Claimant] a fair hearing in the CTP-11 Arbitration".

213 The "material facts and circumstances" in the Claimant's alleged knowledge were taken up in relation to all the grounds. It is convenient to go to them first.

***The Claimant's knowledge***

214 The Defendants began with the issue of the CTP-13 Award on 24 November 2023, and treated what the Claimant said about that award in its application to set it aside (SIC/OA 8/2024 ("OA 8")), resulting in the judgment

in *DJO (HC)*) as knowledge as at that date. OA 8 was filed on 26 February 2024, and I will come to what was taken from it when I come to OA 8.

215 Before OA 8 was filed, on 28 November 2023 the Defendants applied to correct errors in the CTP-13 Award and on 10 January 2024 the Claimants filed their response to that application. The response included that the "package description at Page 2–3 of the final award" and "various other parts of the award" had been copied from "a different final award" in a matter in which Judge C had been part of the tribunal, and:

> The said error goes into the root of the matter and signifies the lack of diligence, application of mind to the actual case before it. It also shows the impact and/or influence of the earlier award in the making of the present Arbitral Award.

216 In the witness statement filed by the Claimant in support of OA 20, it was said that this showed that the tribunal in the CTP-13 arbitration was alive to the Claimant's objections to the CTP 13 Award "based on the substantial copying of the July 2023 Award, in particular the prejudging of the CTP-13 Arbitration and lack of application of mind to the CTP-13 Arbitration".

217 Coming to OA 8, the Defendants said that the Claimant contended that the CTP-13 Award was copied from the two earlier awards, the CP-301 Award and the CP-302 Award. Those words were used, but more accurately as recorded in *DJO (HC)* at [52] the Claimant submitted that 278 paragraphs of the 451 paragraphs of the award were reproduced or substantially reproduced from the earlier awards (the Defendants disputed the number of paragraphs: it appears to have been a similar situation to the present case). The Defendants laid some emphasis on the Claimant's affidavit in support of OA 8 including that after reading "paragraph after paragraph after paragraph of cut-and-pasted reasoning and conclusions" it was felt that the arbitration process was "just about going

through the motions" and that the result was "effectively and unfairly pre-determined" in the earlier arbitrations.

218 As also recorded in *DJO (HC)* at [99], the Claimant there submitted that Judge C had prepared the award "in breach of his obligation of independence and impartiality in the Arbitration", and that his co-arbitrators, who included Judge A, "failed to apply their minds independently to verify that the Award was prepared based on the materials before them and thus failed in their duties of independence and impartiality in the discharge of their decision-making function".

219 The Defendants added that the Claimant would have been aware that in allowing the correction application, the tribunal in the CTP-13 arbitration said nothing about, and so disregarded, the concerns expressed in its response to that application.

220 From this, the Defendant submitted that from the views expressed in relation to the CTP-13 Award, and as well knowing that the same reasoning and authorities had been reproduced across all three of the CP-301 Award, the CP-302 Award and CTP-13 Award, the Claimant knew that Judge C and Judge A were compromised and were unable to approach the issues in the CTP-11 arbitration with an open mind or give it a fair hearing. They said that where the issues in the CTP-13 and CTP-11 arbitrations, although not identical, were similar, the Claimant "surely knew that the Majority would either behave in the same way in the CTP-11 Arbitration, or they would at least be influenced in the same way by the arguments they had heard in the CP-301 and CP-302 Arbitrations". This then became the submission at [176] above, that the Claimant knew by 26 February 2024 at the latest that the Majority had prejudged

the issues, had closed their minds, and would not give the Claimant a fair hearing in the CTP-11 arbitration.

***Preclusion and/or waiver: Ground 1***

221 The Defendants submitted that the Claimant had lost its entitlement to challenge the Award for one or both of two reasons. One was that, with the knowledge aforesaid, it had not applied under Art 14 of the ICC Rules to challenge the Majority. The other was that, with that knowledge, it had not raised an objection to the Majority deciding the CTP-11 arbitration, by saying that it intended to challenge the impartiality of Judge C and Judge A and asking for the proceedings to be suspended and the award not to be issued.

*Challenge to the Majority*

222 Article 14 of the ICC Rules relevantly provides:

> **Article 14 – Challenge of Arbitrators**
>
> 1) A challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based.
>
> 2) For a challenge to be admissible, it must be submitted by a party either within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification.
>
> …

223 Referring to dicta in *Kempinski Hotels SA v PT Prima International Development* [2011] 4 SLR 633 ("*Kempinski*") at [84] and *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara*

*International BV and others and another appeal* [2014] 1 SLR 372 ("*PT First Media*") at [130], the Defendants submitted that failure to bring a timely challenge to the Majority precluded the Claimant from applying to set aside the Award on the grounds on which it could have mounted the challenge – that is, the alleged known prejudgment, closed mind and unfair hearing, in substance the apparent bias and breach of the fair hearing rule in Ground 1. They added reference to *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 ("*Rakna*") for the proposition that a party who fails to exercise its right to take a jurisdictional objection under Art 16(3) of the Model Law is precluded from raising the objection in a setting aside application, and to Gary B Born, *International Commercial Arbitration* (Wolters Kluwer, 3rd Ed, 2021) ("Born") at para 25.04[E][4]:

> If a party fails to challenge an arbitrator's impartiality and independence pursuant to either statutory or institutional challenge mechanisms, notwithstanding notice of the factual grounds for challenge to the arbitrator, it will generally be held to have waived the right to seek annulment of an award on these grounds. A party is not entitled to adopt a 'Heads I win, tails you lose' approach by holding objections to an arbitrator in reserve until an award is rendered and then asserting those objections if it loses on the merits. Simply put, '[w]here a party was fully aware of facts which could possibly indicate arbitrator partiality at the time of the arbitration hearing and that party fails to make an objection during the course of the hearing, it waives its right to object.' This approach has been taken by courts in the United States, France, Switzerland, England and other jurisdictions.

224 *PT First Media* was relevantly concerned with the relationship between the active remedy of setting aside under Art 34(2) of the Model Law and the active remedies of court challenge to an arbitrator under Art 13(3) of the Model Law and jurisdictional appeal to the court under Art 16(3) of the Model Law. In *Kempinski,* the two active remedies were setting aside and challenge to an arbitrator under Art 10.1 of the SIAC Rules, akin to a challenge under Art 14 of

the ICC Rules, but the observation that the failure to challenge "should preclude the argument that is now being made on the basis of the letters" (at [84]) was expressly when the point had not been argued. Nonetheless, it is in line with the principle that a party should not be able to "hedge" or more colloquially "game the system" by holding back a challenge where the grounds for it are available, proceeding with the arbitration, and using those grounds in an application to set aside the award if it loses.

225 The Claimant submitted that it was held in *PT Central Investindo* that justifiable doubts as to an arbitrator's impartiality or independence would give rise to both a ground to challenge under Art 13(3) of the Model Law and grounds for setting aside an award under paragraphs of Art 34(2) of the Model Law (at [130]–[135]); however, I do not think the case takes any further view on whether a failure to challenge precludes a setting aside application on the same grounds. The Claimant's principal submission, as well as contesting the factual basis for a challenge, was that as a matter of law there could not be a waiver by failure to challenge (indeed, that there also could not be a waiver by failing to raise an objection to the Majority).

226 That was so, the Claimant submitted, because Art 4 of the Model Law governed waiver in an arbitration if an objection was not taken, and it governed *inter alia* waiver by a party who knows that "any provision of this Law *from which the parties may derogate*" [emphasis added] has not been complied with but does not make a timely objection. It said that Art 18 (providing that each party shall be given a full opportunity of presenting his case) and Art 12(2) (providing for challenge to an arbitrator if circumstances exist that give rise to justifiable doubt as to his impartiality or independence) are mandatory provisions of the Model Law, citing amongst other authorities *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 at [46] and *Lao Holdings*

at [130] for the former and *PT Central Investindo* at [52] and [134] for the latter. Being mandatory provisions, it said, these may not be derogated from, and so the right to set aside an arbitral award for inability to present a case or for lack of impartiality or independence cannot be lost through failure to challenge the arbitrator (or failure to raise an objection to the Majority); a view, the Claimant said, supported by the learned authors of Howard M Holtzmann and Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International, 1989) at pp 408–410: the passage is lengthy, and I do not set it out.

227 While recording this submission, I do not rule on it.

228 Although a submission to the effect above had been foreshadowed at the hearing of SUM 12, the Defendants' supplementary written submissions did not deal with it. Regard to Art 4 and whether a provision is one from which the parties may not derogate has received scant attention in the cases. In *Lao Holdings* at [130] it was spoken of not in the context of waiver, but as making the ground of non-adherence to an agreed arbitral procedure as a basis for setting aside an award unavailable because "[t]he fundamental rule of procedural fairness reflected in Art 18 and indeed in Art 34(2)(*a*)(ii) and Art 36 will displace a procedural agreement to the contrary or require that it be construed and applied consistently with that rule". That is not the way the Claimant seeks to use Art 4 and non-derogation.

229 At least as to the remedies under the Model Law, and despite Born using the language of waiver, availability of more than one remedy has been approached not as a question of waiver of a remedy by a party, but as one of construction and whether the scheme of the Model Law permits two active remedies (see *PT First Media* referring variously to the underlying philosophy

of the Model Law (at [55]), the design of the enforcement regime (at [65]) and the scheme of the model Law (at [74]). Should what Born calls an institutional remedy, such Art 14 of the ICC Rules, be seen as a similar scheme? Whether and when Art 4 of the Model Law can be an answer to a failure to challenge precluding a setting aside application on the same grounds has some importance, and deserves more full investigation than it has received in OA 20. Because the additional arguments were the subject of written submissions there has not been full argument with more extensive submissions, and I do not think it would be right to express a concluded view. Delay in inviting oral submissions is undesirable, and it is unnecessary to come to a concluded view because I consider that the factual basis for failure to challenge – the Claimant's knowledge – has not been made out.

230 A challenge to an arbitrator is a serious matter and should not be made unless for sound reason, particularly where it calls in question the arbitrator's impartiality and independence including where the charge is that the arbitrator will not bring an open and unbiased mind to the arbitration. That is so because such a charge itself is serious and reflects upon the arbitrator's competence and professionalism.

231 The proceedings in the CTP-11 arbitration were declared closed on 10 November 2023, shortly before the CTP-13 Award was issued. It was not suggested that anything in the conduct of the CTP-11 arbitration to that time, or thereafter until the Award was issued, indicated partiality, lack of independence, unfairness or failure of the Majority to bring an open mind to the decision of the issues.

232 When shortly after the proceedings in the CTP-11 arbitration were declared closed it received the CTP-13 Award, the Claimant undoubtedly had

significant concerns generated by the copying from the prior awards, going to the tribunal's independent application of their minds and to the extent of the Claimant seeing prejudgment of the outcome. But they were concerns as to the decision of the CTP-13 arbitration, and it is a large step to say that the Claimant therefore knew, as knowledge sufficient to take the serious course of a challenge to the Majority, that the Majority would (as it was put) "behave in the same way" or "be influenced in the same way" in the CTP-11 arbitration, and would with a closed mind prejudge the issues.

233 The Claimant placed some emphasis on the differences between the arbitrations – in the contracts, the facts, the teams of counsel, the strategies and arguments, and the members of the tribunals: what this came down to was that the conduct and dynamics of the prior arbitrations had not been replicated in the CTP-11 arbitration, so that the Majority's "behaviour" would by no means be repeated. More specifically, the issues in the CTP-11 arbitration, while similar to those in the prior arbitrations, were not the same; while with commonality, the submissions were not the same; and in particular the CTP-11 arbitration included Judge B as a member of the tribunal, who had not been a member of any of the tribunals in the earlier arbitrations: she would be expected to engage with Judge C and Judge A, and they with her, in deciding the issues.

234 In my view, the large step is not warranted. The decision in the CTP-11 arbitration was a future event, and it is important not to be influenced by the hindsight of the reproduction in the Award when it was later issued. The Defendants' submission was put as knowledge of a present situation, in short knowledge that the Majority had already come to a decision in the CTP-11 arbitration from which they would not move, but it is not correct to reason from holding a view in the circumstances of the earlier arbitrations to necessarily holding a view thereafter in the circumstances of the CTP-11 arbitrations. There

had been no indication in the course of the CTP-11 arbitration that the Majority had come to a decision from which they would not move; there were differences between the arbitrations; and importantly, Judge B would be expected to be a catalyst to independent consideration of the issues. The Claimant remained entitled to expect that the Majority would give proper consideration to the decision of the issues in the CTP-11 arbitration, and any concern that the Majority would not do so in that arbitration would be speculative and would not justify, let alone require, a challenge to the Majority. Knowledge of the apparent bias and failure to give a fair hearing only came when the Award was issued, when of course it was too late to challenge.

*Raising an objection*

235 In *China Machine*, the Court of Appeal stated at [170] the principle that:

> … if a party intends to contend that there has been a fatal failure in the process of the arbitration, then there *must* be fair information to the tribunal that the complaining party intends to take that point at the appropriate time if the tribunal insist on proceeding. This would ordinarily require that the complaining party, at the very least, seek to suspend the proceedings until the breach has been satisfactorily remedied (if indeed the breach is capable of remedy) so that the tribunal and the non-complaining party has the opportunity to consider the position. This must be so because if indeed there has been such a fatal failure against a party, then it cannot simply 'reserve' its position until after the award and if the result turns out to be palatable to it, not pursue the point, or if it were otherwise to then take the point. After all, the requirement of a fair process avails both parties in the arbitration, and to countenance such hedging would be fundamentally unfair to the process itself, to the tribunal and to the other party. In the final analysis, it is a contradiction in terms for a party to claim, as CMNC now does, that the proceedings had been irretrievably tainted by a breach of natural justice, where at the material time it presented itself as a party ready, able and willing to carry on to the award. If a party chooses to carry on in such circumstances, it does so at its own peril. The court must not allow parties to hedge against an adverse result in the arbitration in this way.

[emphasis in original]

236 CMNC had sought to set aside the award on the ground that the tribunal had so mismanaged the procedures for document production in the arbitration that the prospects of a fair arbitration were lost. The principle was not stated in the context of waiver by CMNC of the right to set aside the award on that ground, but with the failure to take the point as a reason for finding that it had not discharged its burden of showing that the tribunal's conduct of the proceedings had miscarried.

237 In *DFM v DFL* [2024] 1 SLR 1283 at [45], however, the court repeated the principle in the context of waiver by failure to make a timely objection to the tribunal's jurisdiction. It was said that a party that believes it has a basis to object to some intended act of the tribunal must take the point before the tribunal and afford the tribunal the opportunity to consider and respond to the objection, and cannot hold the point in reserve and raise it only after the tribunal has made its decision. The principle extends beyond objection to something that has occurred, and there can be waiver of an objection to the tribunal hearing or continuing to hear an arbitration.

238 As earlier indicated, the Claimant's submission founded on Art 4 of the Model Law was said to apply also to waiver by failing to raise an objection to the Majority. Similarly to failure to challenge the Majority, the Defendants' submissions did not deal with the matter and it deserved fuller argument than the exchange of the supplementary written submissions permitted. It is unnecessary to express a view, and I prefer not to do so, because again I do not think that a factual basis for waiver has been made out in relation to the Claimant's knowledge.

239 In *PT First Media* at [200] it was said that broadly speaking, waiver of rights occurs when a party has indicated that it will be relinquishing its rights. In *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 ("*Audi Construction*") at [54] it was more fully said:

> As Lord Goff of Chieveley observed in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The "Kanchenjunga")* [1990] 1 Lloyd's Rep 391 ("*The Kanchenjunga*") at 397 col 2, 'the expression 'waiver' is one which may, in law, bear different meanings' and '[i]n particular, it may refer to a forbearance from exercising a right or to an abandonment of a right'. In the true sense of the word, however, waiver means a voluntary or intentional relinquishment of a known right, claim or privilege: Sean Wilken QC and Karim Ghaly, *Wilken and Ghaly: The Law of Waiver, Variation, and Estoppel* (Oxford University Press, 3rd Ed, 2012) ("*Wilken and Ghaly*") at para 3.14. On this definition, the only form of waiver that befits that label is waiver by election. This doctrine concerns a situation where a party has a choice between two inconsistent rights. If he elects not to exercise one of those rights, he will be held to have abandoned that right if he has communicated his election in clear and unequivocal terms to the other party. He must also be aware of the facts which have given rise to the existence of the right he is said to have elected not to exercise. Once the election is made, it is final and binding, and the party is treated as having waived that right by his election: see *The Kanchenjunga* at 397–398, which was approved by this court in *Chai Cher Watt v SDL Technologies Pte Ltd* [2012] 1 SLR 152 at [33].

240 The court then (at [55]–[56]) found persuasive the explanation in K R Handley, *Estoppel by Conduct and Election* (Sweet & Maxwell, 2nd Ed, 2016) at para 14-002 in terms of a power, including that:

> An election does not involve a choice between two sets of rights which presently co-exist but between an existing set of rights and a new set which does not yet exist. The power is to terminate one and create the other, and the default position is that the existing rights remain in force. …

241 The question can thus be framed: did the Claimant know facts giving a right to object to the Majority on the ground that they had prejudged the issues,

had closed minds, and would not give a fair hearing, and know that it had that right, and clearly communicate that it abandoned or elected to terminate that right?

242 The Claimant submitted that it had not communicated any election: it had been silent, but silence was not a representation unless there was a duty to speak, which there was not. In *Audi Construction* at [59] this principle, ordinarily applicable to waiver by estoppel, was regarded as also applicable to waiver by election since it requires an unequivocal representation, but a duty to speak was found in the need in an adjudication under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006, Rev Ed) to include any jurisdictional objection in the payment response. For an arbitration, there is a duty to speak in the need described above to make an objection known to the tribunal and not hedge against an adverse result. I do not accept this answer to the question.

243 The Claimant's better answer to the question is that it did not have the necessary factual knowledge. It is sufficient to refer to my declining, at [234] above, to take the large step to knowledge in the Claimant that the Majority had with a closed minds prejudged the issues in the CTP-11 arbitration.

***Preclusion and/or waiver: Ground 3***

244 As to breach of agreed arbitral procedure because applying Indian law in their decision of issues 7 to 10 (interest and costs), I have not accepted that the Majority did not act in accordance with an agreed arbitral procedure. Preclusion and/or waiver in relation to the ground in that respect therefore does not matter. For completeness I nonetheless go to it, on the assumption of breach of an agreed arbitral procedure.

245 The Defendants' argument was related to their argument in relation to Ground 1, but was different. It was said that the Claimant knew (a) from the CTP-13 Award that the tribunal had applied Indian law to the issues of interest and costs although neither party to that arbitration had cited Singapore law on interest and costs; (b) that there were similar issues of interest and costs in the CTP-11 arbitration; and (c) that in the CTP-11 arbitration neither party had cited any Singapore law on interest and costs. It therefore knew that because Judge C and Judge A were also sitting on the CTP-11 arbitration and they had not been apprised of the possibility that Singapore law could apply to interest and costs, they would apply Indian law to those issues again. The Claimant could have applied to reopen the CTP-11 arbitration to make submissions on whether Singapore law should apply to interest and costs, but did not do so. It was therefore precluded from setting aside the Award on the basis that the Majority did not follow the agreed procedure.

246 This was not a prejudgment argument: in the components that Judge C and Judge A had not been apprised of the possibility of Singapore law applying and that the Claimant could have made submissions on that matter, it allowed for the Majority's application of Singapore law had they been apprised of that possibility. It came down to saying that because the Claimant knew, as a forecast, that the agreed procedure of applying Singapore law would not be followed and had not asked that it be followed, it could not complain that it had not been followed.

247 Similarly to my view in relation to Ground 1, I do not accept the argument at the step of knowledge that the Majority would again apply Indian law to the issues of interest and costs, that is, that the agreed procedure of applying Singapore law would not be followed. The tribunal received little assistance in relation to interest and costs, but the issues were there for decision

by the tribunal, even if without the assistance which should have been provided. It was the tribunal's responsibility to decide them according to law. The Claimant did not in some manner concede that Indian law should be applied, for example by agreeing with or not speaking against a submission from the Defendants that it did apply (there was no such submission), and was entitled to expect that the tribunal would endeavour to decide according to law even if on earlier occasions the Majority's decision had been to apply Indian law.

248 Going to breach of arbitral procedure in lack of impartiality and independence, I have not come to a concluded decision and preclusion and/or waiver in that respect also does not matter. The Defendants took up their submissions under Ground 1. The answer is the same.

***Preclusion and/or waiver: Ground 4***

249 I have also not accepted that the Award was in conflict with the public policy of Singapore, and preclusion and/or waiver in that respect does not arise. Again for completeness, the Defendants observed that the material facts underlying the public policy ground are the same as those underlying the natural justice ground and took up their submissions in relation to Ground 1; the answer is the same.

**Addendum on the Court of Appeal judgment in *DJO (CA)***

250 The judgment of the Court of Appeal in *DJO (CA)* affirmed the court's concern with the integrity of the arbitral process.

251 On the question of prejudgment amounting to apparent bias, the court posed the question whether the fair-minded and informed observer would, after considering all the relevant facts and circumstances, reasonably apprehend or

harbour the suspicion that by reason of what the President (*ie*, Judge C) had done he was materially influenced by the earlier decisions that he had been party to in the earlier arbitrations. The question was answered (at [70]):

> … In our judgment, the answer to this is plainly in the affirmative. We say this because it was incumbent on this Tribunal to consider the matter afresh. This was especially the case where there were new members on the Tribunal; new counsel at least on one side; and to some degree new arguments being raised. The point can be demonstrated by considering what the reaction of the co-arbitrators and the parties would have been if, at the very outset, the President had made it clear that he would unilaterally have regard to, draw from and/or be influenced by whatever earlier decisions *he alone* had made or been party to in other related arbitrations. In our judgment, on the facts before us, the extent to which the Award drew from the Parallel Awards was such that the informed and fair-minded observer would reasonably apprehend that the Award was prepared by a Tribunal that did not keep an open mind because it was impermissibly influenced by the Parallel Awards that had been rendered earlier.

252 The court explained that despite several material differences between the earlier arbitrations, the earlier awards were used as templates in drafting the award "to a very substantial degree", from which the observer would be left with the reasonable apprehension or suspicion that the tribunal's decision had been improperly influenced by a degree of anchoring bias, being the unconscious tendency to rely on a conclusion earlier made without regard to new information and fresh analysis; and that the decision also appeared to be plagued by confirmation bias, being the difficulty of persuading a decision-maker that has come to an initial view to then change its mind. The suspicion of bias or prejudgment would be further compounded by the resolution of the common issues to the same conclusion despite the raising of different arguments, so far as different arguments were considered by their interposition between paragraphs reproduced from the earlier awards, and by the errors in the award from the reproduction from the earlier awards.

253 On breach of the fair hearing rule, the court referred (at [81]) to its decision in *CAJ and another v CAI and another appeal* [2022] 1 SLR 505 as a decision in which part of an award was set aside because made, at least to some degree, on the basis of the arbitrator's prior experience in dealing with disputes of a similar nature: "That prior experience was an *unarticulated* consideration which the parties were not afforded the opportunity to address …" [emphasis in original]. The court said (at [82]):

> Applying this to the present case, the patently substantial material derived from the Parallel Arbitrations were extraneous considerations that had not been raised to the parties' attention. That material formed such a pervasive part of the Award that it simply could not be overlooked. It was plain that it was neither contemplated nor agreed to by the parties that the Award could be prepared by such a process. For these reasons, we again agree with the Judge that there had been a breach of the fair hearing rule: Judgment at [115].

254 A third matter compromising the integrity of the arbitral process was that the President's co-arbitrators were not privy to the earlier arbitrations and had no direct access to materials or knowledge derived from those proceedings, so that the expectation of equality between the arbitrators was compromised.

255 The Claimant submitted that the Court of Appeal's reasons supported its case of breach of the rules of natural justice: I do not think it necessary to detail the submission. The Defendants' submission was muted, and not easy to understand. In part it appeared to be that it had not been argued before the Court of Appeal that the Claimant did not in the arbitration "address the reasons why the CP-301 and CP-302 Tribunals had ruled against [the Claimant]" giving as the example that it had not put an argument about cl 20.1 being directory not mandatory although it knew that Judge C had construed it as directory: that is, that the Court of Appeal had not received the argument described at [122] of these reasons. In part it appeared to be that in this case the Majority had applied

its mind because it had allowed the new argument about the January 2017 Notification only applying to work on "roads or runways or in building construction". And it was said that the Majority had applied Indian law to the issues of interest and costs not because of a mind closed from the earlier arbitrations but "because none of the parties were alive to the possibility of Singapore law applying on these issues", although without it being apparent whether or not that was an argument put to the Court of Appeal.

256 There is no indication that a submission similar to what might be called the context submission, considered at [111]–[113] of these reasons, was made to the Court of Appeal, but the tenor of the court's reasons is squarely against it in the emphasis on the tribunal's responsibility to consider the particular matter afresh and free from extraneous matters not raised for the parties' consideration. Prejudice to the Claimant's rights does not appear to have been in issue (or in *DJO (HC)* or *DJO (CA)* itself). On breach of the rules of natural justice, in my view the Defendants gain no comfort from *DJO (CA)*, and I consider that my conclusion that the Award should be set aside for breach of the rules of natural justice is comfortably congruent with the appellate decision.

257 The Defendants' supplementary submissions sought to make another point, going to their additional arguments of preclusion and/or waiver. They took from the Court of Appeal's reasoning of suspicion of bias apparent from the use of the prior awards as a template and compounded by further matters that the Claimant "would have known from the [CTP-13 Award] of the matters that they today rely on to challenge the [Award] i.e. that there was allegedly apparent bias or an alleged breach of the fair hearing rule": that is, support for the Claimant's knowledge as described at [214]–[220] of these reasons. The irony of the Defendants asserting obvious prejudgment in the CTP-13 Award in these proceedings whilst resolutely denying prejudgment in *DJO (HC)* and *DJO*

*(CA)* should not be overlooked, but it is enough that I do not think the Court of Appeal's reasons assist the Defendants in making out the step to knowledge that the Majority would with a closed mind prejudge the issues in the CTP-11 arbitration.

**Conclusion**

258 The CTP-11 Award is set aside. The parties should endeavour to agree on costs (except the costs of SUM 12, which are dealt with separately). If agreement is not reached within 21 days, a joint letter to the Registry should set out the area(s) of disagreement and directions will be given for decision by the court.

Roger Giles IJ
International Judge

Koh Swee Yen SC, Pang Yi Ching Alessa, Chang Boon Ngee Laura, Teo Wei Kiat Samuel and Yeshvant Naidu s/o Ravendra (WongPartnership LLP) for the claimant;
Davinder Singh SC, David Fong and Suhas Malhotra (Davinder Singh Chambers LLC) (instructed), Ashish Chugh, Tan Yi Wei Nicholas and Tan Jia Xin (Wong & Leow LLC) for the defendants.