IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2026] SGHC(I) 7

Originating Application No 18 of 2025

Between

South Pacific Oil Limited

… *Claimant*

And

Pacific Islands Energy Private Limited

… *Defendant*

JUDGMENT

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

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South Pacific Oil Ltd
v
Pacific Islands Energy Pte Ltd

[2026] SGHC(I) 7

Singapore International Commercial Court — Originating Application No 18 of 2025
Thomas Bathurst IJ
11 March 2026

25 June 2026 Judgment reserved.

Thomas Bathurst IJ:

1 By an originating application filed on 16 September 2025 the claimant, South Pacific Oil Limited (the "Claimant"), sought to set aside a final award dated 28 August 2025 (the "Final Award") made against it in favour of Pacific Islands Energy Pte Ltd (the "Defendant") in SIAC Arbitration No. 108 of 2023 (the "Arbitration"). The Final Award ordered the Claimant pay the Defendant US$18,795,413.69 and simple interest thereon at 8.34% per annum from 28 May 2024 until the date of full payment. The Final Award also ordered the Claimant pay sums in respect of the Defendant's costs and the arbitration fees.

2 The originating application also sought a declaration that the Tribunal erred in making what was described as a negative jurisdictional ruling in respect of the question of whether the liquidated damages claimed by the Defendant

against the Claimant in the Arbitration were penal in nature and therefore unenforceable.

3 The Claimant sought relief under s 10(3)(*b*) of the International Arbitration Act 1994 (2020 Rev Ed) (the "IAA") in respect of the negative jurisdictional ruling and under s 24(*b*) of the IAA and Art 34 of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law") in respect of the application to set aside the Final Award.

Background to the arbitration

4 The background to the Arbitration is uncontroversial. As set out in the Claimant's written submissions, the Claimant is a state-linked company incorporated in the Solomon Islands. Relevantly, it owns and operates a fuel terminal storage and distribution business in Honiara, the capital city of the Solomon Islands. It is wholly owned by the Solomon Islands National Provident Fund.

5 The Defendant is a privately owned company incorporated in Singapore engaging in the business of supplying petroleum products and lubricants in the Pacific Islands.

6 By a contract dated 8 December 2014 (the "Contract"), the Defendant agreed to supply Products defined as Diesel (0.5% Sulphur) and/or Unleaded Gasoline and/or Kerosene and/or any other petroleum product agreed by the parties from time to time.

7 Clause 2.1 of the Contract obliged the Claimant to accept minimum quantities of the Product for each year of the Contract. Clause 2.1(g) dealt with

the position where the Claimant failed to accept delivery of the minimum quantities; it is in the following terms:

> If South Pacific Oil fails to accept delivery of Product in accordance with this clause 2.1 (yearly minimum quantities), South Pacific Oil shall pay Pacific Islands Energy on demand liquidated damages equivalent to the costs incurred by PIE due to such failure + 5%. It is acknowledged by South Pacific Oil and Pacific Islands Energy that the actual losses to Pacific Islands Energy arising from the above are impossible to calculate accurately in advance and if any liquidated damages becoming [sic] payable and calculated in accordance with this clause represent a genuine attempt by the parties to estimate the minimum losses likely to be sustained by Pacific Islands Energy in the event of such breach and are not intended in any way to be a penalty imposed on a party.

8 The arbitrator in a partial award dated 28 May 2024 (the "Partial Award") concluded that the costs incurred by the Defendant for the purpose of the clause were to be calculated by reference to the Base Cost of the Product (A) referred to in clause 8.2 of the Contract (see Partial Award at [140]). Although, as will be seen below, the Claimant contends the arbitrator overlooked the question of causation in assessing the Defendant's damages, it is not contended that he otherwise misconstrued the Contract or erred in his calculation.

The grounds of the application

9 In its written submissions, the Claimant relied on the following propositions in support of its application:

(a) The Final Award should be set aside for having failed to address an essential question relating to the causative connection between the minimum purchase quantities ("MPQ") breach and the costs incurred by the Defendant due to the MPQ breach;

(b) Alternatively, the Final Award should be set aside for being in conflict with public policy by effectively conferring upon the Defendant a windfall disguised as damages in the abject absence of any consideration by the Tribunal regarding causation of loss;

(c) Alternatively, the Final Award should be set aside under a *de novo* review of the Tribunal's negative jurisdictional ruling in respect of the question whether clause 2.1(g) was an unenforceable penalty;

(d) Alternatively, the Tribunal's determination of *res judicata* and *Henderson v Henderson* rule render the Final Award liable to be set aside under s 24(*b*) of the IAA and/or Art 34 of the Model Law.

The awards

10 As I indicated, the Tribunal made two awards, the Partial Award which the Tribunal described as a Partial Award on Liability and the Final Award which he described as a Final Award on Quantum.

The Partial Award

11 In the Partial Award, the arbitrator dealt with the matters which form the subject of the present complaint under the heading "Issue 2 – Liquidated Damages". At [127]–[128] of the Partial Award, he dealt with the submissions made by the Claimant concerning clause 2.1(g). He made the following remarks:

> 127 In its post-hearing Summary, the [Claimant] says that clause 2.1(g) is not a true "liquidated damages" clause, because clause 2.1(g) does not stipulate any pre-estimate of loss in the event of the [Claimant]'s "fail[ure] to accept delivery of the Product" (except in relation to profit margin). Rather, properly construed, what clause 2.1(g) in substance provides for is the payment of compensatory damages for any actual loss suffered

> by the [Defendant] plus a pre-agreed estimate of profit margin being 5%.
>
> 128 As such, the [Claimant] submits that to the extent that it is in breach of clause 2.1, the [Defendant] is limited to claiming damages "equivalent to the costs incurred by PIE due to such failure +5%".

12 It is apparent from these paragraphs that the arbitrator was considering the construction of the clause. He did not consider as a secondary question whether the clause, properly construed, constituted a penalty.

13 Having reached the conclusion that the question was one of construction, the arbitrator went on to deal with the Claimant's argument that there must be a causative connection between the costs incurred and the breach by the Claimant. He made the following remarks:

> 130 In the [Claimant's] OS, the [Claimant] has also cited numerous cases on the principles of liquidated damages, such as the affirmation by the Singapore Court of Appeal in *Denka Advantech Pte Ltd and another v Seraya Energy Pte Ltd and another and other appeals* [2021] 1 SLR 631, at [151]-[152] of the classic statement of principles on liquidated damages by Lord Dunedin in *Dunlop Pneumatic Tyre Co, Ltd v New Garage and Motor Co, Ltd* [1915] AC 79 that liquidated damages clause must be a genuine pre-estimate of likely loss and the focus is on the secondary obligation of the defendant to pay damages. None of these authorities on the general principles are of assistance as the question here is one of construction, not whether clause 2.1(g) is a valid liquidated damages clause.
>
> 131 Mr Johnson elaborated that because of the milk run and the way that freight was calculated, the [Defendant] enjoyed "a degree of subsidy" because it was not just carrying cargo to Honiara but benefited from a freight cost that enabled it to carry cargo economically for the entire round trip to the South Pacific islands. He argued that the freight component of the price (B) is on the same footing as the insurance component (C) because the tankers still went and delivered on the milk run route, so the [Defendant] already paid the cost for the delivery.
>
> 132 Mr Johnson added that the [Defendant] had a lot of discretion and flexibility to optimise the way it delivers products. He took issue with the [Defendant's] argument that clause 2.1(g) takes into account issues with the economic

delivery to the Pacific Islands. He submitted that, looking at the Contract as a whole and the commercial context, the Contract deals with risks in different ways, but not clause 2.1(g).

133 Mr Johnson further submitted that the formula in clause 2.1(g) has two components. Only the 5% margin is a true pre-estimate of loss that does not require the [Defendant] to prove its profit margin. But the other part that relates to "costs incurred" is not a genuine pre-estimate because the [Defendant] must actually incur those costs, and there must be causative connection between the costs incurred and the breach by the [Claimant]. He added that the 5% profit margin either does not come within the exclusion of prospective profits in clause 28 or is a specific exception to clause 28.

134 In short, Mr Johnson said that clause 2.1(g) covers a situation where a Product must have been loaded on board, otherwise there would be no costs incurred. He acknowledged that clause 2.1(f) also covers a situation where the Product is loaded, but he distinguishes that on the basis that clause 2.1(g) covers "the effect across the course of the year". He argued that the [Defendant's] cross-reference of the word "costs" to the formula in clause 8 does not work because, amongst other things, it ignores the causative element of the failure and there is no reference point in time for the pricing.

135 Having considered the totality of clause 2.1, I do not accept that clause 2.1(g) only applies if Products have been loaded on board. Clause 2.1(g) can clearly be contrasted with clause 2.1(f). The latter applies where the [Claimant] fails to accept delivery of a Product loaded on a vessel. The former applies where the [Claimant] fails to comply with the MPQ. The Parties also acknowledge that the actual losses to the [Defendant] for the breach of such obligation "*are impossible to calculate accurately in advance*", hence the formula "*costs incurred by PIE due to such failure + 5%*".

136 While I agree that there must be a causative connection between the "costs incurred" and the failure to accept delivery of the MPQ, clause 2.1(g) does not limit the [Defendant's] losses to costs incurred as a result of having placed Products on board a vessel. The nature of a breach of the MPQ is such that the [Claimant] would simply not order and nominate sufficient Products to meet the MPQ. That being the case, clause 2.1(g) is intended to compensate the [Defendant] for the consequence of such failure on the part of the [Claimant]. It is unrealistic to say that the [Defendant] has no claim under clause 2.1(g) if it does not proceed to load the shortfall quantities that the [Claimant] has failed to nominate. That argument deprives clause 2.1(g) of any utility. It would compel the [Defendant] to aggravate its losses by actually going out to book a vessel to load the shortfall

> despite knowing that the [Claimant] is not going to take the Product. This makes no commercial sense and is not how business people operate.
>
> …
>
> 138 The question then is how does one assess the "costs incurred" by the [Defendant] if they are not the costs of actual Product loaded? In this regard, I accept the [Defendant's] approach as being the most sensible and feasible to give clause 2.1(g) efficacy. The Parties have already agreed on the base cost of the Product by reference to MOPS. In answer to the [Claimant's] question on when this can be assessed, I agree that the base cost for the shortfall must be based on the average of the base cost of the Products that were shipped for that particular year.
>
> …
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> 140 To conclude on this issue, the [Defendant] is entitled to liquidated damages under clause 2.1(g) based on the simple average of what the (A) component was on each of the deliveries for the year in question, plus 5%. The Parties should be able to calculate this quantum following this Award, and failing agreement on that, the quantum will be determined by me in the next tranche of these proceedings.

14 Having concluded the Claimant breached its contractual obligations, he made (relevantly) the following order (Order 7):

> The [Defendant] is entitled to liquidated damages in respect of the Minimum Purchase Quantities claims under clause 2.1(g) Schedule 1 based on the simple average of what the (A) component was on each of the deliveries for the year in question, plus 5%.

The Final Award

15 In the Final Award which is described as a "Final Award on Quantum", the arbitrator rejected an application by the Claimant to argue clause 2.1(g) of the Contract was void as a penalty. He rejected the submission that the matter had been left open by the Partial Award and concluded that the Claimant was precluded from raising the issue by virtue of the doctrine of issue estoppel or

the extended doctrine of *res judicata*. In that context he made the following remarks:

> 86 Rather than leaving the [Defendant's] entitlement to liquidated damages to the quantum phase, I had determined and awarded in the Partial Award that the [Defendant] is entitled to liquidated damages under clause 2.1(g) as an issue that was specifically put to me as Issue of the List of Issues on Liability. It was, furthermore, made clear in the Partial Award, at [140] that I intended Parties to simply calculate the quantum following my decision that the [Defendant] is entitled to liquidated damages:
>
> > *To conclude on this issue, the [Defendant] is entitled to liquidated damages under clause 2.1(g) based on the simple average of what the (A) component was on each of the deliveries for the year in question, plus 5%. The Parties should be able to calculate this quantum following this Award, and failing agreement on that, the quantum will be determined by me in the next tranche of these proceedings.*
>
> …
>
> 88 I am unable to accept the [Claimant's] proposition. The bottom line is that, if the [Claimant] is correct that I can and should find that the clause was a penalty and hence unenforceable, I would have to directly and clearly reverse my order and declare that the [Defendant] is *not* entitled to liquidated damages. That is a clear breach of the doctrine of the finality of an arbitral award and the principle that an arbitral tribunal is *functus officio* on any substantial issue on the merits that had been determined in an award. That issue, as described in Issue 2 of the List of Issues on Liability, is "Whether the [Defendant] is entitled to liquidated damages in respect of its Minimum Purchase Quantities claims and, if so, on what basis". There is no authority for the proposition that the omission of an argument that could have resulted in a different outcome is an exception to the finality of an arbitral award, or that a new material argument can revive an arbitral tribunal's jurisdiction so that it can change its mind on an earlier award on that issue. I have no jurisdiction to revisit and change my decision in Order 7 of the Partial Award.
>
> 89 The second starting point is the doctrine of *res judicata*, which overlaps but is not exactly on all fours with the finality of an arbitral award. Menon JC (as he then was) in *Goh Nellie v Goh Lian Teck and Others* [2006] SGHC 211 ("*Goh Nellie*"), at [17]-[20] explained well the three conceptually distinct though interrelated principles that come under the umbrella of *res*

judicata, namely cause of action estoppel, issue estoppel, and the extended doctrine of *res judicata* (also known as abuse of process or the rule in *Henderson v Henderson*).

…

91 I have already dealt with the question of the finality of the Partial Award on the issues put to me in the first tranche. The [Claimant] submits that there has been no equivalent of a "final and conclusive judgment on whether clause 2.1(g) is a penalty and therefore unenforceable". I have already dealt with the point on the finality of the Final Award. As I will explain below, there was indeed no final decision on whether clause 2.1(g) is a penalty. On the other hand, there was a final decision that the [Defendant] is entitled to liquidated damages under clause 2.1(g), which must be premised on its enforceability. I will return to this topic below.

…

99 I rejected the [Claimant's] argument that clause 2.1(g) only applies if Products have been loaded on board. First because it can be contrasted with clause 2.1(f) which deals with a scenario where the [Claimant] fails to accept delivery of a Product loaded on a vessel. Secondly, it is unrealistic to say that the [Defendant] has no claim under clause 2.1(g) if it does not proceed to load the shortfall quantities that the [Claimant] has failed to nominate. It would compel the [Defendant] to aggravate its losses by booking a vessel to load Products that it knows the [Claimant] is not going to take. Thirdly, clause 28 Schedule 1 excludes a claim for profits. If clause 2.1(g) does not give the [Defendant] any remedy unless it has loaded the shortfall on board, the [Defendant] would not be able to claim any general damages for loss of profits either due to clause 28 Schedule 1. "In other words, the MPQ obligation might be writ in water."

100 With that context, it is apparent that there was an issue put to me in the first tranche on whether the [Defendant] is entitled to liquidated damages under clause 2.1(g). I did decide that issue. There is an issue estoppel on this issue. The fact that the [Claimant] did not argue penalty does not change the fact that the first tranche disposed of parties' arguments on Issue 2 of the List of Issues on Liability, namely "Whether the [Defendant] is entitled to liquidated damages in respect of its Minimum Purchase Quantities claims and, if so, on what basis." As I asked counsel during the hearing, the underlying premise for the [Defendant's] entitlement to liquidated damages must be that clause 2.1(g) is valid and enforceable. To apply the test in *Goh Nellie*, at [35], the validity and enforceability of clause 2.1(g) is fundamental to the issue of and the decision on the [Defendant's] entitlement to liquidated damages. If clause

2.1(g) is invalid, Issue 2 cannot be answered in the affirmative as I had done. Hence, even though the [Claimant] did not specifically argue that clause 2.1(g) was not invalid [sic] because it was a penalty, it did argue that the [Defendant] was not entitled to liquidated damages under clause 2.1(g). It just took a different approach to arguing this issue than it is doing now in the second tranche (on quantum).

101 Menon JC, in *Goh Nellie*, at [39], acknowledged that, if a point had not been argued, it could raise a question regarding the policy goals underlying the doctrine of *res judicata*. Even so, if a litigant concedes or fails to argue a point, issue estoppel may still arise in respect of the point conceded or not argued. He added, at [40], that the question whether subsequent litigation is in fact foreclosed would also depend on the doctrine of abuse of process. Which brings us to the third category.

102 ln a nutshell, Menon JC explained the doctrine of abuse of process as follows in *Goh Nellie*, at [53]:

> *To put it shortly, a court should determine whether there is an abuse of process by looking at all the circumstances of the case, including whether the later proceedings in substance is nothing more than a collateral attack upon the previous decision; whether there is fresh evidence that might warrant re-litigation; whether there are bona fide reasons why an issue that ought to have been raised in the earlier action was not; and whether there are some other special circumstances that might justify allowing the case to proceed. The absence or existence of these enumerated factors (which are not intended to be exhaustive) is not decisive. In determining whether the ambient circumstances of the case give rise to an abuse of process, the court should not adopt an inflexible or unyielding attitude but should remain guided by the balance to be found in the tension between the demands of ensuring that a litigant who has a genuine claim is allowed to press his case in court and recognising that there is a point beyond which repeated litigation would be unduly oppressive to the defendant.*

103 The [Claimant]'s argument that clause 2.1(g) is unenforceable as a penalty is a direct collateral attack on Order 7 of the Partial Award.

104 Not only was it not argued that clause 2.1(g) was a penalty and hence unenforceable, the facts being alleged regarding disproportionality, i.e., the matters stated in paragraphs 73-75 above, were not put before the Tribunal in the first tranche. I neither understand nor accept the [Claimant]'s argument that a consideration of the rule in

> *Henderson v Henderson* would fall beyond the scope of submission to arbitration. The [Claimant] wants the Tribunal to reverse the determination in Order 7 in the Partial Award. The rule in *Henderson v Henderson* is one of the principles of law that have a direct bearing on this attempt.
>
> …
>
> 110 It is clear to me that it is an abuse of process for the [Claimant] to argue now that clause 2.1(g) is a penalty. In addition, there is a question whether an arbitral tribunal has the jurisdiction to reverse its decision and order on a substantial issue in an earlier award based on an assessment of "special circumstances". As noted above, the doctrine of finality of an arbitral award, which means that an arbitral tribunal is *functus officio*, has similarities but is not on all fours with principles of *res judicata*. In particular, the rule in *Henderson v Henderson* is not the same as the doctrine of finality of award enshrined in section 19B IAA. This is not something that Parties have addressed and it is not necessary for me to say more on this potential conundrum.

The relevant legislation

16 The following provisions of the IAA are relevant:

> **Appeal on ruling of jurisdiction**
>
> **10.**—(1) This section has effect despite Article 16(3) of the Model Law.
>
> (2) An arbitral tribunal may rule on a plea that it has no jurisdiction at any stage of the arbitral proceedings.
>
> (3) If the arbitral tribunal rules —
>
> (*a*) on a plea as a preliminary question that it has jurisdiction; or
>
> (*b*) on a plea at any stage of the arbitral proceedings that it has no jurisdiction,
>
> any party may, within 30 days after having received notice of that ruling, apply to the General Division of the High Court to decide the matter.
>
> …
>
> (6) Where the General Division of the High Court, or the appellate court on appeal, decides that the arbitral tribunal has jurisdiction —

(*a*) the arbitral tribunal must continue the arbitral proceedings and make an award; and

(*b*) where any arbitrator is unable or unwilling to continue the arbitral proceedings, the mandate of that arbitrator terminates and a substitute arbitrator must be appointed in accordance with Article 15 of the Model Law.

…

Awards made on different issues

19A.—(1) Unless otherwise agreed by the parties, the arbitral tribunal may make more than one award at different points in time during the arbitral proceedings on different aspects of the matters to be determined.

(2) The arbitral tribunal may, in particular, make an award relating to —

(*a*) an issue affecting the whole claim; or

(*b*) a part only of the claim, counterclaim or cross-claim, which is submitted to it for decision.

(3) If the arbitral tribunal makes an award under this section, it must specify in its award, the issue, or claim or part of a claim, which is the subject matter of the award.

Effect of award

19B.—(1) An award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties and on any persons claiming through or under them and may be relied upon by any of the parties by way of defence, set-off or otherwise in any proceedings in any court of competent jurisdiction.

(2) Except as provided in Articles 33 and 34(4) of the Model Law, upon an award being made, including an award made in accordance with section 19A, the arbitral tribunal must not vary, amend, correct, review, add to or revoke the award.

…

(4) This section does not affect the right of a person to challenge the award by any available arbitral process of appeal or review or in accordance with the provisions of this Act and the Model Law.

Court may set aside award

24. Despite Article 34(1) of the Model Law, the General Division of the High Court may, in addition to the grounds set

out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if —

(*a*) the making of the award was induced or affected by fraud or corruption; or

(*b*) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

17 Article 34 of the Model Law is also of relevance; it provides as follows:

Article 34. Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.

(2) An arbitral award may be set aside by the court specified in Article 6 only if:

(*a*) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in Article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) 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; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or 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; or
>
> (*b*) the court finds that:
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
>
> (ii) the award is in conflict with the public policy of this State.
>
> (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under Article 33, from the date on which that request had been disposed of by the arbitral tribunal.
>
> …

The submissions

The Claimant

18 At the hearing, counsel for the Claimant argued that the Tribunal's intention should be objectively ascertained at the time of the Partial Award. He also submitted that the court in dealing with whether there is a breach of natural justice, should look at the pleadings holistically instead of technically or pedantically. Counsel for the Claimant submitted that so far as the breaches of natural justice are concerned, the Claimant's case was based on issues of causation and penalty.

19 In relation to causation, he submitted the Tribunal failed to decide what was an essential issue in the second phase of the arbitration proceedings. He submitted, referring to [136] of the Partial Award, that the Tribunal held there must be a causative connection between the MPQ breach and costs incurred as stipulated in clause 2.1(g). He submitted that the first sentence of [136] was an explicit statement by the Tribunal that there must be such a causal connection.

He submitted that the causal connection that the Defendant had to prove was that they must have indented or ordered supplies that were not ultimately taken by the Claimant. He submitted that whilst the Tribunal rejected the argument that the Defendant was required to prove it had loaded the shortfall on board, it did not say that the Defendant was excused or relieved of its burden of proving any causal link.

20 Counsel for the Claimant referred to the submission made on behalf of the Defendant at the Tribunal that clause 2.1(g) was in the nature of a take or pay clause. He submitted that if it was, the claim would be in the nature of a debt claim. However, he submitted the Tribunal was clear that there must be a causal connection.

21 He submitted that what emerged from [136] was that the parameters of costs incurred were not limited to the Defendant's loss based on the loading of the shortfall onto the vehicle. He submitted that all the Tribunal had considered was the parameters of costs incurred. He submitted the Tribunal was not dealing with questions of what costs were incurred due to such failure. He submitted the Tribunal had not decided the question of causal connection.

22 Counsel for the Claimant also pointed to the fact that unlike what he said on the question of penalty, the Tribunal did not say he was *functus officio* on the issue of causation. He referred to the fact that in the Final Award, the Tribunal noted that the Claimant had submitted the Defendant had not suffered any loss in respect of either of the breaches which were found against it. He contrasted this with the statement by the Tribunal at [55] of the Final Award that the issues which arose were whether clause 2.1(g) was unenforceable because it was a penalty and if it was enforceable, what was the amount of damages payable. He submitted this showed that the Tribunal had totally omitted to consider the issue

of causation as one of the issues before it. It must be remembered that in [55] of the Final Award, the arbitrator also stated an issue was whether the Claimant was precluded from arguing clause 2.1(g) was a penalty.

23 In that context, counsel for the Claimant referred to an exchange between the Tribunal and lead counsel for the Claimant in the arbitration in the course of which the Tribunal asked counsel, "[Are you] saying that [clause] 2.1(g) covers a situation where [there] must have been loading a product on board, otherwise there would be no costs incurred", counsel's reply, "It is conceivable that there may be other costs. For example, … additional storage costs if they had to take the fuel back to Singapore; potentially, you could include costs associated with an economically and efficient run" and the Tribunal's response, "That goes to quantum". He submitted the Tribunal was dealing with what the parameters of costs incurred meant and it would be open to the parties to argue if any item bears causal connection to the actual MPQ breach.

24 In relation to Order 7 of the Partial Award, counsel for the Claimant described it as a lifting of [140] of the Partial Award. He submitted it was necessary to look at all parts of the Partial Award, particularly [136]. He submitted that in Order 7, what the Tribunal was saying was that liquidated damages should be calculated by reference to the base cost of the Products that ought to have been nominated and delivered to meet the MPQ. He submitted it did not say anything about causal connection.

25 Counsel for the Claimant submitted that the prejudice caused by the failure to deal with the question of causation was real and significant as it could reasonably have made a difference to the quantification of damages including the possibility of a finding of no damage. In his written submissions, he referred

to the references to this issue in the Claimant's Counter-Memorial, opening submissions and closing submissions in the second phase of the proceedings, submitting the Claimant was at pains to expressly advance his case on the issue of causation.

26 In relation to penalty, counsel for the Claimant submitted the Claimant was denied due process by the Tribunal's refusal to entertain arguments on this point. He referred to certain aspects of the procedural history. First, he referred to Procedural Order No.2 (which had bifurcated the proceedings into two phases) in which Issue 2 stated, "Whether [PIE] is entitled to liquidated damages in respect of its [MPQ] claims". This was to be determined in the first phase of proceedings. He noted the Defendant relied on this issue to say the issue of penalty was decided in the Partial Award. He referred further to the contention in the Claimant's witness statements in the arbitration that any damages sought did not represent actual losses or a genuine attempt by the Defendant to pre-estimate its losses in the event of an MPQ breach. He submitted that it followed as early as the first phase of the proceedings there was an issue raised whether clause 2.1(g) was a genuine pre-estimate of loss.

27 Counsel for the Claimant also referred to the fact that the Claimant's opening written submissions in the first phase of the proceedings, stated that the Defendant's reliance on clause 2.1(g) was misplaced because clause 2.1(g) did not stipulate any pre-estimate of loss. He submitted that was referring to the penalty doctrine. He also referred to the closing submissions in the first phase of proceedings that to allow substantial damages would be to allow a windfall payment which he also submitted was consistent with the penalty doctrine. He also referred to the case authorities pertaining to the penalty doctrine which raised by the Claimant before the Tribunal (*eg*, *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2021] 1 SLR 631, *Dunlop Pneumatic Tyre Co, Ltd v*

New Garage and Motor Co, Ltd [1915] AC 79), as set out at [130] of the Partial Award.

28 Counsel for the Claimant pointed to the statement by the Tribunal at [91] of the Final Award that there was no decision on the question of penalty. He submitted there could not be an issue estoppel on this ground because it was not dealt with. Counsel for the Claimant submitted [130] of the Partial Award was important. He submitted it demonstrated that notwithstanding Issue 2 in Procedural Order No.2 (see [26] above), the Tribunal found it appropriate to only determine the issue of construction and expressly stated it was not going to decide if clause 2.1(g) was a valid liquidated damages clause. He submitted that on a reasonable reading, the Tribunal decided to leave open the question of penalty and the validity of the liquidated damages clause notwithstanding the arguments that were raised. He submitted it was reasonable for a litigant to consider that the Tribunal was prepared to address its mind to penalty when it came to the second tranche. In relation to Order 7, he submitted Order 7 and [130] and [140] of the Partial Award should be read holistically.

29 He submitted the effect was the Claimant was unable to present its case on penalty in violation of Art 34(2)(*a*)(ii) of the Model Law or it amounted to a breach of natural justice under s 24(*b*) of the IAA. He submitted alternatively, the Final Award had been rendered *infra petita* notwithstanding the Tribunal had left the issue open in the Partial Award.

30 Counsel for the Claimant contended on the question of negative jurisdiction that the breach of natural justice was compounded by the erroneous finding that the Tribunal was *functus officio* on the penalty issue. He submitted it could not seriously be denied that this was a negative jurisdictional finding. He submitted that brought the matter within s 10(3)(*b*) of the IAA which, he

submitted, expressly provides that if an arbitral tribunal rules on a plea at any stage that it has no jurisdiction, any party may apply to the court for a ruling on jurisdiction.

31 Counsel for the Claimant referred to the argument by the Defendant that by reason of the decision of Judith Prakash J (as Her Honour then was) in *AQZ v ARA* [2015] 2 SLR 972 ("*AQZ v ARA*"), s 10(3) of the IAA cannot be used to set aside an award which deals with the merits of the dispute as well as the question of jurisdiction (see *AQZ v ARA* at [71]). He submitted the decision should not be followed. He submitted first that the decision is not binding as the Singapore International Commercial Court has co-ordinate jurisdiction with the General Division of the High Court. Second, he pointed out that Art 16(3) of the Model Law only deals with the situation where the arbitral tribunal has ruled that it has jurisdiction. He submitted that the purpose of s 10(3)(*b*) was to extend the regime to include the possibility of allowing the parties to challenge a negative jurisdictional finding.

32 He also referred in that context to the report of the Law Reform Committee of the Singapore Academy of Law (*Report of the Law Reform Committee on Right to Judicial Review of Negative Jurisdictional Rulings* (January 2011)) (the "Law Reform Report"). He noted that in para 22 of that report, the Committee recommended that judicial review of negative jurisdictional rulings ought to be enabled and that the Committee suggested at para 24 "the draftsmen need not draw a distinction between a ruling as a preliminary question and a ruling in an award on the merits". He also referred to the fact that s 10(3)(*b*) of the IAA refers to a ruling on a plea "at any stage of the arbitral proceedings that it has no jurisdiction". He submitted that any stage of the proceedings includes a ruling made in an award on the merits. He

submitted the contrary construction deprives s 10(3)(*b*) of any utility and purpose. He submitted Prakash J did not consider the Law Reform Report.

33 He also submitted that the standard of review was *de novo* and in the present case the Tribunal's findings on issue estoppel and *Henderson v Henderson* were based on his conclusion that he was *functus officio*. He submitted it was immaterial in those circumstances whether decisions on issue estoppel or extended issue estoppel involved questions of admissibility or jurisdiction as "everything that leads to a negative jurisdictional finding is susceptible to a *de novo* review".

34 He also submitted the Final Award should be set aside on public policy grounds. He submitted the award disguises a windfall conferred on the Defendant as compensatory damages. He submitted the test of the public policy ground for setting aside the award is that the award must 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 or violate the forum's most basic notions of justice. He submitted that where the Tribunal left open the question of causation and penalty, the refusal to entertain the arguments on penalty was a matter which would shock the conscience of the court because what it essentially did was confer a substantial amount of damages in circumstances where the Defendant was essentially given a free pass not to address essential questions of proof of actual loss and whether clause 2.1(g) was a penalty.

35 He also referred to the role that the National Provident Fund plays in the Solomon Islands. He stated that the outsized nature of the Final Award can be shown by reference to the fact that the award was equivalent to 2,530% of the profit the Defendant could have expected to make had the Claimant purchased

the MPQ. He also referred to the fact that the figure translated to 150% of the Claimant's total annual profit, 41% of its current net assets and 1.7% of the Solomon Islands' Gross Domestic Product. He also pointed out that the award would represent more than half of the profits that the Defendant would expect to earn in a year even though it was acknowledged the Solomon Islands was a small market. Finally, he submitted that prior to the making of the award the Defendant was prepared to settle all outstanding MPQ damages for US$2m. He submitted the award would set the Solomon Islands' National Provident Fund back by at least three years.

The Defendant

36 Counsel for the Defendant submitted that the point of importance in the application is whether the Tribunal in the Partial Award on liability decided whether the Defendant was entitled to liquidated damages under clause 2.1(g).

37 Counsel for the Defendant submitted that this was decided in the Partial Award. He submitted that if this was the case, the argument that the Claimant was denied the opportunity at the hearing leading up to the Final Award to argue penalty falls away because the validity and enforcement of clause 2.1(g) had already been decided in the Partial Award. The Defendant stated its position was that the Claimant did substantially argue penalty in the lead up to the Partial Award although without specific reference to the word "penalty".

38 Counsel for the Defendant also submitted that if the Tribunal decided in the Partial Award that clause 2.1(g) was a valid liquidated damages clause, the causation argument also falls away because all that was required was to apply the formula in clause 2.1(g) and there were no issues of causation.

39 He submitted that if the Tribunal had decided clause 2.1(g) is a valid liquidated damages clause, then the jurisdictional issue also falls away and likewise, so would the issue estoppel objections. He also submitted that the rule in *Henderson v Henderson* applies because any challenge to the validity or effectiveness of clause 2.1(g) should have been made at the hearing leading up to the Partial Award. He also submitted that even if the penalty argument was raised but not dealt with, although there would not be a *Henderson* type estoppel there would still be an issue estoppel as it was decided that clause 2.1(g) was valid and enforceable.

40 Counsel for the Defendant also submitted that if it was claimed the Tribunal erred in not considering the question of penalty in the Partial Award, the Partial Award should have been challenged and the Claimant is out of time to do so.

41 In relation to the words "the question here is one of construction" in [130] of the Partial Award, he submitted the Tribunal was referring to the argument made by counsel for the Claimant as mentioned at [127] of the Partial Award, not to the whole case. He submitted that what the Tribunal said at [136] of the Partial Award on the requirement of a causative connection was likewise a reference to the argument made on behalf of the Claimant as noted at [134] of the Partial Award, not a reference to the whole case.

42 He also submitted that the proposition that causation and the validity of clause 2.1(g) was still open to attack following the Partial Award is against the plain and obvious reading of Order 7. He submitted that Order 7 was in line with what the Tribunal stated at [140] of the Partial Award and with the list of issues agreed by the parties at the liability phase.

43 Counsel for the Defendant emphasised again that it was no longer open to challenge the Partial Award and if the Claimant had taken the view there was something wrong with the Partial Award because it did not deal with penalty, it should have applied to set it aside. He also stated that even if there was ambiguity in the Partial Award, the Claimant could have applied for interpretation of the Partial Award, but it failed to do so.

44 Counsel for the Defendant submitted that I should follow *AQZ v ARA*.

45 In relation to public policy, he submitted the courts take a restricted view of public policy and there is no precedent for invoking public policy in a case of this nature.

The Claimant's submissions in reply

46 In reply the Claimant repeated its submission that the court should take a holistic approach in dealing with [140] of the Partial Award. He submitted that even reading the Partial Award technically, there is no reference to the word "enforceable". He submitted the exact word used was "entitled". He submitted that when that word was used in [140] it was not a decision encompassing the question of enforceability or validity but whether the Defendant was entitled to construe it as a liquidated damages clause in its entirety. He submitted the Tribunal did not say that clause 2.1(g) was enforceable.

47 He also submitted that penalty was argued.

48 In dealing with [140] of the Partial Award, counsel for the Claimant accepted that ordinarily one would construe a statement that the Defendant was entitled to liquidated damages as necessarily assuming that the liquidated damages clause was valid but stated that the present case was different.

49 In relation to *AQZ v ARA*, counsel for the Claimant repeated his submission that the reasoning in that case would strip s 10(3)(*b*) of the IAA of its utility and purpose.

50 Finally, he submitted that the test for public policy is an open-ended one and that the categories are not closed.

Consideration

51 It is convenient to deal first with the causation issue raised by the Claimant.

52 I have set out the relevant paragraphs of the Partial Award at [13] above. At [127]–[128] of the Partial Award, the Tribunal set out the Claimant's submissions on the construction of clause 2.1(g). Essentially the argument was that clause 2.1(g) requires proof of actual loss.

53 I will return to [130] of the Partial Award when dealing with the penalty issue. However, what is important to note for the purposes of the causation argument is the Tribunal's comment that the question was one of construction.

54 In the succeeding paragraphs [131]–[134] of the Partial Award, the Tribunal dealt with the arguments raised by the Claimant on the question of construction. He noted in [135] that the parties had acknowledged that the actual losses for breach of such obligation "'*are impossible to calculate in advance*', hence the formula '*costs incurred by PIE due to such failure plus 5%*'".

55 It is in that context that the Tribunal made the remarks that there must be a causative connection between the costs incurred and the failure to accept delivery of the MPQ at [136] of the Partial Award. However, the Tribunal dealt

with this question at [138] of the Partial Award. In answering the question, "how does one assess the costs incurred", the Tribunal accepted the Defendant's approach as being the most sensible to give clause 2.1(g) efficacy. That is, the costs incurred by virtue of the failure to take the MPQ under clause 2.1(g) was to be based on the simple average of what the (A) component was on each of the deliveries for the year in question. The Tribunal summarised its conclusion at [140] of the Partial Award and that conclusion is reflected in Order 7 (see [14] above).

56 Once it was determined that the damages for failure to take the MPQ were to be assessed by reference to a formula, there is no requirement for any further proof of loss including any causative connection. The Tribunal made it clear that was his approach at [86] and [88] of his Final Award (see [15] above).

57 For these reasons alone, the Claimant's challenge to the Final Award based on its causation argument fails. It was not the case that the Tribunal had failed to address the requisite causal connection in the Final Award because the Tribunal had already made a decision on it in the Partial Award.

58 So far as the question of penalty is concerned, I am of the view that it was raised as an issue for determination at the liability phase of the arbitration. First, as the Claimant pointed out, Issue 2 of the issues to be determined in the liability hearing was whether the Defendant was entitled to liquidated damages in respect of the MPQ claims (see [26] above). That implicitly raises the question of the validity of clause 2.1(g). That coupled with the submissions that clause 2.1(g) did not stipulate any pre-estimate of loss and would allow a windfall payment to the Defendant together with a reference to the classic cases on penalty referred to by the arbitrator at [130] of the Partial Award

demonstrates that the question of penalty was raised. The Defendant does not contend to the contrary.

59 It is also clear that the Tribunal did not deal with the question of whether clause 2.1(g) constituted a penalty. The Tribunal said as much in [130] of the Partial Award and in [91] of the Final Award.

60 In one sense this is understandable. The question of penalty did not seem to be raised expressly as distinct from implicitly by reason of the matters I have referred to in [58] above. However, I am of the view that it was raised, and the Tribunal failed to deal with it.

61 What then is the effect? It would have been open to the Claimant to challenge the Partial Award under Art 34(2)(*a*)(ii) of the Model Law. However, Art 34(3) of the Model Law provides such an application may not be made after three months have elapsed from the date the party making the application received the award. It is not in dispute that the Claimant did not make such an application.

62 The question remains whether it was open to challenge the Final Award on the basis the Tribunal decided to leave the penalty question open and deal with it in the second tranche of the proceedings which led to the making of the Final Award. In support of this proposition the Claimant argued that on a fair reading of the Partial Award, the question had in fact been left open by the Tribunal for the second tranche of the proceedings.

63 I do not think that this is correct. The statement in [130] of the Partial Award made it clear the Tribunal took the view that penalty was not argued as distinct from it being deferred for further hearing. Further, the Partial Award at

[140] expressly states the Defendant was entitled to liquidated damages, a statement which must be predicated on the validity of clause 2.1(g). Order 7 of the Tribunal's orders on the Partial Award is consistent with that conclusion.

64 Section 19B of the IAA provides that an award made by an arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties. That includes a partial or an interim award (see s 19A of the IAA read with s 19B). An award will be final to the extent it resolves a claim or matter with preclusive effect (see *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [51]–[53], *ONGC Petro additions Ltd v DL E&C Co Ltd* [2023] SGHC 197 at [34], *CBI Constructors Pty Ltd v Chevron Australia Pty Ltd* [2024] 98 ALJR 1096 ("*CBI Constructors*") at [18]). As was stated in *CBI Constructors* at [21], the effect of the final and binding nature of the award is that the tribunal cannot modify the award after it was rendered and has no authority to reconsider or further consider the subject matter of that award (see also Michael J Mustill & Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed, 1989) at 404–405).

65 In the present case, the Tribunal in its Partial Award finally determined the validity of clause 2.1(g). A decision that it constituted a penalty and, therefore was invalid, would be directly contrary to that decision. The Tribunal had no jurisdiction to embark on that issue following the handing down of the Partial Award.

66 Further, the decision in the Partial Award gave rise to an issue estoppel in respect of the validity of clause 2.1(g) including the question of penalty. To subsequently raise the question of penalty, would be to deny the validity of clause 2.1(g), a matter which was determined in the Partial Award (see *Goh*

Nellie v Goh Lian Teck [2007] 1 SLR 453 at [35]–[36], *Blair v Curran* [1939] 62 CLR 464 at 510).

67 It follows the Tribunal was correct in holding it was *functus officio* in respect of the penalty issue following the handing down of the Partial Award.

68 The Claimant also contends that it was denied natural justice by reason of the failure of the Tribunal to consider the question of penalty. However, to the extent there was such a denial, it occurred by virtue of the Tribunal failing to consider the issue in the Partial Award, which the Claimant failed to challenge within the time prescribed by the Model Law. There could be no further denial of natural justice in the Tribunal failing to consider the issue in connection with the handing down of the Final Award and for the reasons set out above, the Tribunal had no jurisdiction to do so.

69 It should be noted that in this application, the Claimant did not challenge the Partial Award under s 24(*b*) of the IAA on the ground it was denied natural justice. Rather it challenged the Final Award submitting that the question of the denial of natural justice should be dealt with holistically. In particular, it did not contend that the time limit imposed by Art 34(3) of the Model Law did not apply to a challenge to an award under s 24(*b*) of the IAA.

70 The Claimant, in my opinion, was correct in taking this approach. Section 3 of the IAA provides that subject to that Act, the Model Law has with the exception of Chapter VIII the force of law in Singapore. Article 34 of the Model Law is in Chapter VII. Thus, the time limit in Art 34(3) of the Model Law would apply to a challenge under s 24(*b*) of the IAA. Although s 24(*b*) of the IAA expands the ground of challenge to an award, it says nothing about time limits. It would be incongruous if different time limits applied to a challenge

under that section in contrast to a challenge on the grounds contained in Art 34(2) of the Model Law which include public policy grounds. This, I note, is the approach taken by the Court of Appeal in *Bloomberg Resorts and Hotels Inc v Global Gaming Philippines LLC* [2021] 1 SLR 1045 at [91]–[97].

71 As I indicated, the Claimant also relies on s 10(3)(*b*) of the IAA contending that the decision of the Tribunal that it was *functus officio* on the question of penalty was a negative jurisdictional ruling which could be challenged under that sub-section. The Claimant accepts that the submission involves the proposition that the decision in *AQZ v ARA* (see [31] above) was wrongly decided.

72 In *AQZ v ARA*, Prakash J, after an extensive review of the drafting history of Art 16(3) of the Model Law (the broadly equivalent provision to s 10(3)(*b*) of the IAA), concluded that relief under Art 16(3) was not available when a party seeks to set aside a ruling which is primarily on jurisdiction but also deals marginally with the merits because that was not the purpose the drafters intended Art 16(3) to serve. She stated in such circumstances an application can be made to set aside the award pursuant to s 3(1) of the IAA coupled with the relevant provision of Art 34(2) of the Model Law (see *AQZ v ARA* at [69]). She also concluded the same position applied in relation to an application under s 10(3)(*b*) of the IAA notwithstanding the difference in wording. In particular, she rejected the submission that the words "at any stage of the arbitral proceedings" affected the position, stating that those words dealt with the issue of when such a determination can be made rather than the question of the form that the tribunal's ruling is to take (see *AQZ v ARA* at [70]–[71]).

73 Even if I was of the view that her Honour's conclusion was incorrect, I would be most hesitant to depart from it. First, it has stood unchallenged for a

number of years. Second, it has been followed on at least three occasions, *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd* [2019] 3 SLR 12 at [68]–[69], *Sinolanka Hotels & Spa (Private) Limited v Interna Contract SpA* [2018] SGHC 157 at [79], *BTN v BTP* [2020] 5 SLR 1250 ("*BTN v BTP* (HC)") at [50]. In *BTN v BTP* (HC), Belinda Ang Saw Ean J (as her Honour then was) rejected an argument based on the Law Reform Report similar to that raised by the Claimant in the present case (at [85]–[87]). Her Honour's decision was affirmed on appeal (see *BTN v BTP* [2021] 1 SLR 276 ("*BTN v BTP* (CA)")) although this particular issue was not dealt with.

74 Further, far from considering the decision in *AQZ v ARA* was incorrect, I respectfully agree with her Honour's decision and her reasons. I also respectfully agree with the reasons of Ang J in *BTN v BTP* (HC) rejecting the argument based on the Law Reform Report. I would only add that, in my view, their Honours' conclusions are fully supported by consideration of the text of s 10(3)(*b*). First, the words "at any stage of the arbitration proceedings" in s 10(3)(*b*) relates to a time when the arbitration proceedings are on foot, not after they have been completed by the making of an award. Second, s 10(6) provides that when the court decides the tribunal has jurisdiction, the tribunal must continue the arbitration proceedings and make an award. That clearly contemplates that an award has not been made. Third, the Model Law and the IAA provide specific and confined grounds for setting aside an award. Section 10 of the IAA should not be construed as implicitly providing a further ground.

75 For these reasons, the Claimant cannot rely on s 10(3)(*b*) to contend that the Tribunal's decision in the Final Award that it was *functus officio* should be set aside. I would add that in the circumstances it is unnecessary to consider whether the Tribunal's ruling was essentially one of *res judicata* which is a ground of admissibility, not jurisdiction (see *BTN v BTP* (CA) at [68]–[73]). I

would also add that, in any case, I would have been satisfied that the Tribunal had correctly concluded that it had no jurisdiction over the penalty issue (see [65] above).

76 There remains for consideration the public policy issues. In its written submissions, the Claimant correctly submitted that it was necessary for an award to be set aside on the grounds of public policy that it would "shock the conscience" or be "clearly injurious to the public good" or be "wholly offensive to the ordinary reasonable and fully informed member of the public" or "would violate the forum's most basic notion of morality and justice" (see *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [59]).

77 I have set out the reasons the Claimant contends the Final Award violates public policy at [34]–[35] above. However, I do not think the ground is made out. Essentially a liability arose as a result of a contract freely entered into between the parties. Whilst clause 2.1(g) may have been liable to be set aside as a penalty (as to which it is not appropriate for me to express any view), the Claimant had the opportunity to challenge the Tribunal's failure to deal with this issue in the Partial Award but did not do so. Whilst I have considerable sympathy for the position of the Claimant, the fact remains the Final Award is not against public policy.

78 In the result I would make the following orders:

(a) the application of the Claimant to set aside Final Award No.130 of 2025 is dismissed;

(b) the Claimant is to pay the Defendant's costs of the application;

(c) in the event the parties are unable to agree on the quantum of such costs within a period of 14 days from this judgment, each party within a further 14 days is to provide submissions on the appropriate quantum of costs together with a schedule setting out the costs incurred by them in the proceedings.

Thomas Bathurst
International Judge

Seow Fu Hong Colin and Huang Qianwei (Colin Seow Chambers LLC) for the claimant;
Lye Kah Cheong and Chan Michael Karfai (Breakpoint LLC) for the defendant.
