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

[2026] SGHC 179

Originating Application No 1311 of 2025

Between

DWL

… *Claimant*

And

DWM

… *Respondent*

JUDGMENT

[Arbitration — Award — Recourse against award — Setting aside — Excess of jurisdiction]
[Arbitration — Award — Recourse against award — Setting aside — Breach of natural justice]

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DWL
v
DWM

[2026] SGHC 179

General Division of the High Court — Originating Application No 1311 of 2025
Philip Jeyaretnam J
9 July 2026

2 September 2026 Judgment reserved.

Philip Jeyaretnam J:

1 This is an application by [DWL] ("Claimant") to wholly or partially set aside an arbitral award ("Award")[1] granted in favour of [DWM] ("Respondent") in a Singapore-seated arbitration ("Arbitration"), on grounds that the Award was issued either in excess of jurisdiction or a breach of natural justice.

2 This matter illustrates the difficulties caused when an arbitral tribunal includes reasons for an outcome sought by one party which were not relied on by that party in its submissions. Here, the Claimant agreed to supply certain equipment to the Respondent at a time when some sanctions had been imposed against customers of the Respondent's nationality, and further sanctions were

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1 Claimant's Bundle of Documents (Volume 1) dated 2 July 2026 ("CBOD-1") at pp 115–389 ("Award").

anticipated, and indeed eventuated. Parties' agreement ("Contract")[2] included a detailed provision concerning how parties should respond to sanctions, including in the event of a party's obligations under the contract being suspended because their performance had become illegal as a result of the introduction of sanctions.[3] A central question in the Arbitration was whether the Claimant was in material breach of this provision, both prior to the Claimant's suspension of the Contract and after. The period after such suspension would only be relevant if the provision survived such suspension. The tribunal (comprising both the majority and the dissenting arbitrator, who dissented on other aspects) ("Tribunal") held that the provision did indeed survive,[4] as the Respondent had contended. However, in so holding, the Tribunal referred to two separate contractual provisions that had not been relied on by the Respondent.[5] Moreover, the Tribunal may have misread those other provisions which did not on their face add support to the conclusion reached. Nevertheless, the Tribunal did not expressly reject and seems to have accepted the reason given by the Respondent for the same conclusion, which was simply that the provision must survive suspension of the Contract on any ground given the purpose of the provision and the overall structure of and intention manifested in the Contract.

3 The question, therefore, as classically formulated by the Court of Appeal in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3

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2 Contract between [DWM] and [DWL] dated 10 December 2021 (CBOD-1 at pp 391–502) ("Contract").

3 Contract at Art 27B (CBOD-1 at pp 454–456).

4 Final Award dated 19 August 2025 ("Award") at paras 6.71–6.73 (CBOD-1 at pp 320–321); Dissenting Opinion dated 19 August 2025 ("Dissenting Opinion") at para 9 (CBOD-1 at p 369).

5 Award at paras 6.71–6.72 (CBOD-1 at pp 320–321).

SLR(R) 86 ("*Soh Beng Tee*") at [65(d)], is whether a reasonable litigant in the position of the Claimant could have foreseen the possibility of reasoning of this type by the Tribunal. Answering this question not only requires close examination of the arbitral record but also depends on how one characterises "reasoning of this type". That a tribunal in deciding the question of interpretation of a contract would read the contract for itself, including by looking at parts of it not expressly referred to by parties, is probably not merely foreseeable but expected. So long as parties have had the opportunity to make their respective arguments on interpretation, a tribunal need not specifically warn parties that it might approach the question of interpretation of the provision in issue in a way that is not identical to either party's submissions. What would likely not be foreseeable would be where a tribunal *proceeds* on a provision or part of a provision different from that which was the subject of argument. In this judgment, I answer this question on the facts of this case along with the other points raised by the Claimant. I begin however with an outline of the facts.

Facts

4 The parties are companies involved in the energy production industry. The Claimant is an energy technology and equipment supplier, and the Respondent is an energy producer based in Country [X].[6] In December 2021, parties entered into the Contract for the Claimant to provide the Respondent with equipment to operate an energy production plant in Country [X].[7]

6 Claimant's Written Submissions dated 2 July 2026 ("CWS") at para 1.

7 CWS at para 1; CBOD-1 at pp 391–502.

Background to the dispute

5 Under the Contract, the Respondent was to make payments to the Claimant at designated intervals, known as "payment milestones", for work done by the Claimant up until that point. Parties further agreed that in conjunction with the first payment milestone ("PM-1"), the Claimant was to provide the Respondent with a Performance Bond and Parent Company Guarantee ("Bond and Guarantee").[8] Neither party disputes that both the Bond and Guarantee payments were duly made to the Respondent around the time the Contract was entered into.[9]

6 When parties entered into the Contract, they were aware of an ongoing international sanctions regime in place against Country [X] since 2014.[10] However, it was only shortly after the Contract was executed, that a new series of international sanctions were imposed on Country [X] in February 2022,[11] which began to impact the Claimant's ability to fulfil its contractual obligations.

7 In the weeks that followed the imposition of these new sanctions, parties engaged in several negotiations on how to move forward with the execution of the Contract. The impact of these new sanctions on parties' contractual relationship ultimately unfolded as follows.[12]

8 Contract at Art 31.1 (CBOD-1 at p 464).

9 Claimant's Counsel in the Arbitration's 1st Affidavit dated 18 November 2025 ("CC-1") at para 29 (CBOD-1 at pp 23–24).

10 Award at paras 4.193, 6.5(2)(i) and 6.11 (CBOD-1 at pp 216, 275 and 279).

11 CWS at para 6.

12 CC-1 at paras 30–61 (CBOD-1 at pp 24–35).

(a) From March 2022, several of the Claimant's subcontractors began refusing to supply the Claimant with key parts for the equipment that was intended to be delivered to the Respondent.[13]

(b) By April 2022, in light of looming concerns that the sanctions would inadvertently continue to impact the Claimant's ability to perform the Contract in the long run, the Respondent then deliberately refused to pay an invoice that was due at the third payment milestone ("PM-3"). This, the Respondent conceded, was for "commercial" reasons as the Respondent feared that paying the invoice at that stage "would only increase [its] losses".[14]

(c) It was on the basis of these looming sanctions, loss of subcontractors and the Respondent's deliberate and sustained non-payment of PM-3 that the Claimant ultimately sought to suspend the Contract, relying on the suspension clauses.[15] The Claimant's Notice of Suspension was filed on 27 May 2022 and came into effect on 1 June 2022.[16]

(d) Up until this point of suspension, parties were in agreement that under Art 27B of the Contract, the Claimant was obligated to take steps to mitigate the effect of sanctions on its performance of the Contract.

(i) Since parties had entered into the Contract at a time when the issue of sanctions against Country [X] was already a live concern, the Respondent submits that Art 27B was intended as a

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13 Award at para 4.189 (CBOD-1 at p 215).

14 Award at para 6.2(3) (CBOD-1 at pp 270–271).

15 CC-1 at paras 38–39 (CBOD-1 at p 29).

16 Award at para 6.7 (CBOD-1 at pp 277–278).

"roadmap" to guide parties on how they may attempt to continue fulfilling their contractual obligations notwithstanding any newly introduced or prevailing sanctions.[17]

(ii) Parties agree that under Art 27B, the Claimant was obligated to attempt to *either*: (a) submit licensing applications such that the Claimant may be permitted to continue delivering its equipment under the new sanctions ("Licensing Obligation"); *or* (b) alter its equipment to comply with the new sanctions ("Alteration Obligation"),[18] subject to whichever course of action elected by the Respondent.[19]

(iii) For instance, as part of its effort to comply with this obligation to mitigate, the Claimant had: (a) submitted up to ten export licensing applications to the authorities by late April 2022;[20] and (b) raised the possibility of altering its equipment packages to avoid being caught by sanctions – although that latter option, in the Claimant's submission, was rejected by the Respondent.[21]

(e) However, the parties disagreed on whether the Claimant's suspension of the Contract was valid as well as what the effect of any

17 Respondent's Written Submissions dated 2 July 2026 ("RWS") at para 10; Award at paras 6.11 and 6.44 (CBOD-1 at pp 279 and 308).

18 CWS at para 7; RWS at para 26; see Contract at Art 27B (CBOD-1 at pp 454–449).

19 CWS at para 60; Notes of Evidence dated 9 July 2026 ("NEs") at 02:29–03:01, 14:20–14:27 and 18:10–18:18.

20 CC-1 at para 36(f) (CBOD-1 at pp 27–28).

21 CWS at paras 8–10; NEs at 03:01–03:14.

suspension was on the Claimant's obligations concerning sanctions.[22] Thus:

(i) On 3 June 2022, the Respondent immediately challenged the validity of the suspension on grounds that it was brought prematurely. Moreover, the Respondent considered that the Claimant was obligated to continue the above mitigation efforts even after the Claimant had suspended the Contract.

(ii) The Claimant, on the other hand, considered that all its obligations under the Contract, including its obligation to mitigate were validly suspended and accordingly, did not take any further steps in mitigation.

(f) On 11 July 2022, the licensing authorities issued a preliminary decision, notifying the Claimant that its previous licensing applications were denied on account of further sanctions levied against Country [X].[23]

(g) On 15 July 2022, just over a month after the Claimant issued its Notice of Suspension, the Respondent issued a Notice of Termination on grounds that the Claimant's suspended performance of the Contract amounted to a material breach of its obligations therein.[24]

(h) A few weeks after on 4 August 2022, the Claimant wrote to the Respondent to reject its Notice of Termination on grounds that its earlier suspension of the Contract and its performance were justified. Again,

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22 CC-1 at paras 38–61 (CBOD-1 at pp 29–35).

23 CC-1 at para 42 (CBOD-1 at p 30).

24 CC-1 at para 46 (CBOD-1 at p 31).

the Claimant pointed to the Respondent's continued non-payment of PM-3, which by this point, was 120 days overdue.[25]

(i) On 25 August 2022, the Claimant issued its own Notice of Termination, citing largely the same grounds that it did in its earlier Notice of Suspension, with a new allegation that the Respondent's purported termination of the Contract on 15 July 2022 was a repudiatory breach.[26]

The Arbitration

8 Following this breakdown between the parties, the Respondent commenced arbitration against the Claimant, and a tribunal comprising three arbitrators was appointed.[27] The Arbitration dealt with the claims brought by the Respondent, as well as a counterclaim raised by the Claimant. For clarity, I will continue to refer to parties as they appear in this setting-aside application.

The Respondent's claim at the Arbitration

9 At the Arbitration, the Respondent made several claims, only the following of which were central to this application.[28] First, the Respondent submitted that the Claimant had breached Art 27B of the Contract in so far as it had failed to take reasonable steps to either (a) obtain the necessary licensing authorisation; or (b) alter its equipment to comply with new sanctions. Second, that breach was material enough to justify the Respondent's subsequent termination of the Contract. A portion of the Respondent's case here rested on

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25 CC-1 at para 47 (CBOD-1 at p 31).

26 CC-1 at para 49 (CBOD-1 at p 32).

27 CC-1 at paras 51–54 (CBOD-1 at pp 32–33).

28 CWS at paras 18–19.

the Claimant's failure to take any action to mitigate the situation concerning sanctions after the Claimant's purported suspension of the Contract on 1 June 2022. Central to this submission was the Respondent's view that not only was the Claimant's purported suspension of the Contract invalid, but it in any event would have had no effect on the Claimant's "continu[ing]" obligation to mitigate the effect of sanctions.[29]

10 In response, the Claimant submitted that not only had it not breached Art 27B of the Contract,[30] but any breach that could have been established would not have been material enough to justify the Respondent's termination of the Contract.[31] In the Claimant's view, all its obligations under the Contract were validly suspended as of 1 June 2022, including its obligations under Art 27B, such that any inaction thereafter was irrelevant to the Tribunal's determination.[32] Moreover, the Claimant submitted that it had, in any event, sufficiently complied with Art 27B, citing the numerous licensing applications it had filed to the authorities as well as efforts it had made to attempt to procure alternative subcontractors.[33]

11 I should note that at the hearing before me, counsel for the Claimant had characterised the Claimant's submissions at the Arbitration quite differently. Counsel submitted that the Claimant had only argued in the Arbitration that it was not obligated to alter its equipment as it considered that its obligations under

29 RWS at para 10(a).

30 CWS at para 20.

31 Award at para 6.36 (CBOD-1 at pp 300–301).

32 Transcript of Arbitration Hearing dated 3 December 2024 at 18:34–19:13 and 20:07–20:34 (Claimant's Bundle of Documents (Volume 3) ("CBOD-3") at pp 567–569).

33 Claimant's Response to the Notice of Arbitration and Counterclaims dated 24 January 2023 at para 70 (Claimant's Bundle of Documents (Volume 2) ("CBOD-2") at p 255); CWS at para 9.

Art 27B were disjunctive.[34] Since the Claimant had been allegedly directed by the Respondent to pursue the licensing route, the Claimant had completely not pursued the alteration route in any meaningful capacity.[35] But this, in my view, was not fully borne out by the arbitral record.[36]

12 Thus, while the parties advanced their submissions on the basis that the Claimant's obligations under Art 27B were disjunctive, they nevertheless made submissions on both limbs, specifically whether and how each limb was fulfilled or unfulfilled, as their case might be.[37]

13 Accordingly, the question of whether the Claimant's obligations under Art 27B were intended to survive the Claimant's suspension of the Contract was central to both parties' submissions. This issue arose at several points in the Arbitration and had further led the Tribunal at the final hearing to question both parties on why Art 27B must have been intended to survive or not survive the Claimant's suspension of the Contract.[38]

14 The arbitral record, however, shows that neither party provided much, if anything, to the Tribunal in terms of reasoning. What can be found are brief and largely conclusory submissions, as follows:

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34 NEs at 02:29–03:14.

35 NEs at 02:29–03:14.

36 NEs at 02:29–03:14.

37 Respondent's Notice of Arbitration in the Arbitration dated 28 November 2022 at paras 53–55 (CBOD-2 at p 224); Claimant's Response to the Notice of Arbitration and Counterclaims dated 24 January 2023 at para 70 (CBOD-2 at p 255).

38 Transcript of Arbitration Hearing dated 3 December 2024 at 18:34–19:13, 20:07–20:34 and 23:20–23:34 (CBOD-3 at pp 567–569 and 572).

(a) The Claimant took the view that since one of its grounds for suspension was the Respondent's non-payment of PM-3, the Claimant could not have been reasonably expected to follow through on obligations to either actively file licensing applications or seek alternative equipment suppliers when they were simply not getting paid.[39]

(b) The Respondent took the view that the obligations under Art 27B must have been intended to survive suspension of the Contract as parties had contracted on the basis of creating a "sanctions-resistant" contractual arrangement. Parties had entered into the Contract in a period when the threat of sanctions being imposed on Country [X] was neither foreign nor fanciful – and in view of protecting their commercial interests, parties had intentionally set out a framework in Art 27B to immunise their Contract from those threats as and when they were expected to occur. That intention, the Respondent submitted, must extend to situations like the present, where the Claimant had purported to suspend the Contract at least in part because of sanctions.[40]

15 Following the close of oral submissions at the Arbitration, the point did not resurface in the Tribunal's post-hearing list of questions to the parties.[41]

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39 Transcript of Arbitration Hearing dated 3 December 2024 at 18:34–19:13 and 20:07–20:34 (CBOD-3 at pp 567–569).

40 Transcript of Arbitration Hearing dated 3 December 2024 at 23:20–23:34 (CBOD-3 at p 572).

41 CWS at para 41; Tribunal's List of Issues dated 24 September 2024 (CBOD-3 at pp 409–411).

The Claimant's counterclaim at the Arbitration

16 The Claimant counterclaimed for (a) a declaration that it had validly terminated the Contract on 25 August 2022; and (b) an order that the Respondent return the Bond and Guarantee *per* Art 45A.3 of the Contract.[42]

17 The Respondent, on the other hand, challenged the counterclaim on grounds that (a) the Claimant's termination of the Contract was invalid in so far as the Respondent had already terminated the Contract a month earlier on 15 July 2022; and (b) to the extent that the Contract was validly terminated by the *Respondent* rather than the Claimant, the Claimant was not entitled to a return of the Bond and Guarantee under the Contract.[43]

18 Indeed, both parties advanced their submissions by adopting an all-or-nothing approach.[44] Moreover, neither made submissions on the terms of the Bond and Guarantee,[45] and the final version of the Guarantee was never adduced before the Tribunal.[46]

The Award

19 In August 2025, the Tribunal issued its decision, comprising the award issued by two arbitrators ("Majority") who decided largely in favour of the

42 CWS at para 22.

43 CWS at para 23.

44 CWS at para 24.

45 CWS at para 24.

46 CWS at para 77.

Respondent ("Award"),[47] and a dissenting opinion of the third arbitrator which instead held in favour of the Claimant.[48]

20 The Tribunal and the Majority made the following findings, several of which the Claimant now submits were made either in excess of its jurisdiction or in a breach of natural justice.

(a) With respect to whether the Claimant was entitled to suspend the Contract in light of the effects of increasing sanctions and the Respondent's non-payment of PM-3 – the Tribunal found in favour of the Claimant but only as regards suspension for *non-payment*.[49]

(b) With respect to whether the Claimant was obligated to continue to mitigate the effects of sanctions under Art 27B, despite its valid suspension of the Contract – the Tribunal found that it was, by reference to two contractual provisions that had never been raised over the course of the Arbitration: Arts 45.6 and 54 of the Contract.[50]

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47 CBOD-1 at pp 115–348.

48 Dissenting Opinion (CBOD-1 at pp 366–389).

49 Award at paras 6.6–6.9 (CBOD-1 at pp 276–278); Dissenting Opinion at para 19 (CBOD-1 at p 372).

50 Award at paras 6.71–6.73 (CBOD-1 at pp 327–328); Dissenting Opinion at para 9 (CBOD-1 at p 369).

(c) With respect to whether the Claimant then materially breached its obligations under Art 27B such that the Respondent was thereafter entitled to terminate the Contract – the Majority found that:[51]

(i) the Claimant failed to take reasonable steps to alter its equipment to enable work to continue despite the new sanctions regime;

(ii) the Claimant failed to take reasonable steps to put in effective licensing applications to enable works to continue despite the new sanctions regime; and

(iii) in so doing, the Majority considered the Claimant's conduct from the time the new sanctions were introduced to the time the Contract was ultimately terminated.

(d) With respect to the Claimant's counterclaim and whether it would be entitled to a return of its Bond and Guarantee – the Majority found that:[52]

(i) the Claimant was not entitled to a return of the Bond and Guarantee since the Contract had been validly terminated by the Respondent, rather than the Claimant, and it was only in the latter situation that parties had agreed that a return may be granted; and

(ii) the Bond and Guarantee were to act as security for the "amount awarded to [the Respondent] in this Award" for the return of the first two payment milestone payments that the Claimant had received.

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51 Award at paras 6.39–6.52 (CBOD-1 at pp 305–316).

52 Award at para 6.78 (CBOD-1 at p 342).

The parties' cases

21 To the extent that the Claimant seeks to set aside the Award either in whole or in part on multiple grounds, I summarise the parties' main submissions on each point here and expand on parties' submissions as I consider them in turn in the analysis below.

The Claimant's case

22 With respect to its application to set aside the Award in its entirety, the Claimant submits that the Majority's finding in the main claim – that the Claimant had materially breached its obligations to mitigate the effect of sanctions under Art 27B – should be set aside as it derives from:[53]

(a) findings made in either an excess of jurisdiction or a breach of natural justice when the Tribunal placed undue reliance on Arts 45.6 and 54 of the Contract to find that the obligations under Art 27B survived the Claimant's suspension of the Contract, even though parties had neither addressed Arts 45.6 or 54 in their submissions nor been given an opportunity to do so;[54]

(b) findings made in an excess of jurisdiction or a breach of natural justice when the Majority applied both the Alteration and Licensing Obligations under Art 27B conjunctively to determine the materiality of the Claimant's alleged breach, even though neither party had advanced that position in the Arbitration;[55]

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53 CWS at para 4.

54 CWS at paras 44–45.

55 CWS at para 52.

(c) findings made in a breach of natural justice when the Majority adopted a "manifestly incoherent" line of reasoning when it considered the Claimant's conduct post-termination of the Contract to then determine whether the Contract was validly terminated prior;[56] and

(d) the above findings, which when viewed cumulatively, reveal that they were made in breach of natural justice as the Majority appeared to have "closed their minds" and neglected to "apply themselves to the parties' arguments".[57]

23 With respect to the Claimant's application to set aside the Award in part, the Claimant submits that the Majority's findings in the counterclaim – that the Bond and Guarantee were not to be returned to the Claimant and instead treated as security for the amounts awarded to the Respondent in the Arbitration – should be set aside as they were derived from findings made either in excess of jurisdiction or a breach of natural justice.[58] This was because the issue concerning the scope of the Bond and Guarantee was never put before the Tribunal, nor asked of parties. Moreover, the documents necessary to interpret their scope were similarly never adduced.[59]

56 CWS at para 66.

57 CWS at para 73.

58 CWS at paras 74–89.

59 CWS at para 77.

The Respondent's case

24 The Respondent challenged each ground to set aside the Award both in whole and in part, making the following principal points:

(a) First, that the overarching policy of minimal curial intervention dictates that the court should be slow to pick apart and set aside an award barring clear and flagrant breaches of the tribunal's jurisdiction or the rules of natural justice.[60] This, *per* the Court of Appeal's decision in *BLC v BLB* [2014] 4 SLR 79 ("*BLC*") at [86], extends to adopting a generous approach to reviewing awards and resisting invitations to "carry out a hypercritical or excessively syntactical analysis" of the awards being challenged before the court. Instead, adopting that generous and proper reading of the Award would reveal that none of the Claimant's allegations that the Tribunal or Majority had adopted either an unforeseeable or inconsistent position were borne out.

(b) Second, and flowing from the above, for the Claimant to prove a breach of the fair hearing rule, the court must be satisfied that the findings made by the Tribunal or Majority were not only a "dramatic departure" from what parties could have reasonably foreseen from the arbitral record, but that the findings were determinative enough that Claimant suffered real or actual prejudice when it was deprived of the opportunity to address it: *CJA v CIZ* [2022] 2 SLR 557 ("*CJA*") at [72], citing *Soh Beng Tee* at [65(e)].[61]

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60 NEs at 44:30–45:24; RWS at paras 38 and 87.

61 RWS at paras 19, 41 and 74; NEs at 77:23–77:27 and 93:23–93:27.

(c) Third, that similarly as regards an alleged breach of the fair hearing rule, the test centres on whether the parties were *given* a reasonable opportunity to present their case, and not whether that opportunity was indeed exercised by the parties. Citing S Mohan J's decision in *Swire Shipping Pte Ltd v Ace Exim Pte Ltd* [2024] 5 SLR 706 ("*Swire Shipping*") at [91], the Respondent repeatedly emphasised that the courts should refrain from granting setting-aside applications to a party who, armed with the benefit of hindsight, now wishes that it had presented its case at the arbitration differently.[62]

(d) Fourth, that as regards the test for when a tribunal may be said to have exceeded its jurisdiction, tribunals are not strictly bound to select between either party's submissions where parties adopt diametrically opposing positions. Rather, *per* the Court of Appeal's decision in *Soh Beng Tee* at [65(e)], a tribunal is "perfectly entitled to embrace a middle path" even if that has not been directly raised by parties.[63]

Issues to be determined

25 To the extent that the Claimant's submissions were organised more clearly around the different impugned portions of the Award, as opposed to consolidated legal grounds for setting-aside, I considered the application as follows.

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62 RWS at paras 18 and 75.

63 RWS at para 74.

26 The Claimant's application to set aside the Award in its entirety turns on whether, in deciding that the Claimant had materially breached its contractual obligations:

(a) The Tribunal acted in excess of its jurisdiction or breached the fair hearing rule by relying on contractual provisions neither party had cited in the arbitration proceedings to decide an issue at [6.71]–[6.73] of the Award ("Ground 1");[64]

(b) The Majority acted in excess of its jurisdiction or breached natural justice by allegedly interpreting and applying a contractual provision differently from how the parties had agreed it ought to be interpreted at [6.37(10)] and [6.52] of the Award ("Ground 2");[65]

(c) The Majority breached natural justice by adopting a manifestly incoherent and inconsistent chain of reasoning by allegedly relying on post-termination conduct to determine whether the Contract was validly terminated at [6.45(iv)] and [6.49]–[6.52] of the Award ("Ground 3");[66] and

(d) In the round, the Majority breached natural justice when the effect of all three of the above alleged breaches are considered cumulatively ("Ground 4").[67]

27 Alternatively, the Claimant's application to partially set aside the Award turns instead on whether, in determining the Claimant's counterclaim in the

64 CWS at para 28.

65 CWS at para 29.

66 CWS at paras 63–69.

67 CWS at paras 72–73.

Arbitration, the Majority acted in excess of its jurisdiction or breached the fair hearing rule by again making findings on an issue that neither party had raised and were "unnecessary" to determining the parties' dispute at [6.78(1)]–[6.78(3)] of the Award ("Ground 5").[68]

The law on setting aside an arbitral award

28 Before setting out my decision on the issues above, I first sketch out the broad legal principles underlying how the court deals with setting-aside applications like the present.

29 Under s 24 of the International Arbitration Act 2001 (2020 Rev Ed) ("IAA"), the court may set aside an arbitral award if it was made either (a) in excess of the tribunal's jurisdiction (Art 34(2)(*a*)(iii) of the UNCITRAL Model Law on International Commercial Arbitration); or (b) in breach of the rules of natural justice in a manner which prejudiced the rights of either party (s 24(*b*) of the IAA). Throughout its submissions, the Claimant relies on both grounds interchangeably to impugn various portions of the Award.[69] I accordingly set out the precise relevant legal principles where each are engaged in the analysis below. Suffice to say at this stage that the parties broadly agree on and refer to the established tests for setting aside an award under these respective grounds.

30 With respect to portions of the Award that the Claimant alleges were made in excess of jurisdiction, parties agree that the court adopts a two-stage *de novo* inquiry: (a) first, the court identifies the matters within the scope of parties' submission to arbitration; and (b) second, the court determines whether the

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[68] CWS at paras 74–89.

[69] CWS at para 5.

arbitral award was appropriately limited to such matters or whether it addressed matters outside the scope of submission that were further irrelevant to the issues requiring determination: *CBX v CBZ* [2022] 1 SLR 47 at [11].[70]

31 With respect to portions of the Award that the Claimant alleges were made in breach of natural justice, the parties accept that the Claimant must in the course of its submissions identify: (a) the relevant rule of natural justice that was allegedly breached; (b) how that rule was allegedly breached; (c) in what way the breach was connected to the making of the Award; and (d) how the breach caused real or actual prejudice to the Claimant: *Soh Beng Tee* at [29].[71]

32 I move now to address each of the Claimant's alleged grounds for setting aside the Award in turn.

Ground 1: Whether the Tribunal's reliance on Arts 45.6 and 54 was in excess of jurisdiction or a breach of the fair hearing rule

33 The Claimant seeks to impugn [6.71]–[6.73] of the Award on grounds that the Tribunal's findings arising out of the articles cited below both (a) fell outside the scope of the parties' submission to arbitration,[72] and crucially; and (b) were never brought to the attention of the parties in the Arbitration.[73] Since neither party made submissions on the basis of these articles, the Claimant submits that the Tribunal's findings as regards those articles and its ultimate decision against the Claimant that arose therefrom should be set aside as these

70 CWS at para 33; RWS at para 20.

71 CWS at para 35; RWS at para 46.

72 NEs at 83:11–83:19.

73 CWS at para 41–49.

were findings made either in excess of jurisdiction or in breach of the fair hearing rule.[74]

34 I first set out below the challenged portions of the Award below for reference – making amendments where necessary to identify the parties as they appear in these setting-aside proceedings.[75]

> 6.71. The [Claimant] submits that once it suspended the Contract on 27 May 2022 it had no further obligations under the Contract, and in particular under Article 27B. The Tribunal finds that there were accrued breaches by the [Claimant] of this provision up until 27 May 2022. After a suspension and termination under the Contract by either party, Article 45.6 provides that the Supplier is "*not relieved of any of its obligations whatsoever under the Contract*". Article 54 also provides that the obligations under Article 27 survive termination, and it follows they also survive suspension.
>
>> ***"ARTICLE 54 – PROVISIONS SURVIVING THE CONTRACT***
>>
>> *Termination of the CONTRACT and/or COMPANY's provisional and/or final acceptance of WORK or any parts thereof shall not affect the operation of or PARTIES obligations arising out of, Articles 2, 3, 4, 5, 6, 7, 10, 11, 13, 14, 20, 22, 23, 24, 27 29, 30, 31, 32, 33, Chapter VI, 42, 43 44, 45, 45A, 46.3, 47.2, 47A, 48, 49, 51, 52, 54, 55 or 56 or any other provisions of the CONTRACT which expressly or by their nature survive termination and/or COMPANY's provisional and/or final acceptance of WORK."*
>
> 6.72. The Tribunal finds the <u>obligations under Article 27B survived the suspension and were breached by the [Claimant] both before and after this date.</u> It follows that the <u>[Claimant's] argument that once it suspended the Work, the [Respondent] could not terminate the Contract, has no merit.</u>
>
> 6.73. By majority, the Tribunal finds that the termination by the [Respondent] on 15 July 2022 was lawful, as it has found material breaches of the Contract by the [Claimant]. It follows there is no need to consider the alleged termination by the [Claimant] on 25 August 2022. Assuming that the [Claimant's]

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74 CWS at para 49.

75 Award at paras 6.71–6.73 (CBOD-1 at pp 320–321).

> suspension was valid under Article 45A. l, this did not relieve it of its ongoing duties under Article 27B – either prospectively, or with respect to breaches already committed. As noted above, the Contract expressly provides that Article 27B obligations survive suspension and termination.
>
> [emphasis in bold and italics in original; emphasis in underline added]

The parties' cases

35 For the purposes of this application, it is common ground that:[76]

(a) underlying the parties' dispute in the Arbitration as to whether the Claimant had materially breached its obligations under Art 27B was an anterior question as to whether those obligations were intended to survive the Claimant's suspension of the Contract on 1 June 2022;[77]

(b) in resolving that anterior question, the Tribunal had cited Arts 45.6 and 54 of the Contract and decided the Art 27B was intended to survive the Claimant's suspension of the Contract;[78] and

(c) the Tribunal had cited Arts 45.6 and 54 despite the fact that neither the parties nor the Tribunal had ever raised these articles over the course of the Arbitration – these articles had never featured in the proceedings nor in the list of post-hearing questions to the parties.[79]

36 What is disputed between the parties, however, is whether the Tribunal's reference to those articles in these circumstances forms sufficient ground to set

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76 CWS at paras 41–49; RWS at paras 9–24.

77 CWS at para 44; RWS at paras 9–12.

78 CWS at para 41; RWS at para 9.

79 CWS at paras 41–42; RWS at para 12.

aside the Award – be it for being a finding made in excess of jurisdiction or in breach of the fair hearing rule.

The Claimant's case

37 In the Claimant's submission, to the extent that Arts 45.6 and 54 were never raised by parties in the Arbitration, that immediately placed any reliance on those provisions outside the Tribunal's jurisdiction. Moreover, the Claimant submits that the Tribunal's decision as to whether Art 27B obligations were intended to survive the Claimant's suspension of the Contract turned *solely* on its interpretation and application of Arts 45.6 and 54 – such that it was determinative of the issue and all the more reason parties ought to have been granted an opportunity to address the interpretation of those Articles before the Tribunal.[80] By instead depriving the parties of their right to be heard by failing to put these provisions before the parties and "embark[ing] upon an entirely unforeseeable chain of reasoning", the Tribunal had breached the fair hearing rule.[81]

38 What made the Tribunal's reliance on Arts 45.6 and 54 particularly unforeseeable was because it was clear on its plain reading, in the Claimant's view, that neither applied to Art 27B.[82] I reproduce the articles below for reference:[83]

> **ARTICLE 45.6 – Other Rights or Remedies**
>
> Suspension, demands in respect of the BOND and/or Parent Company Guarantee, termination of the CONTRACT *in accordance with the provisions of Article 45* shall be without

80 NEs at 08:26–09:17.

81 CWS at para 41.

82 CWS at para 45.

83 Contract at Arts 45.6 and 54 (CBOD-1 at pp 489 and 498).

> prejudice to any rights or remedies that COMPANY may have under the CONTRACT, and *without relieving SUPPLIER of any of his obligations whatsoever under the CONTRACT*.
>
> **ARTICLE 54 - Provisions Surviving the Contract**
>
> Termination of the CONTRACT and/or COMPANY's provisional and/or final acceptance of WORK or any parts thereof shall not affect the operation of or PARTIES obligations arising out of, Articles 2, 3, 4, 5, 6, 7, 10, 11, 13, 14, 20, 22, 23, 24, *27*, 29, 30, 31, 32, 33, Chapter VI, 42, 43 44, 45, *45A*, 46.3, 47.2, *47A*, 48, 49, 51, 52, 54, 55 or 56 or any other provisions of the CONTRACT which expressly or by their nature survive termination and/or COMPANY's provisional and/or final acceptance of WORK.
>
> [emphasis added]

39 Had the Claimant been given the opportunity to address the applicability of these provisions to interpreting Art 27B, the Claimant submits it would have been able to argue that:

> (a) First, Art 45.6 applied only where the suspension and termination of the Contract is "in accordance with the provisions of [Art] 45" which sets out parties' obligations in the event that the *Respondent* suspends or terminates the Contract. However, the question before the Tribunal was whether Art 27B would survive the *Claimant's* suspension of the Contract.[84]
>
> (b) Second, Art 54 applied to Art 27 but should not have been read as applying to Art 27B. Given that Art 54 expressly references the provisions that would survive termination "by number and letter (*e.g.* Articles 45A, 47A), the reference to Article 27 but not Article 27B shows that the parties intended to <u>exclude</u> Article 27B from the list" [emphasis in original].[85]

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[84] CWS at para 45(a).

[85] CWS at para 45(b)(ii).

40 Accordingly, the Tribunal having now relied on these provisions despite never putting them before the parties, had caused prejudice to the Claimant as it had been unable to advance those submissions as to why those provisions ought not to apply.[86]

41 The prejudice faced by the Claimant was deepened by the fact that the Tribunal's findings on this issue had trickle-down effects on the rest of the Majority's findings in the Award.[87] Specifically, having concluded on the sole basis of Arts 45.6 and 54 that Art 27B imposed obligations on the Claimant which would survive the Contract's suspension, the Majority thereafter (a) considered the Claimant's failure to fulfil those obligations based on facts which occurred after the suspension; which (b) the Majority found amounted to a material breach; which (c) entitled the Respondent to terminate the Contract.[88]

The Respondent's case

42 While the Respondent does not contest that the provisions were never expressly put to the parties, the Respondent submits that the Tribunal's reliance on them flowed reasonably from and were sufficiently connected to parties' arguments.[89] Further, the Respondent submits that the extent to which the Tribunal relied on Arts 45.6 and 54 to resolve the question of Art 27B's survivability had been overstated by the Claimant.[90]

86 CWS at paras 46–49.

87 CWS at paras 47–49.

88 CWS at paras 47–49.

89 RWS at paras 9–13.

90 RWS at para 22.

43 During the Arbitration, the Respondent had invited the Tribunal to consider the overarching context and purpose of Art 27B within parties' wider contractual relationship and this supported its interpretation that Art 27B must have been intended by parties to survive suspension of the Contract.[91] This broader view – that Art 27B was entered into by parties at a time when sanctions were already in place for the purposes of making the Contract sanctions-resistant – was then echoed by the Tribunal in preceding portions of the Award.[92] Accordingly, the Respondent submits that not only was the Tribunal simply adopting the Respondent's position as argued in the Arbitration to decide that Art 27B survived the Claimant's termination, but the Tribunal's reference to Arts 45.6 and 54 was merely meant to supplement the reason given by the Respondent.[93] The Tribunal's reference to Arts 45.6 and 54 was never determinative of the issue.

44 Further, the Claimant's view that Arts 45.6 and 54 were plainly inapplicable to Art 27B was beside the point. The question put before the Tribunal was whether Art 27B ought to survive the Claimant's suspension of the Contract. In fact, the question of whether the Claimant's suspension of the Contract operated to "wipe out" the Claimant's obligations under Art 27B was expressly raised by the Claimant itself.[94] Given that both parties had adduced the full Contract before the Tribunal, it should have been apparent to the Claimant that the Tribunal may answer the question by "deploy[ing] a contractual interpretation chain of reasoning, including by reference to other

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91 RWS at paras 14–17.

92 RWS at para 11.

93 RWS at para 22.

94 RWS at para 16; see Transcript of Arbitration Hearing dated 3 December 2024 at 18:34–19:13 and 20:07–20:34 (CBOD-3 at pp 567–569).

provisions in the Contract".[95] It also should have also been particularly apparent to the Claimant from the language of Arts 45.6 and 54 that they were, at the very least, potentially relevant to the Tribunal's assessment of Art 27B's survivability. Particularly, Art 54 provided "in no uncertain terms that it sets out 'Provisions Surviving the Contract'".[96]

45 Accordingly, the Claimant's subsequent failure to raise the inapplicability of Arts 45.6 and 54 during the Arbitration, despite their clear *potential* applicability to the issue was therefore not the same as being deprived of the right to be heard on the issue.[97] The opportunity had arisen, the Claimant had simply failed to take it.[98] In any event, the Respondent submits that the Claimant did not suffer any real or actual prejudice as a result of the Tribunal's findings.[99]

My decision

46 Before I turn to address the substance of the Claimant's application as regards [6.71]–[6.73], I consider it necessary to deal with a brief preliminary point engaged by both parties. In their submissions, parties disagree on the *nature* of the findings in [6.71]–[6.73] in relation to the Tribunal's broader resolution of the dispute. The Respondent submits that [6.71]–[6.73] should be read as *supplementary* to earlier paragraphs in which the Tribunal had accepted the Respondent's submission that Art 27B should survive the Claimant's suspension of the Contract in light of parties' intention to build a sanctions-

95 RWS at para 15.

96 RWS at para 12(b).

97 RWS at paras 14–17.

98 RWS at para 17.

99 RWS at paras 22–24.

resistant contractual agreement.[100] The Claimant disagrees with this characterisation and considers that [6.71]–[6.73] encapsulates the Tribunal's *entire basis* for finding that Art 27B survives suspension of the Contract.[101]

47 In support of this position, the Claimant cites the following paragraphs wherein the Tribunal identifies its reasons for concluding that Art 27B survives suspension, and those were confined solely to [6.71]–[6.72], which rely on Arts 45.6 and 54:[102]

> 6.44. … [regarding the Claimant's obligations under Art 27B] These critical obligations as set out in paragraphs 6.71- 6.72 below, survive both suspension and termination.
>
> 6.50. … and indeed [the Claimant's] obligations under Article 27B survive termination -see paragraphs 6.71-6.72 below.

48 On this point, I do not fully agree with the Claimant. While I accept that Arts 45.6 and 54 feature strongly in the Tribunal's reasoning, they were not the entire basis for finding that Art 27B survives suspension of the Contract. In particular, the Tribunal agreed at [6.37(1)] with the Respondent that "at the time of the Contract formation, the Parties contemplated the imposition of sanctions, which had been introduced in 2014, and in Article 27B provided a road map imposing obligations on the Parties, which would attempt to save the Contract as much as possible, and protect the Parties relationship".[103] It was this point about parties' intention that founded the Respondent's submission during the Arbitration that Art 27B survived suspension on any ground.

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100 RWS at para 22.

101 NEs at 08:26–09:17.

102 NEs at 08:26–09:17; Award at paras 6.44 and 6.50 (CBOD-1 at pp 308 and 315).

103 CBOD at p 301.

49 It is clear from the arbitral record that parties had placed the issue of whether Art 27B was intended to survive the Claimant's suspension of the Contract well within the Tribunal's jurisdiction and that each was granted an opportunity to advance submissions for and against that proposition.[104] That the Tribunal did not decide the issue *exclusively* in line with the arguments advanced by parties does not of itself mean that it exceeded its jurisdiction.

50 In my view, where the issue concerns interpretation of a contract, it is natural and not unexpected for a tribunal to look at the contract as a whole and find support for a conclusion sought by one party from parts of the contract that neither side referred to. Therefore, I answer no to both these questions. I agree with the Respondent that on balance, the Tribunal's reliance on Arts 45.6 and 54 was neither in excess of its jurisdiction nor a breach of the fair hearing rule.

The Tribunal's reliance on Arts 45.6 and 54 was not in excess of jurisdiction

51 With respect to what falls within the scope of a tribunal's jurisdiction, the Court of Appeal outlined at [38] of *CJA* that:

> … the question of what matters were within the scope of the parties' submission to arbitration would be answerable by reference to five sources: the parties' pleadings, the list(s) of issues, opening statements, evidence adduced, and closing submissions at the arbitration. This was an elaboration of the principle that in considering whether the jurisdiction has been exceeded, *the court must look at matters in the round to determine whether the issues in question were live issues* in the arbitration. In doing so, *it does not apply an unduly narrow view of what the issues were*: rather, it is to have regard to the *totality of what was presented* to the tribunal whether by way of *evidence, submissions, pleadings or otherwise* and consider whether, in the light of all that, these points were live.
>
> [emphasis added]

104 CWS at para 44; RWS at para 16.

52 In my judgment, the Respondent's submission that the Tribunal's reliance on Arts 45.6 and 54 were within the scope of the Arbitration[105] was borne out on two points. First, from the very outset, parties had adduced the entire Contract as evidence before the Tribunal, which was then tasked to determine the meaning, nature and effect of a particular obligation contained in it. Second, and more pertinently, the Tribunal had been *invited* by the Respondent to make that determination by reference to the *entire* Contract and the role of Art 27B within it.[106] In other words, I came to the view that the specific reliance placed by the Tribunal on Arts 45.6 and 54 fairly derived from "the totality of what was presented to the tribunal" – this being the evidence before the Tribunal (*ie*, the Contract) and Respondent's submissions at the Arbitration: see *CJA* at [38].

53 The fact that neither Art 45.6 nor Art 54 ever featured in parties' submissions or in the questions parties fielded in the Arbitration also had little bearing on whether the findings amounted to an excess of jurisdiction. In *WRP Asia Pacific Sdn Bhd v Grant Thornton Singapore Pte Ltd* [2025] SGHC 198 ("*WRP Asia*"), Aidan Xu J considered that even if a particular contractual provision has not been explicitly raised in pleadings, it may nevertheless come within the scope of the parties' submission to arbitration where it is "clearly intertwined with the broader issue" before the tribunal: *WRP Asia* at [46] and [48], citing *Swire Shipping* at [61] and [48]. In this case, the issues before the Tribunal could be broken down as follows:

(a) Before the Tribunal was the ultimate issue of whether the Respondent was entitled to terminate the Contract.

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105 RWS at para 21.

106 RWS at para 10(a).

(b) The issue in (a) turned on whether the Claimant had materially breached its obligations under Art 27B.

(c) Anterior to that issue in (b) was what are the relevant facts the Tribunal may consider in deciding whether the Claimant materially breached its obligations under Art 27B. Specifically, were the obligations under Art 27B intended to survive suspension such that the Tribunal may continue to make findings based on the Claimant's inaction after it had suspended the Contract on 1 June 2022?

(d) In determining the issue in (c), the Respondent had invited the Tribunal to consider Art 27B, particularly as it relates to the wider contractual arrangement between parties.

54 In my view, the issue in [53(d)] put the rest of the Contract, particularly Arts 45.6 and 54 which concern the various obligations parties agreed would survive one party's suspension, squarely within the Tribunal's scope of jurisdiction – regardless of whether the Tribunal was ultimately correct in finding that they applied.

55 Tribunals are not required to abide slavishly by the pleadings parties put before them in an arbitration in order to stay within the confines of their jurisdiction. Rather, an award may be upheld, and tribunals may be allowed to depart from parties' pleadings, particularly where the findings were "premised on the fundamental point raised by [a party] in its submissions": *CJA* at [59].

56 Reviewing awards in this light coheres with the Court of Appeal's decision in *CJA*, which allowed the appeal against the decision made by the Judge below, holding at [40] that:

> [w]here we think the *Judge may have erred*, however, was in expressing the view that *a tribunal is not entitled to depart from the pleadings to the extent of making its decision based on a ground that has not been pleaded at all or is not ancillary to the pleadings* (GD at [50]). That appeared to inform his approach to the case: he found that since it was "never [the appellant's] case in the arbitration proceedings that it had a valid claim if there was no subsisting agreement after the Amended Agreement expired", the Tribunal exceeded its jurisdiction in finding that the appellant had a valid claim despite the expiry of the Amended Agreement (GD at [56]). But that approach is inconsistent with the *principle that the court must cast a much wider eye than that, and have regard to the totality of what was placed before the Tribunal*, as we have observed previously.
>
> [emphasis added]

57 I should add that when it comes to the interpretation of contracts, parties would not usually plead specific provisions of the contract as context for the interpretation they are putting forward and would instead set out the interpretation for which they contend. Detailed arguments for that interpretation would be made subsequently and might well refer to other articles of the contract. In the Arbitration, the Respondent put forward an interpretation of Art 27B in its pleadings,[107] that it obliged parties to use best efforts and act in good faith to agree adjustments to the Contract if faced with sanctions, and this specific obligation was raised by the Tribunal in the course of oral submissions and responded to by the Claimant's counsel.[108]

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107 Respondent's Statement of Claim in the Arbitration dated 23 August 2023 at para 34 (CBOD-2 at p 310).

108 Transcript of Arbitration Hearing dated 3 December 2024 at 20:01–20:34 (CBOD-3 at p 569).

58 For the foregoing reasons, I decline to set aside the Award on the basis that the Majority's findings on Arts 45.6 and 54 were made in excess of jurisdiction.

The Tribunal's reliance on Arts 45.6 and 54 was not a breach of the fair hearing rule

59 The strongest way of putting the natural justice or fair hearing challenge in the Claimant's favour would be that the Respondent's argument was that Art 27B survived suspension because this followed implicitly from the overall structure and intent of the contract, while the Tribunal relied on two specific provisions, namely Arts 45.6 and 54, as expressly providing for Art 27B's survival, when neither provision had been referred to in argument or raised to parties.

60 The fair hearing rule is premised on the foundational principle that parties have a right to be heard and to that end, are given a reasonable opportunity to present their case. Neither party seriously disputes that the Tribunal had to consider whether Art 27B survived the Claimant's suspension of the Contract.[109] Indeed, I agree with the Respondent that the arbitral record reveals that it was the Claimant themselves who first raised the point by contending that its obligations under Art 27B were "wipe[d] out" immediately upon its suspension of the Contract.[110] In light of this, the Tribunal had given both parties an opportunity at the hearing to make submissions on why each considered that Art 27B survived or did not survive the Claimant's

[109] CWS at para 44; RWS at paras 10 and 16.

[110] Transcript of Arbitration Hearing dated 3 December 2024 at 18:34–19:13 and 20:07–20:34 (CBOD-3 at pp 567–569).

suspension.[111] The Claimant's application now succeeds only if I consider that in the circumstances, it was also further incumbent on the Tribunal to (a) alert parties that it was considering an unargued premise for finding that Art 27B survives; and (b) invite parties to make further submissions responsive to the same. In my view, it was not.

61 On this point, the Respondent had pointed to [65] of the decision issued by Chan Seng Onn J in *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 to submit that such an invitation would be unnecessary if "an unargued premise flows reasonably from an argued premise".[112] I agree, but I further considered it particularly helpful to set out Chan J's holding at [65] in full:

> … the foundational principle which courts should not lose sight of is that parties who choose arbitration as their preferred system of dispute resolution must live with the decision of the arbitrator, good or bad. Commercial parties appoint arbitrators for their expertise and experience, technical, legal, commercial or otherwise. **These arbitrators cannot be so straightjacketed as to be permitted to *only* adopt in their conclusions the premises put forward by the parties.** If an unargued premise flows reasonably from an argued premise, I do not think that it is necessarily incumbent on the arbitral tribunal to invite the parties to submit new arguments. **The arbitral tribunal would be doing nothing more than inferring a related premise from one that has been placed before it.**
>
> [emphasis in original in italics; emphasis added in bold]

111 Transcript of Arbitration Hearing dated 3 December 2024 at 18:34–19:13, 20:07–20:34 and 23:20–23:33 (CBOD-3 at pp 567–569 and 572).

112 RWS at para 19.

62 Rather, the Court of Appeal has clarified in *Soh Beng Tee* at [65(d)]–[65(e)] that a breach of the fair hearing rule would only be made out in exceptionally limited circumstances, specifically it is:

> (d) …[o]nly in instances such as where the impugned decision reveals a dramatic departure from the submissions, or involves an arbitrator receiving extraneous evidence, or adopts a view wholly at odds with the established evidence adduced by the parties, or arrives at a conclusion unequivocally rejected by the parties as being trivial or irrelevant, might it be appropriate for a court to intervene. In short, there must be a real basis for alleging that the arbitrator has conducted the arbitral process either irrationally or capriciously. To echo the language employed in *Rotoaira* […] the overriding burden on the applicant is to show that a reasonable litigant in his shoes could not have foreseen the possibility of reasoning of the type revealed in the award. It is only in these very limited circumstances that the arbitrator's decision might be considered unfair.
>
> (e) It is almost invariably the case that parties propose diametrically opposite solutions to resolve a dispute. They may expect the arbitrator to select one of these alternative positions. The arbitrator, however, is not bound to adopt an either/or approach. He is perfectly entitled to embrace a middle path (even without apprising the parties of his provisional thinking or analysis) so long as it is based on evidence that is before him. Similarly, *an arbitrator is entitled – indeed, it is his obligation – to come to his own conclusions or inferences from the primary facts placed before him.* In this context, he is not expected to inexorably accept the conclusions being urged upon him by the parties. *Neither is he expected to consult the parties on his thinking process before finalising his award unless it involves a dramatic departure from what has been presented to him.*
>
> [emphasis added]

63 Put another way, a tribunal will only be found to have denied a party a reasonable opportunity to present its case if it adopts a chain of reasoning which dramatically departs from and bears no nexus to parties' submissions. Otherwise, I align with the position set out by Vinodh Coomaraswamy J at [159]

of *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 that:

> … a particular chain of reasoning will be open to a tribunal in any one of the following circumstances: (a) if it arises from the party's express pleadings; (b) if it is raised by reasonable implication by a party's pleadings; (c) if it does not feature in a party's pleadings but is in some other way brought to the opposing party's actual notice; or (d) if the links in the chain flow reasonably from the arguments actually advanced by either party or are related to those arguments.

64 In earlier determining whether the Tribunal's findings were made in excess of its jurisdiction, I considered that the Tribunal's reliance on Arts 45.6 and 54 fell within the scope of the Arbitration to the extent that the analysis flowed from the Respondent's submission: see above at [51]–[57]. That applied equally to determining whether the Majority's chain of reasoning was sufficiently connected to the Respondent's submissions and thereby reasonably foreseeable to the Claimant such that it had an opportunity to make its case.

65 The Respondent had invited the Tribunal to review parties' entire contractual arrangement in considering what parties must have intended in drafting Art 27B at multiple points in the Arbitration.[113] Not only would that have, in my view, placed the rest of the Contract along with its provisions within the express purview of the Tribunal (and thereby, the scope of the Arbitration), but it would have likewise placed the Claimant on reasonable notice that *all* other provisions in the Contract were now in play before the Tribunal for the purpose of deciding on the meaning and effect of Art 27B.

66 As regards the question of foreseeability, the Claimant submits that it could not have reasonably foreseen that the Majority would adopt this chain of

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113 RWS at para 10(a).

reasoning as it was plain on the language of Arts 45.6 and 54, in the Claimant's view, that neither applied to Art 27B: see above at [39].[114] Indeed, the Respondent also made no vigorous attempt to defend the correctness of the Tribunal's reliance on those provisions – except to emphasise that a setting-aside application is not a vessel through which a party may attempt to relitigate the merits of a dispute.[115]

67 To my mind, the fact that Arts 45.6 and 54 were clearly inapplicable to Art 27B not only had no bearing on the question of whether the Tribunal's reliance on them was foreseeable; if anything, the fact that these provisions (which purport to exhaustively set out the obligations parties intended to survive the Contract) so clearly failed to apply to Art 27B suggests that the opportunity to raise these provisions was all the more open to the Claimant at the Arbitration. It was the Claimant who failed to identify that opportunity and take it as it arose. I expand on these points in turn.

(1) The Majority's reliance on Arts 45.6 and 54 was reasonably foreseeable

68 First, on whether the Tribunal's chain of reasoning was foreseeable. Whether the Claimant ought to have foreseen the Tribunal's reliance on Arts 45.6 and 54 turns less on whether one could have reasonably foreseen that the Tribunal would decide that the articles *apply* to Art 27B, but rather on whether the articles were *relevant* to the question of Art 27B's survivability. Regardless of whether Arts 45.6 and 54 plainly applied or did not apply to Art 27B was beside the point – the question is solely whether they could have *informed* the interpretation of Art 27B *either way*.

114 NEs at 05:06–07:27.

115 RWS at para 13.

69 In this vein, I agree with the Respondent that the language of Arts 45.6 and 54 would have *prima facie* suggested that these articles were at least *relevant* to determining the question of Art 27B's survivability.[116]

(a) With respect to Art 45.6, even if I were to accept the Claimant's interpretation that it applies only when it is the *Respondent* who suspends the Contract, it at the very least sets out the circumstances under which suspension would apply "without relieving [the Claimant] of any of his obligations whatsoever under the [Contract]".[117]

(b) The same can be said for Art 54 which not only is expressly entitled "Provisions Surviving the Contract" but to the extent that it sets out (potentially even exhaustively) which provisions parties intended to have that effect,[118] it ought to reasonably have been on the Claimant's radar during the Arbitration.

70 Accordingly, on the Claimant's own construction of these provisions, it is my view that Arts 45.6 and 54 were not just tangentially relevant to answering whether Art 27B was intended to survive the Claimant's suspension. If anything, applying these provisions as the Claimant had argued would *favour* the Claimant's interpretation of Art 27B. Namely, the existence of Arts 45.6 and 54 (to the extent that each potentially could be read to have exhaustively set out the obligations parties intended to survive suspension) was in and of itself an opportunity for the Claimant to argue that *per* the *expressio unius est exclusio alterius* principle, the Claimant's Art 27B obligations must therefore have been

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116 RWS at para 12(b).

117 Contract at Art 45.6 (CBOD-1 at p 489).

118 Contract at Art 54 (CBOD-1 at p 498).

intended by parties to be extinguished upon the Claimant's suspension of the Contract.

71 Indeed, this may well be a point which the Claimant considers as simply bolstering its submission that it was particularly prejudiced by the Tribunal's failure to put either of the articles before the parties for their submissions. Had the Tribunal drawn the Claimant's attention to these provisions then certainly, the Claimant would have been able to press the point and could have reasonably convinced the Tribunal otherwise.

72 But this is where I find the Court of Appeal's pronouncement in *CJA* instructive, and this goes to my second point on the adequacy of the opportunity granted to the Claimant to address the point on Art 27B's survivability.

(2) The Claimant had an adequate opportunity to present its case

73 As held by Judith Prakash JCA at [75] of *CJA* "there is a difference between, on the one hand, a party having no opportunity to address a point or his opponent's case, and a party *failing to recognise or take the opportunity which exists*; the latter does not involve a breach [emphasis added]" of the fair hearing rule (as contained in s 33(1) of the Arbitration Act 1996 (c 23) (UK)). In my view, this is a case where the Claimant, had it properly considered its case, had all along the opportunity to address the outright inapplicability of these provisions but had, for whatever reason, opted not to. This was not a situation where reference to the provisions would have been anterior to the Claimant's case or simply an argument that the Claimant *could* have made merely for completeness. Considering the inapplicability of these provisions would have advanced the Claimant's case had the Claimant thought to raise it.

74 This was also not a case where the point was so obscure and remote to the arguments advanced by the parties that it could not possibly have come to the Claimant's attention but for being raised by the Tribunal. The question at large concerned the interpretation of a contractual provision. I agree with the Respondent that it was entirely foreseeable in the circumstances that that question could have been answered by reference to other provisions within the same contract,[119] particularly where the title of at least one of the provisions was directly relevant to the question at hand.

75 At the hearing before me, counsel for the Claimant had advanced a further argument on the limited opportunity it had to address this point on Art 27B. Namely, counsel had contended that some consideration should be given to the fact that the point concerning the survivability of Art 27B had purportedly only arisen at an oral hearing before the Tribunal.[120] The point counsel sought to make was that "when things are raised only orally … there is a certain level of imprecision that makes it difficult for [parties]' to have a chance to respond properly".[121] I disagree on account of two points.

(a) First, I agree with the Respondent that while the point had never been expressly put to the Claimant prior to the oral hearing before the Tribunal, it was always a latent issue underlying parties' dispute. From the outset, the Respondent had described the Claimant as having been in "continuous breach of its obligations" under Art 27B of the Contract in

119 RWS at para 15.

120 NEs at 101:11–101:14.

121 NEs at 101:11–101:14.

its written submissions before the Tribunal.[122] That should have put the Claimant on adequate alert that the point was in contention.

(b) Second, and regardless of the fact that the precise point may have arisen most clearly in an oral hearing – it should be noted that it was the Claimant itself who first expressly floated the issue of Art 27B's survivability before the Tribunal.[123] The point was not taken by the Respondent, nor was it a point put to the Claimant in passing by the Tribunal. Rather, it was the Claimant, who had on its own accord, put forth its reasons for why its obligations ought to have ended once it had suspended the Contract.[124]

76 To this end, I reproduce below extracts from *two* hearing transcripts in the Arbitration which show that it was the Claimant that had prepared to bring the issue concerning Art 27B's survivability to the Tribunal. In its submissions, the Respondent had only directed me to the transcript of the *final* hearing in the Arbitration to show that the issue had arisen before the Tribunal and the Claimant had an opportunity to put forward its reasons.[125] However, a closer review of the arbitral record reveals that a similar point had been made by the Respondent months before in an earlier hearing. For clarity, I have amended the extracts to identify parties as they appear in this setting-aside application.

77 In September 2024, the Respondent made submissions before the Tribunal on the broad nature and purpose of Art 27B and made a further point

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122 RWS at para 10(a); Respondent's Statement of Claim in the Arbitration dated 23 August 2023 at paras 66 and 244 (CBOD-2 at pp 318 and 357).

123 RWS at para 16.

124 RWS at para 16.

125 RWS at para 16.

on how the article was intended to interact with suspensions in the event of sanctions.[126]

> Respondent's counsel: Let's start with then Article 27B of the Contract. And as a starting point this is, as the Tribunal will know, a very detailed provision. It is almost two pages long. It contemplates several different scenarios, which we will analyse. *Overall, there's one transversal obligation that is mentioned repeatedly in this provision. It's almost like a mantra, and it indicates what the Parties would do if difficulties arose. And that overall objective is that, the Parties would continue the relationship economically, legally, structurally as closely as possible, to that contemplated under the Contract*, to the maximum extent permitted by the applicable law or the sanctions. That is, the robust obligation.
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> …
>
> [T]here's one final part, I would like to bring to the Tribunal's attention, and that is in the penultimate line. In the last sentence it says, "for the avoidance of doubt, the relevant obligations of the Parties shall be suspended." And *in my submission, the emphasis here on the relevant obligations is important*. And this is a scenario, where we are talking about some piece of the equipment needing a license. *The Contract says that in this scenario, that specific relevant obligation is suspended, not the entire Contract.*
>
> [emphasis added]

126 Transcript of Arbitration Hearing dated 16 September 2024 at 17:25–18:37 (CBOD-2 at pp 648–649).

78 Months later in December 2024, the Claimant, appearing before the Tribunal, takes the opportunity to respond.[127]

Arbitrator:	Thank you. Mr [Y], any further comments?
Claimant's counsel:	We just referred to our submissions on that particular point, *I would like the opportunity*. I'm happy to do it now, if it would be helpful, to respond directly to the Article 27(b) allegations that have been made. Particularly in the context of this cumulative argument, it's important to understand what those allegations are. And why it is our view, that none of them are relevant. So, I think *two points are very important before you even consider the 27(b) related arguments*. They both relate to the fact that [Respondent] sought to terminate the contract on July 15th. The first reason that that is critical, is because having treated the contract as being live between May 27th and July 15th, the [Respondent] likewise was obligated to comply with its own obligations under the contracts during that period. And that included the obligation to pay the invoice for PM-3. It chose not to do that. Because it failed to do so, it triggered the right for [Claimant] to suspend the agreement, which it did and which is deemed effective as of June 1st. *That suspension also applies to any obligations under Article 27(b). They can't have it both ways. They can't claim that they're somehow entitled to withhold payment of PM-3, which is necessary in [Respondent's] own words, during the hearing, to allow in their view, [Claimant] to perform the Contract, but at the same time insist upon performance of Article*

127 Transcript of Arbitration Hearing dated 3 December 2024 at 18:32–19:12 (CBOD-3 at pp 567–568).

27(b). So, the suspension wipes out their Article 27(b) claims.

[emphasis added]

79 In response to a further question from the Tribunal, the Claimant then repeated its submissions as to why its obligations under Art 27B should have been extinguished upon suspension of the Contract.[128]

Arbitrator:	… Just taking on one point. You suspend in May, and then later on, sanctions come. *There is a specific sanctions [Art] 27(b).* And you said that all your obligations end because they're being suspended. *But it can't be right, because 27(b)(ii)(a),* if it becomes illegal to fulfil, you still are required to negotiate [INAUDIBLE] to agree on adjustment, aren't you?
Claimant's counsel:	So, I'm glad you asked that question, because the point I'm trying to make here is a specific one, and it relates to the non-payment of PM-3. So, you're referring to suspension based on sanctions. It's our position that we properly, and in fact, were required to — it was automatic we say — the suspension that occurred on May 27 … But the fact remains they made a commercial decision not to pay the PM-3 invoice on June 1st, and because they did not do so, that fact alone gave the [Claimant] the right to suspend, as it did, the Contract as of that date. And it's that suspension that I was referring to, that suspended any purported obligations that [Claimant] may have had under Article 27(b) after that date. *The point here is that, the [Respondent] cannot have it both ways. They can't refuse to pay PM-3 on June 1, and somehow avoid the consequences of that, which is suspension, and at the same time*

128 Transcript of Arbitration Hearing dated 3 December 2024 at 20:01–20:34 (CBOD-3 at p 569).

> *demand performance of other provisions, including Article 27(b) under the Contract.* And that's why we say, failure to pay the PM-3 invoice essentially wipes out all of their Article 27(b) claims because they can't point to any conduct after June 1, *and they don't point to any conduct after June 1 to support those Article 27(b) claims.*
>
> [emphasis added]

80 Importantly, a distinction must be drawn between opportunities that a tribunal must give a party, and opportunities that parties themselves open the door to but then fail to exploit and take to its fullest. In my view, the Claimant, having had months to prepare and then having been the one to re-surface this point before the Tribunal, had a fair enough opportunity to consider and set out its reasons as to why its obligations under Art 27B were suspended along with the Contract on 1 June 2022. And to the extent that the Tribunal's reliance on Arts 45.6 and 54 then flowed from the submissions put forward by the Respondent and were contained within the Contract (as compared to buried in some other less central document in the Arbitration), the Tribunal was not bound to specifically put these two articles before the parties for further submissions.

81 As to whether this was an adequate opportunity for the Claimant to make its case, the Court of Appeal has held in *Phoenixfin Pte Ltd v Convexity Ltd* [2022] 2 SLR 23 at [52] that:

> [w]hen … the court has to consider whether a party has been afforded natural justice during arbitration proceedings, the pivotal question is always whether that party has been given a *fair opportunity to deal with an issue … The extent of the opportunity needed to be given depends on the nature of the issue. If the issue is a legal one, then sufficient time to make legal submissions is all that is required.*
>
> [emphasis added]

82 In my judgment, the Claimant had an adequate opportunity to make its point at the hearing. The Claimant had, on its own accord raised its point, and upon questioning by the Tribunal further reiterated its position. This was even notwithstanding the Tribunal's question to the Claimant which indicated its consideration of the Respondent's view that Art 27B was a "specific sanctions" provision.[129] Counsel for the Claimant had sought to impress upon me at the hearing that its opportunity to make submissions here had been limited because it was arguing exclusively on grounds that the Contract was suspended for the Respondent's non-payment of PM-3.[130]

83 I again do not consider that this takes the Claimant's case very far. For one, this was not borne out on the arbitral record, which shows that the Claimant had advanced its argument on suspension on multiple grounds, including sanctions, *force majeure*, and illegality in addition to the Respondent's non-payment.[131] Indeed, its arguments on the survivability of Art 27B were limited to suspension for non-payment, but that, if anything, was on the Claimant's own election as to how it chose to run its case. The Respondent had, by that point, made its submissions on the limited survivability of Art 27B in the case of sanctions and illegality – it remained for the Claimant to respond accordingly. Again, this was not an instance in which the Claimant was deprived of an opportunity to make its case, but simply one the Claimant opted not to take and now must bear the consequences of: see *CJA* at [75].

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129 Transcript of Arbitration Hearing dated 3 December 2024 at 20:01–20:05 (CBOD-3 at p 675).

130 NEs at 11:06–11:23.

131 Claimant's Statement of Defence and Counterclaims in the Arbitration dated 13 December 2026 at paras 85–190 (CBOD-2 at pp 399–429).

84 I deal now with a final point made by counsel for the Claimant at the hearing – that the Claimant suffered a breach of the fair hearing rule particularly because the Respondent had not put forward a specific legal basis for which it claimed that Art 27B ought to survive suspension.[132] In the Claimant's submission, since the default position on suspension is that it would generally operate to suspend *all* ongoing obligations under the Contract, the burden fell on the Respondent to prove precisely why that suspension operated to the exclusion of Art 27B.[133] The Respondent's broad reference to the overarching purpose of Art 27B was far too vague to enable the Claimant to know the case it had to respond to.[134] For the Tribunal to have effectively stepped into the shoes of the Respondent to provide a contractual basis on which it decided the issue, and then not put it before the Claimant was accordingly a breach of the fair hearing rule.[135]

85 I do not agree. Of course, in an ideal situation, it would have been helpful for the Respondent to have more fully fleshed out its case for why Art 27B should have survived suspension of the Contract. But this does not detract from the fact that the Respondent had in the September hearing already put forward a position – based in large part on the broad purpose of Art 27B but also on its contractual interpretation of its "penultimate line" on suspension.[136] In any event, even if the Respondent's submissions left much to be desired, this would not operate to bar a tribunal from reading the contract as a whole and relying on other parts of it. Especially where they flow reasonably from one party's

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[132] NEs at 89:25–90:05.

[133] NEs at 89:25–90:05.

[134] NEs at 90:03–90:05.

[135] NEs at 90:08–90:11.

[136] Transcript of Arbitration Hearing dated 16 September 2024 at 17:25–18:35 (CBOD-2 at pp 648–649).

submissions – and this applies even if submissions were less than satisfactory to answer the point. More importantly, the context in which the Art 27B submission arose was in connection to the Claimant's effective defence – that it ought not to be held liable for its failure to act after it had purported to suspend the Contract on 1 June 2022. Having found that the Claimant enjoyed an adequate opportunity to make that submission, I do not consider that a breach of the fair hearing rule can be made out on the facts before me.

86 For the foregoing reasons, I dismiss the Claimant's application to set aside the Award based on the findings made at [6.71]–[6.73] regarding Arts 45.6 and 54 of the Contract. In my view, none of these findings were made in excess of jurisdiction or in breach of the fair hearing rule.

Ground 2: Whether the Majority's interpretation and application of Art 27B was in excess of jurisdiction and a breach of natural justice

87 Parties agree that both had interpreted Art 27B and advanced their submissions in the Arbitration on the basis that Art 27B imposed *disjunctive* obligations on the Claimant.[137] In the event of sanctions, the Claimant was to *either*: (a) alter its equipment to comply with prevailing sanctions; *or* (b) apply for licenses from the authorities to enable delivery of the equipment.

88 Indeed, this is borne out by the wording of Art 27B which, in so far as it is relevant, provides that:[138]

> **ARTICLE 27B**
>
> …
>
> (b) If EQUIPMENT PACKAGE is considered to be SANCTIONED COMPONENT or contemplates the use of

137 CWS at para 51; RWS at para 26.

138 Contract at Art 27B (CBOD-1 at p 454).

> SANCTIONED COMPONENTS, SUPPLIER shall, at the option of COMPANY in consultation with SUPPLIER and acting reasonably, *either* (A) subject to Article 15.5 and Article 22, ensure that such EQUIPMENT PACKAGE (as applicable) shall be altered (at COMPANY's cost), to the extent possible and to the extent SUPPLIER is satisfied with the quality of any relevant alternative items, in such a manner so as provide for the use of any relevant alternative items having substantially the same or better technical characteristics and/or capabilities and not being SANCTIONED COMPONENTS, *or* (B) subject to Article 15.5 and Article 22 immediately apply for a prior permit or authorization of the relevant SANCTIONS AUTHORITY before executing relevant WORKS and/or actions and use reasonable endeavours to obtain such prior authorization_and in case such relevant permit or authorization can be issued only after fabrication of the EQUIPMENT PACKAGE, SUPPLIER undertakes to apply for all necessary permits or authorizations prior to exportation of EQUIPMENT PACKAGE for delivery to COMPANY …
>
> [emphasis added]

89 The root of the Claimant's complaint on this ground, however, is that notwithstanding that agreement between parties, the Majority nevertheless:

(a) interpreted Art 27B as imposing conjunctive obligations on the Claimant by "incorrectly" stating that parties had proceeded on a "dual track basis" *vis-à-vis* Art 27B at [6.37(10)] of the Award;[139] and

(b) thereafter assessed whether breaches of *both* limbs of Art 27B *cumulatively* gave rise to a material breach by stating that its findings that the Claimant had materially breached the Licensing Obligation were "subject to the findings" made earlier in relation to the Alteration Obligation at [6.52] of the Award.[140]

139 CWS at paras 51–52.

140 CWS at paras 54–55.

90 I set out below the challenged portions of the Award and highlight the key words the Claimant cites in support of its submission.[141]

> 6.37(10). … Although Article 27B.1(b) provided an option for the [Respondent] to instruct the [Claimant] to either alter the Equipment Package or source alternative items, the Parties proceeded on a ***dual track basis*** *of seeking alteration/alternative supply and applying for license applications*, without formally amending the provision.
>
> …
>
> 6.52. The Tribunal by majority, finds that the [Claimant] was in material breach of its obligations under Article 27B.1(b) by acting unreasonably in submitting inadequate applications, and not challenging [the licensing authority's] preliminary decisions, or seeking a court to suspend issuance of final denials. *This findings on licences* ***are subject to the findings above that alternative [redacted] vendors could have been found for listed items****, or listed components shipped with non-listed ones in a single shipment.*
>
> [emphasis in bold and italics added]

The parties' cases

91 The Claimant submits that having "charted its own course" by interpreting Art 27B as imposing *conjunctive* obligations on the Claimant, despite parties' agreement otherwise,[142] the Majority had exceeded its jurisdiction and breached natural justice.[143] The fact that parties had agreed on the nature of Art 27B (*ie*, that it imposed disjunctive obligations on the Claimant), meant that the issue now fell outside of the Tribunal's jurisdiction because the nature of Art 27B was never a dispute put before it.[144] Similarly, to the extent that this was central to the Majority's finding that the Claimant had

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141 Award at paras 6.37(10) and 6.52 (CBOD-1 at pp 304 and 316).

142 CWS at para 52.

143 CWS at para 59.

144 NEs at 21:07–21:18.

materially breached its obligations under Art 27B and neither party disputes that "[n]o notice was given … that the Majority would treat [the Claimant's] Art 27B obligations as conjunctive",[145] the Majority had likewise breached the rules on natural justice.

92 The Respondent disputes the Claimant's submission on three grounds.[146]

(a) First, that the Majority had not, in fact, interpreted Art 27B conjunctively nor did the Majority apply it as such when considering the question of materiality.

(b) Second, that regardless of parties' agreed interpretation of Art 27B, it was well-within the scope of the arbitration and entirely foreseeable that the Tribunal would have had to determine the nature of the obligations before assessing whether they had been individually breached.

(c) Third, that the finding had not, in any event, prejudiced the Claimant as the Majority had assessed whether the Claimant had breached each limb of Art 27B and concluded that each breach independently amounted to a material breach.

My decision

93 On both parties' submissions, the entirety of the Claimant's complaint rests on how the findings of the Majority should be interpreted. I would need first to agree with the Claimant that the Majority had applied Art 27B conjunctively. The Claimant's reading is based on the Majority's use of the

145 CWS at para 57.

146 RWS at paras 26–38.

words "dual track basis" to describe parties' approach to complying with Art 27B, along with the Majority's finding that the Claimant had materially breached the Licensing Obligation "subject to" the Majority's findings on the Alteration Obligation. In other words, if I do not agree with the Claimant on how the Award should be read, then there is no reason to address the rest of the Claimant's submissions advanced on the basis of their reading.

94 In the round, I decline to set aside the Award as I disagree with the interpretation put forward by the Claimant. Instead, I agree with the Respondent that a proper reading of the Award is that the Majority did not adopt a conjunctive interpretation of Art 27B.[147]

95 In arriving at its view that the Majority had adopted this interpretation despite parties' agreement, the Claimant drew chiefly on two phrases in the Award to each ground its submission that the Majority had (a) first, "incorrectly" interpreted its obligations in Art 27B as conjunctive at [6.37(10)]; and (b) second, applied that incorrect interpretation and determined the question of whether the Claimant had materially breached Art 27B by assessing the Claimant's conduct as regards both limbs of Art 27B *cumulatively* at [6.52]. I consider each in turn.

The Majority did not interpret Art 27B inconsistently with parties' submissions

96 With respect to the first portion of the Award, the Claimant submits that [6.37(10)] reveals that the Majority had adopted an entirely inconsistent interpretation of Art 27B as not only was it clear on the provision's plain wording that its obligations were disjunctive, but neither party had made

[147] RWS at paras 27–29.

submissions suggesting that parties had nevertheless proceeded on such a "dual track basis".[148]

> 6.37(10). … Although Article 27B.1(b) provided an option for the [Respondent] to instruct the [Claimant] to either alter the Equipment Package or source alternative items, the Parties proceeded on a ***dual track basis*** *of seeking alteration/alternative supply and applying for license applications*, without formally amending the provision.
>
> [emphasis in bold and italics added]

97 The Respondent's counter to the interpretation put forth by the Claimant is twofold. First, that the Majority was not, in fact, interpreting Art 27B. The words "dual track basis" were merely the Majority's "observation" of parties' approach to Art 27B, as opposed to a "finding on the nature of [the Claimant's] Art 27B obligations".[149] Second, that the Respondent's competing interpretation is then borne out by the language adopted by the Majority within this paragraph and its placement *vis-à-vis* the wider Award.[150] Broken down, the Majority did not "use the word 'finds'" in [6.37(10)], as compared to when it made clear findings on questions of breach in subsequent paragraphs in the Award.[151] And the absence of the word "finds" coheres with the fact that [6.37(10)] appears under the broader heading of "Chronology after Sanction" – where the Majority laid out the facts following the imposition of new sanctions *before* it turned to decide whether those facts suggest that the Claimant had materially breached its obligations under Art 27B.[152]

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148 CWS at para 51.

149 RWS at paras 5(b) and 27–29.

150 RWS at para 29.

151 RWS at para 29(c).

152 RWS at para 29(a).

98 I accept the Respondent's interpretation of the Award.[153] I note the Claimant's submission that these must have been findings in so far as the main header above [6.37] was "Tribunal Finding".[154] But the Respondent's interpretation still characterises it as a finding, but as a finding of fact concerning what the parties did, rather than a finding concerning what their legal obligation was.

99 Moreover, accepting that the Majority had made a factual *finding* that parties had proceeded on a "dual track basis" – is also, in fact, consistent with what had been pleaded and argued by parties in the Arbitration. At the hearing before me, counsel for the Claimant argued vigorously for the point that parties could have *never* proceeded on a "dual track basis" as:[155]

(a) doing so would have been inconsistent with the approach set out in Art 27B and any departure therefrom had to be via a formal amendment to the Contract. Neither party suggests that any such formal amendments were made;[156] and

(b) the Claimant was only to comply with Art 27B via whichever "track" the Respondent had elected to pursue. To the extent that the Respondent had consistently provided in writing that the Claimant was to go under the Licensing Obligation route, the Alteration Obligation was no longer in play.[157]

153 RWS at para 29.

154 NEs at 14:27–15:03.

155 NEs at 14:14–14:19.

156 NEs at 18:28–19:16.

157 NEs at 14:20–14:26.

100 I accept that this was the Claimant's primary submission at the Arbitration.[158] However, contrary to what counsel for the Claimant had advanced before me at the hearing, this was not the *only* way parties had made their submissions. It was clear even from the get-go in the Respondent's Notice of Arbitration that its claim of breach was based on the Claimant's *simultaneous* failure to comply with either obligation under Art 27B.[159]

> 53. … the [Claimant] violated its obligations under Article 27B of the Contract.
>
> 54. *First*, the [Claimant] failed to consult with the [Respondent] as envisaged by Article 27B.l(b) of the Contract and never requested the [Respondent's] decision whether the [Claimant] shall either to alter or apply for prior authorisations with respect to the equipment, which was allegedly impacted by the SANCTIONS.
>
> 55. *Second*, the [Claimant] did not take any reasonable measures to ensure scouting for relevant alternatives to the items allegedly restricted by the SANCTIONS and(or) for alternative subcontractors, nor provide any sufficient evidence thereof.
>
> 56. *Third*, the [Claimant] failed to make its best efforts to obtain a license or approval from [the licensing authority] in order to fulfil its obligations under the Contract. …
>
> [emphasis in original]

101 Further, in the Respondent's later Statement of Claim in the Arbitration, it likewise stated that it had "also suggested to consider alternative equipment configurations and searching for SANCTIONED COMPONENTS on alternative markets".[160]

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158 Award at para 6.36(a) (CBOD-1 at p 300).

159 Respondent's Notice of Arbitration in the Arbitration dated 28 November 2022 at paras 53–56 (CBOD-2 at p 224).

160 Respondent's Statement of Claim in the Arbitration dated 23 August 2023 at para 65 (CBOD-2 at pp 318–319).

102 In response, the Claimant asserted that it had "complied with *all* such obligations, including by seeking to negotiate a modification of the Contract in good faith, by *searching for relevant alternatives to the sanctioned items* and by using its best efforts to obtain a license [emphasis added]".[161] The Claimant further set out its full position on *both* obligations under Art 27B in its Statement of Defence.[162] Finally, even after asserting that it was bound to comply with *only* the Licensing Obligation (as elected by the Respondent), the Claimant nevertheless pursued the *alternative* submission that it had also made best efforts to comply with the Alteration Obligation.[163]

103 In light of the above, there was nothing inconsistent with in the Majority's finding that parties could be *described* as having proceeded on a "dual track basis". The Claimant had on the facts sought to fulfil both its obligations to seek alternative equipment and *simultaneously* submit licenses for approval. I turn now to consider whether this finding could then be said to have had some bearing on the Majority's assessment of the materiality of the Claimant's Art 27B breach.

The Majority did not apply Art 27B inconsistently with parties' submissions

104 Again, the Claimant's submissions on this point turn on the use of the phrase "subject to" in [6.52] of the Award.[164]

> 6.52. The Tribunal by majority, finds that the [Claimant] was in material breach of its obligations under Article 27B.1(b) by acting unreasonably in submitting

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161 Claimant's Response to the Notice of Arbitration and Counterclaims dated 24 January 2023 at para 70 (CBOD-2 at p 255).

162 Claimant's Statement of Defence and Counterclaims in the Arbitration dated 13 December 2023 at paras 122–143 (CBOD-2 at pp 411–416).

163 Award at para 6.36(a)–(b) (CBOD-1 at pp 300–301).

164 CWS at para 54; Award at para 6.52 (CBOD-1 at p 316).

> inadequate applications, and not challenging [the licensing authority's] preliminary decisions, or seeking a court to suspend issuance of final denials. *This findings on licences* ***are subject to the findings above that alternative [redacted] vendors could have been found for listed items****, or listed components shipped with non-listed ones in a single shipment.*
>
> [emphasis in bold and italics added]

105 In the Claimant's submission, the phrase "subject to" means that *but for* the Majority's earlier finding that the Claimant had breached its Alteration Obligation, it would not have found the Claimant in material breach of Art 27B even if it considered the Claimant in breach of the Licensing Obligation.[165] In short, the Claimant suggests that the Majority here had decided the materiality of the Claimant's breach of Art 27B "in one breath".[166] Putting aside the Claimant's submission that it ought not to have been bound by the Alteration Obligation in the first place, the Claimant submits that this was *not* a situation wherein the Majority had considered the Claimant in material breach of both the Alteration Obligation and Licensing Obligation independently.[167] The Majority did not conclude, in the Claimant's view, that it was in material breach of both limbs and therefore certainly in material breach of Art 27B.[168] Rather, based on its inconsistent interpretation of Art 27B above, the Majority had folded the issue into a single strand of analysis and found the Claimant in material breach of Art 27B *only* when it considered the *cumulative* effect of the Claimant's conduct *vis-à-vis* both limbs of Art 27B.[169]

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165 CWS at paras 54–55; NEs at 27:25–27:30.

166 NEs at 26:15–26:25.

167 NEs at 28:21–29:03.

168 NEs at 28:21–29:03.

169 NEs at 28:21–29:03.

106 I disagree with that interpretation of the Award, particularly given that it hinges centrally on the effective nitpicking of a single phrase in the Award. I agree with the Respondent that not only does such a reading this risk reading the Award out of context, but that the court should refrain from encouraging parties to pick apart the precise language adopted by tribunals.[170] The Respondent rightly relies on the Court of Appeal decision in *BLC*, where the court considered at [86] that the policy of minimal curial intervention demands that courts take a "generous approach" to reviewing awards and should refrain from carrying out a "hypercritical or excessively syntactical analysis of what the arbitrator has written" or "approach an award with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards, with the objective of upsetting or frustrating the process of arbitration".

107 Adopting that generous approach to reviewing the Award, it becomes clear that the Majority simply considered the Claimant's obligations under both limbs of Art 27B for completeness, and this very much mirrored parties' submissions in this regard. Both parties submitted that both obligations were disjunctive, but both still went to the effort of outlining their submissions for each limb independently: see above at [100]–[102]. The Majority, having done the same, cannot be said to have operated on a different interpretation of Art 27B, much less said to have stepped beyond the scope of parties' submissions.

108 I further disagree with the Claimant's submission that the Majority considered the question of materiality in a single breath. Rather, I agree with the Respondent that it is sufficiently clear from [6.44] of the Award that the Majority had found the Claimant in breach of its Alteration Obligation – and

170 RWS at para 38.

found that that alone amounted to a material breach.[171] The same was said by the Majority in relation to the Licensing Obligation at [6.52].[172]

> 6.44. … Therefore, by majority, the Tribunal finds the [Claimant] was in material breach of its obligations under Article 27B to seek to descope or alter the scope of sanctioned Equipment up to 3 June 2022, source alternative components for sanctioned Equipment from [redacted] jurisdictions (which even if specialised there were alternatives), and negotiate in good faith to adjust the Contract (including descoping).
>
> …
>
> 6.52. The Tribunal by majority, finds that the [Claimant] was in *material breach of its obligations under Article 27B.l(b) by acting unreasonably in submitting inadequate applications, and not challenging [the licensing authority's] preliminary decisions*, or seeking a court to suspend issuance of final denials. This findings on licences are subject to the findings above that alternative [redacted] vendors could have been found for listed items, or listed components shipped with non-listed ones in a single shipment.
>
> [emphasis added]

109 Moreover, I disagree with the Claimant's submission that the phrase "subject to" must mean "dependent on".[173] I agree with the Respondent that a fairer interpretation would in fact be that the Majority acknowledged that its findings in [6.52] had to be read together with its findings in [6.44], because the Majority understood that the Claimant would only be in breach of Art 27B if it was satisfied that the Claimant had complied with neither the Alteration Obligation or the Licensing Obligation.[174] It would not matter that the Majority considered the Claimant in breach of one of the limbs, if on a disjunctive reading of Art 27B, the Claimant was always entitled to *not* fulfil one limb in favour of

171 RWS at para 37; Award at para 6.44 (CBOD-1 at p 308).

172 RWS at para 37; Award at para 6.52 (CBOD-1 at p 316).

173 CWS at para 55.

174 RWS at para 36.

another. The Majority had to conclude that both limbs were not fulfilled for it to find that the Claimant had definitively failed to meet its obligations under Art 27B. This approach taken by the Majority, if anything, supports the Respondent's submission that the Majority had interpreted Article 27B consistently with the way the parties had (as a disjunctive set of obligations). Such an interpretation cannot be said to be in excess of its jurisdiction.

110 For the foregoing reasons, I dismiss the Claimant's application to set aside the Award. I did not accept the Claimant's threshold submission that the Majority had interpreted and applied Art 27B inconsistently with what had been pleaded by parties.

Ground 3: Whether the Majority's findings on the Claimant's post-termination conduct were manifestly incoherent

111 On the third ground mounted by the Claimant, the complaint turns on whether the Majority had adopted a manifestly incoherent line of reasoning by considering the Claimant's conduct *after* 15 July 2022 to determine whether the Respondent was entitled to terminate the Contract *by* 15 July 2022. To this end, an analysis of the third ground would largely mirror the approach taken to the second ground above. Namely, both grounds require me to first agree with the Claimant that the Majority had adopted a particular approach. So long as I disagree with that interpretation of the Award on the facts, any legal arguments as to why that interpretation shows grounds to set aside the Award would fall away.

112 The question is whether, in deciding that the Claimant's conduct had indeed given the Respondent sufficient reason to terminate the Contract, the Majority had (a) considered the Claimant's post-termination conduct; and (b) if so, was wrong to. In my view, the Claimant's application here failed on the first

point alone. I do not consider that a fair reading of the Award suggests that the Majority had in fact considered the Claimant's post-termination conduct to decide the validity of the Respondent's termination.

The parties' cases

113 The Claimant's submission on this point can broadly be broken down into four parts.[175]

(a) First, the question is whether the Claimant's conduct as at 15 July 2022 justified the Respondent's decision to terminate the Contract.

(b) Second, the Majority had acknowledged at [6.45(iv)] in the Award that it was thereby excluded from considering what the Claimant could have done after the Respondent had terminated the Contract.

(c) Third, flowing from the first two points, it was therefore inconsistent and manifestly incoherent for the Majority to find that the Claimant had failed to fulfil its contractual obligations based on the Claimant's conduct after 15 July 2022 at [6.49] and [6.50] of the Award.

(d) Fourth, this gravely prejudiced the Claimant's case as but for its consideration of the Claimant's post-termination conduct, the Majority would have been unlikely to find that the Claimant's prior conduct was sufficient to give rise to a material breach.

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[175] CWS at paras 63–69.

114 The Respondent's submissions, on the other hand, were as follows.[176]

(a) First, a proper reading of the Award would show that no such inconsistency arose in the Majority's reasoning, let alone one grave enough to suggest that the Majority had entirely neglected an essential point.

(i) The Respondent did not challenge the Claimant's assertion that the Majority had considered the Claimant's post-termination conduct; the Respondent merely justified this approach by submitting that this reasonably flowed from the Majority's earlier finding that the Claimant's Article 27B obligations survived its suspension and termination.[177]

(ii) The Majority's finding in [6.45(iv)] was not to be read as a "blanket rejection" of the relevance of the Claimant's post-termination conduct. Rather, the Majority was simply rejecting the Respondent's submission that one way the Claimant could have better fulfilled its licensing obligation was by alerting the licensing authority to an inconsistency in how it treated the Claimant's application for another project *versus* this one. In the Respondent's submission, the Majority considered the comparison to be inappropriate on account of these being different projects, not necessarily because this could have only been raised by the Claimant after the termination of the Contract.[178]

176 RWS at paras 49–65.

177 RWS at para 54.

178 RWS at para 53.

(b) Second, there is a high threshold for the court to find that an award was manifestly incoherent – the Claimant must demonstrate that the alleged inconsistency gives rise to a clear and virtually inescapable inference that the tribunal had completely failed to consider an essential point.[179]

(c) Third, and in any event, no real or actual prejudice was caused to the Claimant by the Majority's finding.[180]

My decision

115 The Claimant's case relies on reading three paragraphs together to come to the conclusion that the Majority had incoherently: (a) acknowledged that it could not consider post-termination conduct at [6.45(iv)]; but then (b) considered such conduct in deciding the issue at [6.49] and [6.50] of the Award.[181] However, in my view, while the Majority had indeed rightly acknowledged that it should not assess the Claimant's conduct after the Respondent's termination date, none of the later paragraphs suggest that the

179 RWS at para 50.

180 RWS at para 56.

181 CWS at paras 63–68.

Majority had based its findings on termination on what the Claimant had failed to do post-termination.

116 I make each point in turn, and for ease of reading will reproduce the relevant portions of the Award as each are analysed below, beginning first with respect to the purported inconsistency that arose at [6.45(iv)].

117 At [6.45(iv)], the Majority found that:[182]

> 6.45(iv). … The [Respondent] also points out that the [Claimant] had submitted similar applications for licences on another project, [redacted], and received approval, so at least clarification of contradictory decision should have been sought from [the licensing authority], *however, the [Claimant] rightfully points out that the application in respect to this project was after termination of the Contract by the [Respondent], and therefore this allegation is not relevant.* …
>
> [emphasis added]

118 In my view, the language adopted by the Majority here was fairly clear. I disagree with the Respondent's submission that the Majority had relied on the Claimant's other post-termination conduct and only rejected the conduct in [6.45(iv)] on account of it being a different project.[183] I agree with the Claimant's interpretation that [6.45(iv)] showed that the Majority was keenly aware that it ought not to decide the validity of a termination based on facts that occurred after it.[184]

119 Thereafter, however, no inconsistency arose in the Majority considering post-termination facts. The only point at which the Award referred to steps the

182 Award at para 6.45(iv) (CBOD-1 at pp 311–312).

183 RWS at para 53.

184 CWS at para 65.

Claimant could have taken after the Contract was terminated by the Respondent on 15 July 2022 was at [6.50] of the Award. There, the Majority stated that:[185]

> … the [Claimant] could and should have submitted comments immediately or asked for reasons, immediately after receiving the preliminary decisions in 11 July 2022, *not waiting the prescribed 10 days noted by [the licensing authority] in their decisions.* Had it notified the [Respondent] of the decisions prior to 15 July 2022, *instead of waiting until 21 July 2022* (after the time limit), the [Respondent] might have insisted on comments being submitted, or might have reconsidered the date they terminated on. Further, the *[Claimant] did not accept the [Respondent's] termination, and could have asked for reasons after 15 July 2022 until its own purported termination on 25 August 2022*, and *indeed its obligations under Article 27B survive termination* -see paragraphs 6.71-6.72 below. The [Claimant] also could have involved the [Respondent] in interactions with *[the licensing authority]*. It provided a list of such interactions, but not one document evidences this, as they were redacted, despite a request on 22 April 2024 from the [Respondent] to provide them unredacted versions which was refused by the [Claimant] on grounds of commercially sensitive information (for the avoidance of doubt the Tribunal does not find an adverse inference about this as no application to the Tribunal was made by the [Respondent] to order unredacted copies be produced -refer to paragraphs 4.310 to 4.325 above).
>
> [emphasis added]

120 Again, adopting a generous interpretation of the Award would suggest that what the Majority was referring to was the chain of events that *could* have taken place had the Claimant made a better attempt to comply with its obligations in the first place – *before* termination of the Contract. In the Majority's view, had the Claimant immediately sought the licensing authority's reasons for rejecting its license application (even if that had been as late as 11 July 2022), that could have stalled the Respondent's decision to terminate the Contract and thereby given the Claimant more time to attempt to comply with its Art 27B obligations and preserve the Contract. Even with respect to the

185 Award at para 6.50 (CBOD-1 at p 315).

Majority's reference to the obligations that continued to survive termination, no inconsistency arose.

(a) First, I agree with the Respondent that this line of reasoning flowed reasonably from the Majority's findings regarding the survival issue.[186]

(b) Second, the Majority was not illogically determining that the Respondent was entitled to terminate the Contract on 15 July 2022 because the Claimant had failed to take any action until later in August 2022, as the Claimant submits. Rather, a more generous interpretation would be that the Majority considered that the Claimant's persistent unwillingness to take any action to obtain a license, even after the Respondent had terminated the Contract, revealed that it *never* had an intention to do so. This is in line with the Majority's later findings, where the Majority speculated as to why the Claimant had adopted such a "bare and lacklustre" approach to seeking the licenses from the start, and concluded that the Claimant likely had no intention to prioritise the maintenance of the Contract in the second quarter of 2022.[187]

121 That same analysis applied to [6.49] of the Award, which considered the actions the Claimant could have taken to either bolster its licensing applications from the get-go or the initiative the Claimant could have taken immediately after the licensing authority had rejected the applications to appeal the decision.[188]

> 6.49. Further, the [Claimant] should have submitted observations to [the licensing authority's] preliminary decisions, with a request for reasons. In accordance with

186 RWS at paras 54–55.

187 Award at para 6.51 (CBOD-1 at pp 315–316).

188 Award at para 6.49 (CBOD-1 at pp 314–315).

> [redacted national law], *more detailed reasons were required, and submitting observations may have resulted in [the licensing authority] when having to expand their cryptic two sentence explanation, reconsidering their decisions.* Mr [B] agrees with this, although he is of the view [the licensing authority] rarely change their minds. *If required, the [Claimant] could have sought an extension of the deadline to submit preliminary observations, but did not. If such action had been taken, it cannot be ruled out that [the licensing authority] might have changed their minds, particularly since an application was made under Article 2a,* but [the licensing authority] of its own volition invoked Article 3b to reject the application seemingly on the erroneous basis that the supply of any goods, and provision of services, would constitute technical services or other services related to the process units listed in Annex X. *This flags to the Tribunal that [the licensing authority] might have misunderstood the precise nature of the equipment in the application. …*
>
> [emphasis added]

122 Based on this interpretation of the Award, it could not be said this was either an illogical chain of reasoning that parties would have had sufficient notice of or evidence to say that the Majority had neglected to consider an issue in its entirety. Having considered that no inconsistency, in fact, arose in the Majority's determination of the issue, there was no basis to even consider whether the findings were so manifestly incoherent as to warrant setting aside the Award for breach of natural justice.

Ground 4: Whether the Majority's findings cumulatively amounted to a breach of natural justice

123 Having found that none of the above alleged breaches of natural justice were even remotely made out, I consider it unnecessary to address in detail the Claimant's alternative submission that the Award should nevertheless be set aside in its entirety on account of the Majority's aforementioned findings pooled together.[189]

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189 CWS at paras 72–73.

124 On each ground of complaint advanced in the Claimant's application, I have considered that the Majority had acted within the rules of natural justice.

(a) The Majority's reliance on Arts 45.6 and 54 to resolve the question of Art 27B's survivability flowed reasonably from the Respondent's submission and was not such a dramatic departure from parties' submissions that it ought to have been brought to the parties' special attention. If anything, reliance on Arts 45.6 and 54 was an opportunity missed by the Claimant to make its point on the issue – but it was certainly not an opportunity denied to the Claimant by the Majority in arriving at the Award.

(b) As regards the remaining findings, I find that the Claimant's complaints were premised on what were ultimately contrived readings of the Award. A generous reading of the Award reveals that the Majority had not adopted an interpretation of Art 27B that was at odds with parties' agreed interpretation, nor had it decided the materiality of the Claimant's alleged breach by purportedly considering the Claimant's failure to comply with both the Alteration and Licensing Obligations cumulatively.

(c) Nor had the Majority adopted a manifestly incoherent chain of reasoning by considering the Claimant's post-termination conduct to justify its finding that the Respondent had validly terminated the Contract. Of the few references the Majority had made to the Claimant's acts post 15 July 2022, *none* were referred to as or even found to be further acts of breach.

125 On balance, there was no "cumulative effect of breaches"[190] to be assessed to find that the Claimant had suffered any real or actual prejudice in the Arbitration.

126 Further and in any event, I came to the view that even considering the Claimant's case at its highest, the end point of the argument was simply: had the Majority determined that the Claimant's Art 27B obligations were both extinguished as of 1 June 2022 and that only the Claimant's fulfilment of its Licensing Obligation was relevant, this would have whittled down the scope of the Claimant's conduct that it could have assessed, which in all likelihood would not have been deemed sufficient to form a material breach. In my respectful view, the Claimant's submission here is not only highly speculative but it fails to identify a clear rule of natural justice that has been breached. On this point, the Claimant suggests in broad strokes that the Majority's breaches, when viewed cumulatively, indicates that the Majority had "closed their minds and did not apply themselves to the parties' arguments".[191]

127 In my view, this argument was untenable. The test is whether there exists a clear and virtually inescapable inference that the tribunal had *entirely neglected* to address parties' submissions on essential issues: *BZW v BZV* [2022] 1 SLR 1080 at [61]. Mere argument that the tribunal had, even at repeated stages, applied its mind wrongly or even inadequately, is insufficient to meet that high threshold for finding a breach of natural justice and setting aside an award.

[190] CWS at para 39.

[191] CWS at para 73.

128 In light of the findings above, there are no grounds to set aside the whole Award, be it for findings made in excess of jurisdiction, breach of natural justice or the cumulative effects of the latter in the round.

Ground 5: Whether the Majority's findings on the scope of the Bond and Guarantee were in excess of jurisdiction or a breach of natural justice

129 Having concluded that there are no grounds to set aside the Award in its entirety, I now turn to consider the Claimant's alternative argument.[192] Specifically, that the Award should at least be set aside in part, particularly as it concerns the Claimant's counterclaim for the return of its Bond and Guarantee.

130 The Claimant's complaint on this point is directed at [6.78(1)]–[6.78(3)] of the Award. There, the Majority concluded that the Claimant was not entitled to a return of the Bond and Guarantee under Art 45A.3 of the Contract.[193] However, instead of merely deciding the issue on an effectively all or nothing basis, as had been pleaded by the parties,[194] the Majority instead found that the Bond and Guarantee were to act as security for the Respondent's receipt of damages in the Award, including for returns of payments the Claimant had received at earlier payment milestones.[195] I reproduce the relevant portions of the Award for reference.[196]

> **6.78. Return of the Performance Bond and Parent Company Guarantee.**
>
> (1) Since the [Respondent's] termination was lawful, and the [Claimant's] termination under Article 45A.3 ineffective, by

192 CWS at paras 74–89.

193 CWS at paras 76–77.

194 CWS at paras 76–78; RWS at para 71.

195 CWS at paras 76–78.

196 Award at para 6.78 (CBOD-1 at p 342).

majority the Tribunal finds that the [Claimant] is not entitled to the return of the Bond or Guarantee.

(2) The [Claimant] as found above was in material breach of Article 27B, entitling the [Respondent] to terminate the Contract. A significant amount of the additional costs incurred in completing the Work by the replacement contractor have not yet been incurred, and it is likely that there will be an excess in accordance with Article 45.4.3(a), which is payable to the [Respondent]. Mr [Z] in his Report calculates the [A] Contract for 6 GCU's as EUR 149,155,727.111208 based on an exchange rate at 22 August 2022 (which amount is incorrect as noted above), In Annex 1 the [Claimant] calculates that based on an exchange rate as at 13 September 2024, EUR 43,578,652 remains to be completed. Future payments can be calculated in due course at prevailing exchange rates upon payment. *The Bond and Guarantee are security for the eventual claim for the balance of the costs of completing the Work, which are in excess, as per the formula in Article 45.4.3(a). As found above, the [Respondent] is entitled to payment once there is an excess, and does not have wait until a final accounting at the end of the [A] Contract.*

(3) The *Bond and Guarantee are also security for the amount awarded to the [Respondent] in this Award for return of PM's 1 and 2* (less amounts incurred)

[emphasis added]

131 I also reproduce below Art 45A.3 of the Contract, which provided the contractual mechanism via which the Respondent was to return the Claimant its Bond and Guarantee upon the *Claimant's* termination of the Contract:[197]

45A.3 SUPPLIER'S Remedies on Termination

If the CONTRACT is terminated by *SUPPLIER* under sub-Article 45A.2, COMPANY shall promptly:

a) *return the Performance Bond and Parent Company Guarantee to SUPPLIER*, and

b) pay SUPPLIER in accordance with sub-Article 46.3.

Such payment shall constitute the full and final amount payable by COMPANY under the CONTRACT. to the exclusion of any other compensation for such termination.

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[197] Contract at Art 45A.3 (CBOD-1 at p 490).

[emphasis added]

The parties' cases

132 Similar to the issue concerning the interpretation of Art 27B above, the crux of the Claimant's application to partially set aside the Award rests on its view that the Majority had acted both in excess of its jurisdiction and in breach of the fair hearing rule on account of the following:[198]

(a) First, both parties had interpreted Art 45A.3 as providing for an effectively "all or nothing" approach – the Claimant was to either be granted the return of the Bond and Guarantee or not.[199]

(b) Second, however, the Majority had taken upon itself to determine the scope of the Bond and Guarantee to determine what was payable and offset the amounts against those to be paid by the Claimant to the Respondent following the Arbitration. Crucial to this submission was the Claimant's assertion that parties were so unaware that the Majority would endeavour to consider the scope of these payment instruments that they had not even submitted into evidence the final and executed version of the Guarantee.[200]

(c) Third, the Majority's approach was therefore outside the scope of what parties had submitted to arbitration and further its approach breached the fair hearing rule as it gave parties no reasonable opportunity to make submissions on the point. Had the Claimant been made duly aware that the Majority was considering the issue in this

198 CWS at paras 74–89.

199 CWS at para 76.

200 CWS at para 77.

manner, it would have had the opportunity to make legal submissions and adduce the terms of the Guarantee.[201]

(d) Fourth, the Majority's findings on the scope of the Bond and Guarantee at [6.78(2)]–[6.78(3)] had necessarily infected the Majority's broader dismissal of the Claimant's counterclaim in [6.78(1)]. Accordingly, the Majority's entire set of findings on the counterclaim therefore ought to be set aside.[202]

133 On the other hand, the Respondent submits that:[203]

(a) As regards the Claimant's submission that it was beyond the scope of the Majority's jurisdiction to consider the scope of the Return Payments, it was well-within the Majority's jurisdiction to equitably carve up the compensation mechanisms available to the parties as both parties had invoked the equitable jurisdiction of the Tribunal in their pleadings.[204]

(b) As regards the Claimant's submission that the Majority's approach deprived it of a right to be heard, particularly seeing as the Majority had again undertaken an unforeseeable line of reasoning, this was not a dramatic departure from the parties' submissions. As with interpreting Art 27B of the Contract, the Majority was entitled to assess the scope of provision it has been called by parties to apply. This, when taken along with the parties' pleadings invoking the equitable

201 CWS at paras 85–86.

202 CWS at para 82.

203 RWS at paras 69–82.

204 RWS at para 78.

jurisdiction of the Tribunal should have placed the Claimant on sufficient notice that the scope of the Bond and Guarantee were live questions to be determined. The Claimant's decision then not to take the opportunity to make submissions on the point was not therefore a basis for setting aside the Award.[205]

(c) In any event, the findings made by the Majority as to the scope of the Bond and Guarantee had no material bearing on the outcome of the counterclaim in the Arbitration and for that reason, need not be set aside. The Majority had dismissed the Claimant's counterclaim for the repayment of its Bond and Guarantee on the sole ground that such repayment was due only if it had been the Claimant who had validly terminated the Contract under Art 45A.3. However, to the extent that the Majority had found that the Contract was instead validly terminated by the Respondent, this did away with the Claimant's counterclaim.[206] In this vein, the findings made by the Majority on the scope of the Bond and Guarantee were at best, in counsel for the Respondent's words, *obiter dicta* – they was ancillary to the outcome of the decision and need not be set aside in any event.[207]

My decision

134 I saw no reason to set aside the findings made at [6.78(1)]–[6.78(3)]. The thrust of the Claimant's complaint was directed at the Majority's findings on the scope of Art 45A.3 and the Bond and Guarantee, which were confined to [6.78(2)]–[6.78(3)] of the Award. However, the Claimant's application to

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205 RWS at paras 73–76.

206 RWS at para 82.

207 NEs at 48:19–48:22.

nevertheless set aside all three paragraphs of the Award hinges on its submission that the Majority's ultimate finding that the Claimant should be disentitled from receiving repayments of the Bond and Guarantee at [6.78(1)] was "linked to and flowed from" the impugned findings in the subsequent paragraphs.[208]

135 In my view, [6.78(1)] was clearly a finding made independent of and unconnected to the Majority's subsequent findings on the scope of the Bond and Guarantee. Taking [6.78(1)] on its own, I disagree that there were any grounds to set it aside. At [6.78(1)], the Majority determined that since it found that the Contract had been validly terminated by the Respondent, the Claimant was not entitled to a return of the Bond or Guarantee *per* Art 45A.3. I agree with the Respondent that this finding merely flowed from the Majority's earlier decision and its clear application of Art 45A.3 – in fact, its decision to dismiss the counterclaim in this manner cohered entirely with the "either/or approach" advanced by parties at the Arbitration.[209] This was therefore an entirely foreseeable chain of reasoning adopted by the Majority and was adequately responded to by the parties at the Arbitration.

136 The challenge principally concerns [6.78(2)] and [6.78(3)]. However, I agree with parties that the Majority's findings in those two paragraphs on the scope of the Bond and Guarantee were, as counsel for the Respondent had described at the hearing, effectively "*obiter dicta*"[210] and as the Claimant itself conceded "strictly unnecessary for the determination of this counterclaim".[211]

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208 CWS at para 82.

209 RWS at para 82(a).

210 NEs at 48:19–48:22.

211 CWS at para 82.

137 This being the case, I see no basis to set aside [6.78(1)], but also little reason to set aside [6.78(2)] and [6.78(3)] given that neither had a bearing on the Majority's ultimate dismissal of the counterclaim. It should not ordinarily be the role of a court to tidy up an award by removing *obiter dicta* or the like.

138 At the hearing, counsel for the Claimant had also indicated before me that crucially, the Bond in particular is governed by a separate arbitration clause from the Contract such that any further dispute that were to arise between parties when the Bond is eventually called on by the Respondent will likely fall within the jurisdiction of a separate tribunal.[212]

139 Accordingly, I state for the avoidance of doubt that though I decline to set aside [6.78(2)] and [6.78(3)], I consider both to be findings made to be in effect *obiter dicta*. I also note that neither party has raised any particular objection to me arriving at this conclusion.[213]

140 For the foregoing reasons, I dismiss the Claimant's alternative application to set aside the Award in part as I do not consider that either ground to set aside the Award has been sufficiently made out.

Conclusion

141 Arbitral tribunals should be mindful, when developing reasons of their own in support of a conclusion sought by one party of the risk that such reasoning might leave the other party feeling that it had not been properly heard. As a matter of good practice, the Tribunal in this case ought perhaps to have raised with parties the relevance of Arts 45.6 and 54 before coming to the view

212 NEs at 37:01–37:14.

213 NEs at 49:03–49:08; 83:26–84:05.

that they were both relevant and favoured the conclusion sought by the Respondent. However, the Tribunal's failure to do in this case did not amount to a breach of natural justice or excess of jurisdiction. I dismiss the Claimant's setting-aside application and hold that none of the Tribunal or Majority's findings were made in excess of jurisdiction. Nor do any of the findings, whether they be viewed independently or cumulatively, amount to a breach of natural justice.

142 With respect to costs, I award costs to the Respondent. The Respondent seeks indemnity costs against the Claimant for bringing an application which the Respondent describes as a "disguised attempt to re-litigate the merits of the Award".[214] I disagree with the Respondent's characterisation of the application and order that the Respondent is entitled to costs from the Claimant on the standard basis. If parties are unable to agree on the quantum of such costs within 21 days of this judgment, they may seek directions from me for the determination of that quantum.

Philip Jeyaretnam
Judge of the High Court

Cavinder Bull SC, Tan Shihao Sean, Natalie Ng Hai Qi and Nicole Therese Lim Su Anne (Drew & Napier LLC) for the claimant;
Kronenburg Edmund Jerome, Lim Yanqing Esther Candice, Lim Ngee Tong Samuel and Chi Hui Shuen Euodia (Braddell Brothers LLP) for the respondent.

214 RWS at para 86.