Year Sun Chemitanks Terminal Corp *v* Gunvor Singapore Pte Ltd

[2021] SGHC 229

Case Number	: Originating Summons No 51 of 2021
Decision Date	: 13 October 2021
Tribunal/Court	: General Division of the High Court
Coram	: S Mohan JC
Counsel Name(s)	: Lee Wei Yuen Arvin (Li Weiyun), Lyssetta Teo Li Lin and Tay Ting Xun Leon (Wee Swee Teow LLP) for the plaintiff; Siraj Omar SC, Allister Brendan Tan Yu Kuan, Joelle Tan and Hendroff Fitzgerald L (Drew & Napier LLC) for the defendant.
Parties	: Year Sun Chemitanks Terminal Corp — Gunvor Singapore Pte Ltd

Arbitration – Award – Recourse against award – Setting aside

13 October 2021

S Mohan JC:

Introduction

1 Originating Summons No 51 of 2021 ("OS 51") concerned an application by the plaintiff to set aside Singapore International Arbitration Centre ("SIAC") Award No. 161 of 2020 (the "Award") rendered by an arbitrator in SIAC Arbitration Nos. 360 and 361 of 2018. The plaintiff alleged breaches of the rules of natural justice by the arbitrator in the making of the Award.

2 I heard OS 51 on 21 April 2021. On 26 April 2021, I dismissed OS 51 with costs, delivering oral grounds containing brief reasons for my decision. As the plaintiff has appealed against my decision, I now set out the grounds for my decision in full.

3 For completeness, in Originating Summons No. 1311 of 2020 ("OS 1311"), the OS 51 defendant (as the plaintiff in OS 1311) applied for and obtained leave to enforce the Award in Singapore as a judgment of the court, and thereafter filed garnishee proceedings seeking to garnish monies held by the SIAC as part of a deposit paid by the OS 51 plaintiff in the arbitration proceedings. In tandem with OS 51, the OS 51 plaintiff (as the defendant in OS 1311) filed HC/SUM 1352/2021 ("SUM 1352") seeking, *inter alia*, an adjournment of all further proceedings in OS 1311 pending the final disposal of OS 51. Following my dismissal of OS 51, I also dismissed SUM 1352. There has been no appeal against my decision in SUM 1352.

Factual background

Background to the dispute

4 The plaintiff is a company incorporated in Taiwan while the defendant is a company incorporated in Singapore.[note: 1] The parties had, from May 2018 to September 2018, an "amicable working relationship" during which six sale and purchase agreements for gasoil of various quantities, ranging from 9,588.743 metric tons ("MT") to 13,930.843 MT, were executed without any problems. The plaintiff thus decided "to increase the volume of gasoil to be ordered under the seventh and eighth agreements" dated 8 October 2018 (the "First Contract") and 19 October 2018 (the "Second Contract") respectively (collectively, the "Contracts").[note: 2] Each of the Contracts concerned the sale by the defendant to the plaintiff of 20,000 MT (+/– 10% at the seller's option) of gasoil with

500ppm sulphur content, with delivery on free on board (or "FOB") Taichung basis.[note: 3] Under the First Contract, delivery of the gasoil was to be effected between 28 September to 30 October 2018 (*ie*, a 33-day loading period) while under the Second Contract, the delivery period was between 1 and 30 November 2018. Delivery of the contracted quantities could be effected by way of "multiple liftings" with a minimum quantity of 2,000 MT per lifting to be loaded onboard the nominated vessel.[note: 4]

5 Clause 26 of the Contracts is identical, and I reproduce below the pertinent parts which parties referred to ("Clause 26"):[note: 5]

26. DESTINATION RESTRICTION

26.1 It is a condition of the agreement that the product delivered under the agreement shall not be sold, transferred, transported, transshipped [*sic*], imported or discharged (by the buyer or others), directly or indirectly and irrespective of means, to any destination ("Restricted Destination") which is at the time of such import inconsistent with, penalised or prohibited under the laws of the country in which such product was produced or contrary to any laws, regulations, decrees or other official United Nations, Singapore, Swiss, United States of America, European Union rules, regulations or requirements applicable to the seller which relate to foreign trade controls, export controls, embargoes or international boycotts of any type, or contrary to any regulation, rule, directive or guideline applied by the government of that country (or international body) or any relevant agency thereof.

The buyer shall keep itself informed as to such laws, regulations, rules, directives or guidelines and shall ensure that they are complied with.

26.2 The buyer undertakes that the product deliverable hereunder shall not:

(A) be exported to any Restricted Jurisdiction; or

(B) be sold or supplied to any natural or legal person in any Restricted Jurisdiction; or

(C) be sold or supplied to any natural or legal person for the purposes of any commercial activity carried out in or from any such Restricted Jurisdiction.

For the purposes of this clause,

(I) "**Restricted Destination**" includes any port(s), vessel/barge(s) or storage facilities in any Restricted Jurisdiction.

(II) "**Restricted Jurisdiction**" shall mean any country, state, territory or region against which there are sanctions imposed by the country in which such product was produced, the United Nations, Singapore, Switzerland, United States of America, or European Union which prohibit the shipment thereto of crude oil and/or petroleum products.

26.3 The buyer shall, if the seller so requires, provide the seller with appropriate documentation for the purposes of verifying the final destination of any delivery hereunder. Such documentation shall be provided within seven (7) days of the request or such lesser period as will enable the seller or its supplier to comply (to the seller's satisfaction) with any requirement or request of the government or authority in question.

…

26.6 The buyer shall ensure that all of its sale agreements involving the product shall contain the same Restricted Destination clause or another clause that has like effect.

…

26.8 The buyer undertakes and warrants that it will comply with the provisions of this clause. Any breach of this clause shall constitute an event of default, and shall entitle the seller to exercise its rights relating to such event of default, including an indemnity for any fines or penalties imposed on the seller.

6 On 30 October 2018 and under the First Contract, 1,994.862 MT of gasoil was loaded at the port of Taichung onboard the motor tanker "OSLO" nominated by the plaintiff as the FOB buyer (the "OSLO Parcel"), and for which the plaintiff paid the defendant a sum of USD 1,425,003.37. The plaintiff alleged that there were quality issues with the OSLO Parcel, and in respect of which it had to eventually compensate the third-party buyer to whom it had on-sold the cargo.[note: 6] Save for the OSLO Parcel, the plaintiff failed to take delivery of any of the remainder of the cargo it had contracted to buy from the defendant under the Contracts because of the alleged quality concerns.[note: 7] The defendant subsequently sent two letters dated 28 November 2018 to the plaintiff purporting to terminate the Contracts and stated that it would claim "losses, damages, costs and expenses" against the plaintiff.[note: 8]

7 By a Notice of Arbitration filed with the SIAC on 21 December 2018, the plaintiff commenced two arbitrations against the defendant, one under each of the Contracts.[note: 9] Both arbitrations were subsequently consolidated by the SIAC on 15 February 2019. The arbitral tribunal was constituted on 23 April 2019 ("Tribunal") with the appointment by the SIAC of a sole arbitrator ("Arbitrator").[note: 10]

The Arbitration Proceedings and the Award

8 In the arbitration proceedings, the plaintiff claimed, *inter alia*, for a refund of "[a]ll sums that have actually been received by the [defendant] from the [plaintiff]" in relation to the First Contract.[note: 11] The plaintiff also sought a declaration that the Second Contract had "not been validly formed" and a declaration that the defendant "is not entitled to any payment" under the Contracts.[note: 12] The defendant in turn counterclaimed, *inter alia*, for the plaintiff's breach in its failure and/or refusal to "take delivery of the cargo as agreed". Instead, the plaintiff "only took delivery of 1,994.862MT of cargo under [the First Contract] on 30 October 2018, and took no further deliveries thereafter".[note: 13] The defendant also counterclaimed for the plaintiff's breach in respect of the Second Contract, with damages for breach of the Contracts to be calculated based on s 50(2) of the Sale of Goods Act (Cap 393, 1999 Rev Ed) ("SOGA").[note: 14] As will be elaborated below, the defendant subsequently changed tack and proceeded on the basis that the damages, if any, due to the defendant were to be calculated based on s 50(3) of the SOGA instead. Section 50(3) of the SOGA provides that:

> Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept.

9 In the arbitral proceedings, the plaintiff advanced two arguments relating to the aforementioned issues (the "Arguments"). According to the plaintiff, the defendant "had failed to adduce evidence of actual losses (the "No Actual Losses Argument")" and "had no goods [*ie*, the requisite gasoil to supply] for the majority of the [33-day loading period] and therefore suffered no losses (the "No Goods No Losses Argument")".[note: 15] In summary, the plaintiff's No Actual Losses Argument was that the defendant "had failed to adduce evidence of actual losses and accordingly, had not suffered any actual losses despite [the plaintiff's] breach of contract" and thus claimed for "forecasted" losses which "were never incurred".[note: 16] The plaintiff's No Goods No Losses Argument was that the defendant "did not have sufficient [g]asoil to supply to [the plaintiff] under the [Contracts] and therefore could not have suffered any losses". In that regard, the plaintiff argued that the defendant's own documents "showed that they did not have the necessary goods to meet [the required volume of gasoil] all the way until 24 October, just a week left until the end of the loading period" under the First Contract.[note: 17]

10 Lastly, I noted that parties had initially disputed whether there was an available market and hence a number of the arguments made and evidence tendered in the arbitration proceedings revolved around the issue of hedging and whether the defendant had failed to mitigate its alleged loss. The plaintiff contended that the defendant ought to have mitigated its losses by entering into gasoil hedging contracts on or shortly after 30 October 2018 and 6 November 2018 for the First and Second Contracts respectively, when the defendant had initially denied that there was an available market for the gasoil.[note: 18] However, about a week prior to the evidentiary hearing, the defendant conceded that there was an available market. Thereafter, the question of whether there was an available market was no longer a contentious issue or contemplated in parties' submissions in the arbitration. Consequently, the issue of hedging became irrelevant and s 50(2) of the SOGA was no longer the focus.[note: 19] At the hearing before me, counsel for the defendant, Mr Siraj Omar SC, confirmed that while the defendant had initially advanced its case on the basis of there being no available market, it subsequently dropped that claim and instead advanced its claim on the basis that there *was* an available market, and relied on s 50(3) of the SOGA instead.[note: 20]

11 In the arbitral proceedings, the defendant also counterclaimed for the plaintiff's breach of Clause 26 of the Contracts, the relevant portions of which have been reproduced at [5]. The defendant submitted that the plaintiff had breached Clause 26 of the First Contract by: (a) failing to ensure that its own sale contract with its buyer, Great Sign Ltd ("Great Sign"), regarding the OSLO Parcel contained the same or equivalent Restricted Destination clause (as required by Clause 26.6); and (b) failing to provide documentation verifying the final destination of the OSLO Parcel (in breach of Clause 26.3). Clause 26.8 thus entitled the defendant to an indemnity from the plaintiff for any fines or penalties imposed on it.[note: 21]

12 The plaintiff responded that Clause 26 could not be relied on by the defendant following the defendant's termination of the First Contract. In particular, it was not stipulated in either of the Contracts that Clause 26 would survive termination. As such, the plaintiff sought to adduce expert evidence on whether Clause 26 would survive termination as a matter of industry practice. This forms the contextual backdrop to the second ground of objection which the plaintiff raised in OS 51 (see [19] below). The plaintiff also submitted that, in any case, Clause 26.8 is a compensatory indemnity and not a preventive indemnity. In that regard, the defendant has not suffered any losses as a result of any alleged breach of Clause 26 which the plaintiff ought to indemnify.[note: 22]

13 On 17 November 2020, the Tribunal issued the Award in favour of the defendant. The Tribunal

held, *inter alia*, that:[note: 23]

(a) the plaintiff was in breach of the First Contract by failing to lift the remaining gasoil within the loading period, and such breach entitled the defendant to terminate the First Contract, which it did by way of letter on 28 November 2018;[note: 24]

(b) the plaintiff was in breach of the Second Contract by failing to provide a letter of credit by 9 November 2018 and by failing to lift any gasoil within the loading period, and such breaches entitled the defendant to terminate the Second Contract, which it did by way of letter on 28 November 2018;[note: 25] and

(c) the plaintiff was in breach of Clause 26 of the First Contract by failing to ensure that its sale contract with Great Sign regarding the OSLO Parcel contained the same or equivalent Restricted Destination clause in the First Contract and by failing to provide documentation verifying the final destination of the OSLO Parcel. The Tribunal therefore granted a declaration that the plaintiff was required to indemnify the defendant in the event that any fines or penalties are imposed on the latter by reason of the final destination of the OSLO Parcel.[note: 26]

14 Flowing from the findings as set out at [13(a)] and [13(b)], the Arbitrator found that the defendant was entitled to be compensated for any loss and damage it had suffered by reason of the plaintiff's breaches of the Contracts for non-acceptance of gasoil, with damages to be assessed by reference to s 50 of the SOGA as follows:[note: 27]

(a) concerning the First Contract, the difference between the contract price and the market price on the next business day after the expiry of the loading period (*ie*, 31 October 2018), rounded to the nearest dollar; and

(b) concerning the Second Contract, the difference between the contract price and the market price on the next business day after the expiry of the loading period (*ie*, 3 December 2018).

15 The Arbitrator made three dispositive orders against the plaintiff:[note: 28]

(a) in respect of the First Contract, the Arbitrator awarded the defendant damages in the sum of USD 303,555.00 plus (i) interest at the rate of 6.30688% per annum from 31 October 2018 (inclusive) until the date of payment (exclusive) and (ii) costs and expenses in the amount of S$504,407.09 and costs of the arbitration pursuant to Clause 20 of the First Contract;

(b) in respect of the Second Contract, the Arbitrator awarded the defendant damages in the sum of USD 3,055,096.00 plus (i) interest at the rate of 6.37888% per annum from 3 December 2018 (inclusive) until the date of payment (exclusive) and (ii) costs and expenses in the amount of S$504,407.09 pursuant to Clause 20 of the Second Contract; and

(c) an indemnity for any fines or penalties imposed on the defendant by reason of the final destination of the parcel of 1,994.862 MT of gasoil delivered to the plaintiff aboard the MT OSLO on 30 October 2018 pursuant to Clause 26.8 of the First Contract.

The parties' cases

16 I briefly summarise the parties' cases in OS 51.

17 The plaintiff applied to set aside the Award, relying on the ground of breach of natural justice under s 24(*b*) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") and/or Art 34(2)(*a*)(ii) of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"). The plaintiff acknowledged that the four requirements (as reiterated by the Court of Appeal in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [29]) would have to be satisfied by it, namely:[note: 29]

(a) which rule of natural justice was breached;

(b) how it was breached;

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

(d) how the breach prejudiced its rights.

18 The plaintiff argued that all the requirements were met in this case, and raised two grounds. The first was that the Arbitrator's "failure to consider or address points raised by parties falls foul of the *audi alteram partem* rule, which states that a judge must hear both sides of a case before reaching a decision".[note: 30] In this regard, the plaintiff submitted that the Arbitrator "had failed to apply its mind to [the plaintiff's] Arguments".[note: 31] The Arguments went to the crux of the issue of whether the defendant had "proven its losses to entitle it to claim for the same" as the plaintiff must "prove its losses in the first place before damages can be assessed".[note: 32] If the Arbitrator had considered the Arguments, the defendant would not have been awarded damages, interest on such damages, and costs.[note: 33] I term this first ground of objection the "1st NJ Breach".

19 The plaintiff submitted, as its second ground, that it was "not given a full or reasonable opportunity to be heard" under Article 18 of the Model Law due to the Tribunal's direction "not to submit expert evidence on certain aspects of industry practice".[note: 34] The expert evidence related to whether Clause 26 (see above at [5]) survives the termination of each of the Contracts by reason of industry practice.[note: 35] Had the Arbitrator not disallowed the plaintiff's application to adduce expert evidence, the plaintiff would not have been ordered to indemnify the defendant with respect to the relevant fines and penalties that may have been imposed on the defendant.[note: 36] Thus, this ground also satisfied the requirements as laid down in *Soh Beng Tee* (see above at [17]). I term this ground of objection the "2nd NJ Breach".

20 The defendant's position was that "there [was] no legal or factual basis to sustain [the plaintiff's] claims in this application".[note: 37] Concerning the plaintiff's allegation that the Arbitrator failed to apply his mind to the Arguments, the defendant submitted that this allegation was a "complete non-starter" as the plaintiff has not suffered any prejudice and, in any case, the Arbitrator had considered the Arguments.[note: 38] Concerning whether Clause 26 survived the termination of the Contracts, the defendant submits that the Arbitrator had afforded both parties the opportunity to be heard in relation to the expert evidence which the plaintiff sought to adduce.[note: 39]

21 Additionally, not every breach of the rules of natural justice will in itself amount to the required "prejudice" mentioned at [17(d)] above. The Court of Appeal was careful to elaborate that it is necessary to "prove that the breach, if any, had caused actual or real prejudice to the party seeking to set aside an award" (*Soh Beng Tee* at [86]). In that regard, an applicant will have to persuade the court that there has been some actual or real prejudice caused by the alleged breach which is "more

than technical unfairness" (*Soh Beng Tee* at [91]). At the very least, it must be established that the breach could "have actually altered the final outcome of the arbitral proceedings in some meaningful way" (*Soh Beng Tee* at [91]).

Issues to be determined

22 The foregoing summary demonstrates that there are two main issues to be determined:

(a) whether the Arbitrator failed to consider the Arguments and consequently, was the 1st NJ Breach made out; and

(b) whether the 2nd NJ Breach was made out by virtue of the Arbitrator's decision not to grant the plaintiff leave to adduce expert evidence in relation to the survivability of Clause 26.

23 I address each of these issues in turn.

Issue 1: whether the 1st NJ Breach was made out

The applicable legal principles

24 The requirements which must be shown, when an applicant seeks to challenge an arbitration award as having been made in contravention of the rules of natural justice, are well-established and set out in *Soh Beng Tee* (see above at [17]). The relevant rule of natural justice that OS 51 is concerned with is encapsulated in the Latin maxim *audi alteram partem*.

25 As the Court of Appeal in *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN*") held, the *audi alteram partem* rule includes an arbitrator bringing his or her mind to bear "on an important aspect of the dispute" (at [46]). In *AKN* at [46], the Court of Appeal further elaborated that an inference that an arbitrator had "indeed failed to consider an important pleaded issue" will not be drawn readily. The threshold is a *very high* one – namely, such inference "must be shown to be clear and virtually inescapable" (*AKN* at [46]). For example, that threshold would be satisfied where it is undisputed that the arbitration tribunal simply "failed to consider, whether explicitly or implicitly" the arguments "notwithstanding the pleadings … to [that] effect" (*BRS v BRQ and another and another appeal* [2021] 1 SLR 390 at [106]). However, in instances where the arbitrator had "misunderstood the aggrieved party's case, or having been mistaken as to the law, or having chosen not to deal with a point pleaded by the aggrieved party because he thought it unnecessary", such inference should not be drawn (*AKN* at [46]). With regard to arguments raised by a party on an issue, the Court of Appeal in *AKN* also stated at [47] that:

> … The judge in *AQU* also considered the High Court decision of *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM*"), and reiterated the proposition that no party to an arbitration had a right to expect the arbitral tribunal to accept its arguments, regardless of how strong and credible it perceived those arguments to be (see *AQU* at [35], citing *TMM* at [94]). *This principle is important because it points to an important distinction between, on the one hand, an arbitral tribunal's decision to reject an argument (whether implicitly or otherwise, whether rightly or wrongly, and whether or not as a result of its failure to comprehend the argument and so to appreciate its merits), and, on the other hand, the arbitral tribunal's failure to even consider that argument. Only the latter amounts to a breach of natural justice; the former is an error of law, not a breach of natural justice.*
>
> [emphasis added]

26 The imposition of such a high threshold by our courts is congruent with the principle of party autonomy, which is the "critical foundational principle in arbitration". The courts "do not and must not interfere in the merits of an arbitral award and, in the process, bail out parties who have made choices that they might come to regret, or offer them a second chance to canvass the merits of their respective cases" (*AKN* at [37]). The court does not exercise any appellate jurisdiction over an arbitral tribunal and the grounds for curial intervention are narrowly circumscribed. As such, the Court of Appeal in *AKN* cautioned (at [39]) that the courts:

> … must resist the temptation to engage with what is substantially an appeal on the legal merits of an arbitral award, but which, through the ingenuity of counsel, may be disguised and presented as a challenge to process failures during the arbitration. A prime example of this would be a challenge based on an alleged breach of natural justice. When examining such a challenge, it is important that the court assesses the *real* nature of the complaint. Among the arguments commonly raised in support of breach of natural justice challenges are these:
>
> (a) that the arbitral tribunal misunderstood the case presented and so did not apply its mind to the actual case of the aggrieved party;
>
> (b) that the arbitral tribunal did not mention the arguments raised by the aggrieved party and so must have failed to consider the latter's actual case; and
>
> (c) that the arbitral tribunal must have overlooked a part of the aggrieved party's case because it did not engage with the merits of that part of the latter's case.
>
> Although such arguments may be commonly raised, more often than not, they do not, in fact, amount to breaches of natural justice.
>
> [emphasis in original]

27 The foregoing principles, naturally, inform the way in which our courts approach challenges to an award based on a complaint of breach of natural justice. In *CDI v CDJ* [2020] 5 SLR 484 ("*CDI*"), which the plaintiff referred to in its submissions, this court distilled some of the pertinent points and I would highlight those summarised at [31(c)]–[31(e)]:[note: 40]

> (c) an arbitral award is to be read generously and in a reasonable and commercial way, in the sense that the general approach of the courts is to strive to uphold the award; in this context, consideration may be given to the eminence of the arbitrator in his or her field and experience in the area of law concerned (*TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM*") at [44]–[45] citing *Atkins Limited v The Secretary of State for Transport* [2013] EWHC 139 (TCC) and *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14);
>
> (d) flowing from (c), an arbitral award should be read supportively, meaning it should be given a reading which is likely to uphold it rather than to destroy it (*Soh Beng Tee* … at [59]);
>
> (e) the corollary of (d) is that it is not the court's function to assiduously comb an arbitral award microscopically in its attempt to determine if there was any blame or fault in the arbitral process (*Soh Beng Tee* at [65(f)]; in short, the court should not nit-pick at the award (*TMM* at [45]); …

The parties' positions

28 At the outset, I should point out that it is *not* the plaintiff's case that it was not afforded a reasonable opportunity to present or advance the Arguments, or lead relevant evidence on them. It accepts that that the Arguments were fully canvassed to the Arbitrator. The plaintiff's sole contention is that the Arbitrator "failed to apply [his] mind" to the Arguments,[note: 41] both of which concerned important or material issues in the dispute.[note: 42] It is also not in dispute that in the List of Issues agreed to by the parties for the Arbitrator's determination, Issue 12(d) was framed as follows:[note: 43]

d. If there was an available market:

i. What was the date when the cargo ought to have been accepted or the time of refusal to accept?

ii. What was the market price on the date(s) identified above?

iii. Is Gunvor entitled to seek any further or other losses outside those stated in Section 50(3) of the Act?

iv. Does Clause 21 of the Contracts exclude any of Gunvor's losses?

v. Did Gunvor adequately mitigate its losses?

For completeness, Clause 21 is an exemption clause and seeks to limit parties' liability for certain breaches of the Contracts; that provision has no bearing to the issues in OS 51 and nothing further needs to be said on it.

29 The plaintiff argued that its No Actual Losses Argument was made clear in its oral opening submissions, in its cross-examination at the evidentiary hearing,[note: 44] its expert witness report[note: 45] and its written closing submissions.[note: 46] The plaintiff's expert witness on quantifying losses was also of the opinion that the defendant "has not evidenced its actual loss, rather it seeks to arbitrarily cut-off its claim at 4 January 2019" and did not believe that the defendant reasonably hedged the Contracts given this arbitrary cut-off.[note: 47]

30 Despite the plaintiff's repeated emphases on its No Actual Losses Argument, the point was "completely unaddressed by the Tribunal" and it was "completely absent from the Tribunal's reasoning in considering damages in the Award".[note: 48] Instead, the relevant paragraphs in the Award "only address the *calculation of losses* that [the defendant] was entitled to, but not whether [the defendant] had *even suffered any actual losses* in the first place" [emphasis in original].[note: 49] At the hearing before me, counsel for the plaintiff, Mr Arvin Lee, elaborated that s 50(3) of the SOGA (to which the Arbitrator referred) "only deals with calculation of damages and *does not do away with proof of actual loss*" [emphasis added].[note: 50]

31 As for the No Goods No Losses Argument, it was raised by the plaintiff in its oral opening submissions and written closing submissions. The point was made that even for the cargo of approximately 2,000 MT of gasoil lifted under the First Contract, the defendant's documents "showed they did not have the necessary goods to meet this all the way until 24 October, just a week left until the end of the loading period".[note: 51] Even with the defendant's new cargo of gasoil with +3 °C pour point on 24 October 2018, the defendant could not have fulfilled the Second Contract, which

required gasoil with 0°C pour point.[note: 52] The plaintiff had also pleaded the same in its Reply and Defence to Counterclaim.[note: 53]

32 At the hearing before me[note: 54] and in its written submissions,[note: 55] the plaintiff submitted that the prejudice suffered as a result of the 1st NJ Breach was that the Award was thereby made in favour of the defendant. Mr Lee argued that had the Arbitrator considered the Arguments, the dispositive orders for damages, interest and costs for breach of the Contracts would not have been made.

33 The defendant argued that the Arbitrator "did in fact deal with the Arguments in the Award and must therefore have considered them".[note: 56] The Arbitrator had "expressly referred to" the Arguments "at paragraph 209 of the Award in the context of the [plaintiff's] costs submissions".[note: 57] The Arbitrator noted that, in relation to the issue of costs, the plaintiff had submitted that the defendant "has suffered no actual loss, and/or did not have goods to supply for the most part of the duration under both Contracts".[note: 58]

34 In any case, the plaintiff's position "ignore[d] the fact that the parties had agreed that the applicable measure of damages was that set out in section 50 of the [SOGA]" [emphasis in original].[note: 59] As the plaintiff accepted, s 50 of the SOGA "does not require actual losses, or evidence thereof" and the plaintiff's point that it "sought to make by way of the Arguments was irrelevant to the measure of damages" [emphasis in original].[note: 60] The alleged prejudice which the plaintiff sought to demonstrate "assumes that the Tribunal would not just have considered the Arguments but also accepted them", for which there was "no basis for" and was "speculative at best" [emphasis in original].[note: 61] Even if the Tribunal had accepted the Arguments, given that the plaintiff had already agreed that the measure of damages under s 50 of the SOGA does not require actual losses or proof of such actual losses, the Arguments "could not have impacted the Tribunal's findings".[note: 62]

35 The plaintiff's rebuttal to the Arguments being mentioned in the part of the Award dealing with the issue of costs, was that it was "an entirely separate matter". Such reference to the Arguments "only in the latter section" was both "convenient" and "somewhat of an afterthought" by the Arbitrator – it "[did] not mean that the Tribunal had this in mind when dealing with the issues of damages".[note: 63] This was because while the parties agreed that the Arbitrator would publish a single award also covering the question of costs, the parties also agreed that the Arbitrator would draft the costs portion of the Award separately and only after the Arbitrator's draft award on the substantive claims had been finalised and sent to the SIAC for scrutiny.[note: 64] The plaintiff also highlighted, in respect of prejudice suffered, that it was "not possible to adduce any evidence since the Tribunal did not address [the Arguments] at all in the Award". Nevertheless, the Arguments were "so fundamental" that there was "a reasonable probability that the Tribunal could have ruled in [its] favour".[note: 65] More generally, the plaintiff's position was that the Arbitrator's references to the Arguments within the Award were "clearly insufficient to show that the Tribunal had in fact addressed its mind" to the Arguments.[note: 66]

My analysis and decision

36 In my judgment, the Arbitrator did not fail to consider the Arguments. In accordance with the principles highlighted at [27], I have sought to read the Award as a whole, generously and in a

commercial way. Having done so, I disagreed with the plaintiff that a review of the Award (both as a whole and in particular, that part of the Award which dealt with the losses that the defendant would be entitled to if the plaintiff was liable[note: 67]), leads to the clear and inescapable inference that the Arbitrator failed to give any consideration to the Arguments or the issue of no actual loss. I arrived at this conclusion for a number of reasons.

37 First, the Arbitrator expressly stated that parties were "agreed that if [the defendant was] entitled to losses arising from breaches of the Contracts for non-acceptance of gasoil, those losses [were] to be determined by reference to section 50 of the [SOGA]"[note: 68] and that s 50(3) of the SOGA "provides for a measure of damages enabling an innocent party to be put *into the same position it would have been in had performance taken place*" [emphasis added].[note: 69] In my view, the reference to putting a party into the "same position it would have been in had performance taken place" demonstrated two things – one, that the Arbitrator had put his mind to considering *both* the *fact* of losses suffered as a result of the other party's breach as well as the *measure* of such losses, and two, in arriving at that conclusion, the Arbitrator was in effect *agreeing* with the defendant's arguments on s 50(3) of the SOGA and its operation. Thus, I disagreed with the plaintiff that the Arbitrator had referred to s 50(3) of the SOGA *only* as a provision setting out a mathematical formula to calculate losses.

38 For completeness, and as mentioned briefly at [10], the issues of hedging and the applicability of s 50(2) of the SOGA were rendered moot when the defendant dropped its claim on the basis that there was no available market and admitted that there was an available market.[note: 70] In my judgment, that issue was relevant to OS 51 insofar as the plaintiff, in its own submissions, seemed to have tied its arguments regarding the defendant's failure to prove actual loss with the date of 4 January 2019 and what the defendant did or did not do with the goods thereafter; those arguments were however targeted to damages being determined ***under s 50(2)*** *and not s 50(3) of the SOGA*. I would highlight that, in the affidavit supporting OS 51, the plaintiff acknowledged that s 50 of the SOGA did "not *require* actual losses, or *evidence* thereof" [emphasis added],[note: 71] but sought to make the distinction that s 50 was only concerned with the *calculation* of damages (*ie*, it merely prescribed a formula). The plaintiff thus sought to emphasise that the agreement between parties in the arbitral proceedings was for s 50(3) of the SOGA to be used only for calculating the quantum of damages, and not that the defendant had in fact suffered any losses as a result of the plaintiff's breach.

39 In the arbitration, the defendant had made the specific submission that the parties' agreement that there was an available market meant that the s 50(2) measure of damages and the issue of hedging became irrelevant; the defendant also made the argument that neither party was contending that hedging outcomes were relevant to an assessment of damages under s 50(3) of the SOGA. On the basis that there was an available market, the "'available market' measure builds in mitigation", and it did not matter "what the seller *actually* does with the goods" [emphasis in original] – the assessment of damages under *s 50(3)* of the SOGA was simply "the differential between the contract and market price."[note: 72]

40 As the Arbitrator noted, parties were in agreement that the defendant's losses were to be determined by reference to s 50(3) of the SOGA. I agree that the plaintiff acknowledged and accepted that, at least on a *prima facie* basis, the Arbitrator could rely on s 50(3) of the SOGA without requiring direct (or for that matter, *any*) evidence or proof of actual loss (see [38]). I could not quite see how, in substance, a distinction could then be drawn by the plaintiff such that the Arbitrator nevertheless had to also ascertain if a loss was in fact incurred. As I mentioned at [37], it

did not appear to me that the Arbitrator regarded s 50(3) of the SOGA as a provision that *only* dealt with calculating the damages suffered by a seller for a buyer's non-acceptance of goods sold. If a tribunal had evidence before it of the difference between the contract price and the market or current price at the time when the buyer ought to have accepted the goods, that would, *prima facie*, be relevant to demonstrating both whether a loss had in fact been incurred and provide the reference points for determining the quantum of such loss suffered. Whether that approach is right or wrong was, however, a matter that touched on the underlying merits of the case which are not justiciable before this court.

41 Second, when the Award is read closely, it becomes reasonably clear that the defendant's arguments as summarised at [39] found favour with the Arbitrator.[note: 73] The corollary of that is that the Arbitrator could be taken to have implicitly *rejected* the Arguments, even if this was not expressly or clearly stated in the Award; that cannot then give rise to *any*, let alone a clear and virtually inescapable inference, that the Arbitrator completely failed to address the Arguments in deciding Issue 12(d).

42 The point is succinctly made by Justice Chan Seng Onn in *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM*") at [104]–[105]:

> 104 Even if some of an arbitral tribunal's conclusions are bereft of reasons, that is not necessarily fatal. There are a variety reasons why an arbitral tribunal may elect not to say something. In my view, the crux is whether the contents of the arbitral award taken as a whole inform the parties of the bases on which the arbitral tribunal reached its decision on the material or essential issues: *Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119 at 122. In this regard, I agree fully with Prakash J's following observation in *SEF* ([76] supra) at [60]:
>
> > The fact that the [Adjudicator] did not feel it necessary to discuss his reasoning and explicitly state his conclusions in relation to the third and fourth jurisdictional issues, though unfortunate in that it gave rise to fears on the part of SEF that its points were not thought about, cannot mean that he did not have regard to those submissions at all. It may have been an accidental omission on his part to indicate expressly why he was rejecting the submissions since the Adjudicator took care to explain the reasons for his other determinations and even indicated matters on which he was not making a determination. Alternatively, he may have found the points so unconvincing that he thought it was not necessary to explicitly state his findings. Whatever may be the reason for the Adjudicator's omission in this respect, I do not consider that SEF was not afforded natural justice.
>
> 105 There is plainly no requirement for the arbitral tribunal to touch on "each and every point in dispute" in its grounds of decision: *Checkpoint Ltd v Strathclyde Pension Fund* [2003] EWCA Civ 84 at [48]. Last but not least, it bears repeating that as guided by *Thong Ah Fat*, decisions or findings which do not bear directly on the substance of the dispute or affect the final resolution of the parties' rights may not require detailed reasoning.

43 In relation to Issue 12(d), the Arbitrator noted that the parties "appear to be in agreement that the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market price at the time when the gasoil ought to have been accepted".[note: 74] The Arbitrator went on to summarise the parties' submissions on the issue of mitigating losses, and then reasoned as follows:

> 164. Year Sun alleges that Gunvor failed to mitigate any losses it might have suffered because it did not sell the undelivered portion of gasoil under the First Contract on 31 October 2018 (being

the day after the last day of the loading period) and the gasoil under the Second Contract on 7 November 2018 (being the date after which Year Sun sought to cancel the Second Contract). Year Sun's submissions in this regard rely on well-established authority as to the principles of mitigation of damages. As I set out at paragraph 160 above, **there does not appear to be any dispute that the measure of damages to be applied is that set out in section 50(3) of the Sale of Goods Act**. However, **the effect of Year Sun's submissions as to mitigation is to suggest that such measure is subject to a duty to mitigate**.

165. **Gunvor submits that questions of mitigation are not relevant when assessing damages pursuant to section 50(3) of the Sale of Goods Act because the concept of an available market *"builds in"* mitigation, irrespective of what Gunvor might actually have done with the cargo**, which was an independent speculation.

166. **Gunvor's submission is to my mind correct**. Section 50(3) provides for a measure of damages enabling an innocent party to be put into the same position it would have been in had performance taken place. Toulson J. (as he then was) summarised the position in *Dampskibsselskabet "Norden" A/S v Andre & Cie SA* [2003] EWHC 84 Comm:

> 41. The broad principle deducible from the *Elena D'Amico* and the authorities there considered is that where a contract is discharged by reason of one party's breach, and that party's unperformed obligation is of a kind for which there exists an available market in which the innocent party could obtain a substitute contract, **the innocent party's loss will ordinarily be measured by the extent to which his financial position would be worse under the substitute contract than under the original contract.**
>
> 42. **The availability of a substitute market enables a market valuation to be made of what the innocent party has lost, and a line thereby to be drawn under the transaction.** Whether the innocent party thereafter in fact enters into a substitute contract is a separate matter. He has, in effect, a second choice whether to enter the market – similar to the choice which first existed at the time of the original contract, but at the new prevailing rate instead of the contract rate (the difference being the basis of the normal measure of damages). The *option* to stay out of the market arises from the breach, but it does not follow that there is a causal nexus between the breach and a *decision* by the innocent part [*sic*]) to stay out of the market, so as to make the guilty party responsible for that decision and its consequences. The guilty party is not liable to the innocent party for the effect of market changes occurring after the innocent party has had a free choice whether to re-enter the market, nor is the innocent party required to give credit to the guilty party for any subsequent market movement in favour of the innocent party."

[emphasis in original in italics; emphasis added in bold]

44 In my judgment, the paragraphs from the Award quoted above demonstrate that the Arbitrator had considered and understood the thrust of the Arguments. In that regard, the Arbitrator did not simply determine the issue on the basis of the parties' agreement that the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market price at the time when the gasoil ought to have been accepted. The Arbitrator had gone further to consider the substance of the Arguments and, in my view, implicitly rejected them by virtue of his acceptance of the defendant's arguments. Furthermore, the excerpt quoted by the Arbitrator from *Dampskibsselskabet "Norden" A/S v Andre & Cie SA* ("*Norden*") [2003] EWHC 84 Comm, especially the portions I have added emphasis to at [41]–[42] of *Norden*, show that the Arbitrator was also considering *what the defendant's loss was* and not just whether there was mitigation of loss by the

defendant. Read as a whole, nothing in the Award suggests that the Arbitrator completely failed to consider the Arguments in relation to the plaintiff's liability for damages.

45 Third, if the plaintiff was advancing the argument that *even under s 50(3) of the SOGA* the defendant had to adduce evidence of and prove actual loss in the sense of something more than just evidence of the contract and market or current prices, it was, in my view, incumbent on the plaintiff to raise the point or argument clearly before the Tribunal *at the material time* in the arbitration proceedings. There was nothing in the arbitration record put into evidence before me that suggested that this specific point or argument was in fact made to the Arbitrator. During the hearing before me, Mr Lee accepted that the point was not made "in such direct language" but argued that there was no need to because many of the opening paragraphs in the plaintiff's written closing submissions were spent on the general issue of "no actual loss".[note: 75] I disagree.

46 The Court of Appeal has reminded parties on more than one occasion that they cannot run to the courts to cry foul and contend that there has been a breach of natural justice when they have failed to properly make a point or raise an argument before the tribunal (see, *eg*, *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 ("*China Machine*") at [168]; *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 at [67] and [76]; *BLC and others v BLB and another* [2014] 4 SLR 79 at [53]). It is not the court's role to rescue the parties *ex-post facto* from strategic decisions made in the course of the arbitration, and this would include decisions made to advance or craft arguments in a certain way before the tribunal. In this case, if the Arguments were as critical to Issue 12(d) as the plaintiff makes them out to be, it was, in my judgment, incumbent that the plaintiff made it clear to the Arbitrator that notwithstanding s 50(3) of the SOGA, there would still be no loss because of the Arguments, and that if the Arguments were accepted, the result would be no or at best nominal damages being awarded to the defendant.

47 On the contrary, the Arbitrator was informed that it was common ground between the parties that there was an available market and s 50(3) of the SOGA would, *prima facie*, apply as the measure of damages. If the Arbitrator could rely on that section without considering any evidence of actual loss and decided to take that path, I did not see how the plaintiff could thereafter complain that the Arbitrator had failed to apply his mind to considering the Arguments. Even if, for the sake of argument, the Arbitrator erred because he did not fully appreciate the true nature of the Arguments as advanced by the plaintiff, or simply misunderstood the plaintiff's case on this issue or misunderstood how s 50(3) of the SOGA should be applied in light of the Arguments, that would nevertheless *still* be insufficient to get the plaintiff across the finish line (*AKN* at [47]). It would, at best, demonstrate an error or errors of law. It is axiomatic that such errors are not subject to challenge before the courts under the guise of a breach of natural justice.

48 Additionally, the fact that the Arbitrator did refer specifically to certain aspects of the Arguments in the Award demonstrated, in my view, that the Arbitrator had in mind and did consider the Arguments. The mere fact that no clear or express mention of the Arguments were set out in the relevant part of the Award dealing with the issue of damages or specifically on Issue 12(d) did not, without more, lead to the clear and virtually inescapable inference that the Arbitrator entirely failed to consider Arguments – as I have explained at [41] and [42] above, there could be a number of reasons for that.

49 The Arbitrator referred to parts of the No Goods No Loss Argument in another section of the Award which dealt with an issue pertaining to uncertainty of delivery terms under the Contracts. I reproduce those paragraphs below:[note: 76]

> 90. Year Sun raises two further arguments in response to the provisions of the FOB sale terms.

First, it asserts that if Year Sun had nominated vessels for delivery before 30 October 2018, Gunvor in any event did not have gasoil to meet such nominations until 24 October 2018. Second, it asserts that Gunvor required a letter of credit to be issued ten days before any lifting could take place.

91. As to the amount of gasoil available to Gunvor for delivery, a point which Year Sun developed at great length during the evidentiary hearing, this to my mind is irrelevant. All Year Sun had to do was to nominate vessels. If it transpired that Gunvor did not have gasoil to meet its delivery obligations it would have found itself in breach of contract. It is by no means a foregone conclusion that Gunvor could not have performed its delivery obligations, and it is entirely speculative to assume this would have been the case. Whether or not Gunvor would have been able to supply gasoil upon nomination is also irrelevant for the purpose of determining the terms of the Contracts.

50 It can be seen that these paragraphs capture the essence of the No Goods No Loss Argument. The Arbitrator specifically noted that the plaintiff "developed at great length during the evidentiary hearing" the point that the defendant did not have sufficient gasoil available for delivery (*ie*, the No Goods No Loss Argument) and that such argument "to [his] mind [was] irrelevant". Rather, if it transpired that the defendant "did not have gasoil to meet its delivery obligations it would have found itself in breach of contract" but it was by "no means a foregone conclusion that [the defendant] could not have performed its delivery obligations".[note: 77]

51 The fact that the No Goods No Loss Argument had not been advanced by the plaintiff specifically in relation to the uncertainty of terms issue is of relevance. In my judgment, that was indicative that the Arbitrator was alive to and had applied his mind to the Arguments or aspects of them, not in a silo, but laterally across *the entire case* where the Arbitrator felt that they might have relevance or more relevance. In my judgment, this is fatal to the plaintiff's contention that the Arbitrator had completely failed to address his mind to the Arguments. It bears emphasising the very high threshold that a party has to meet to persuade the court that an arbitral tribunal failed to address a material issue (or arguments on such an issue) – the inference has to be clear and *virtually inescapable* (*AKN* at [46]), which means that no other reasonable inference or conclusion could be arrived at. Thus, if it is equally plausible that the tribunal had either implicitly rejected the argument or considered it irrelevant *to the issue* in relation to which it was advanced, the objection that a breach of natural justice was occasioned will not pass muster. In my judgment, in this case, it could equally be concluded that the Arbitrator either rejected the Arguments implicitly or did not find them convincing, or at all relevant *to Issue 12(d)* (reproduced at [28]).

52 A similar reasoning applies in relation to the Arbitrator's express reference to the Arguments when dealing with the issue of costs. At para 209 of the Award, the Arbitrator noted as follows:[note: 78]

Year Sun claims USD 494,602.24. It submits that it should be reimbursed its costs in full and that Gunvor should bear its costs in full because Gunvor (a) has wasted Year Sun's time and costs for one and a half years pursuing hopeless and unarguable counterclaims; (b) has suffered no actual loss, and/or did not have goods to supply for the most part of the duration under both Contracts. Year Sun also submits that it acted reasonably in rejecting two sealed offers to settle made by Gunvor, and that Gunvor unreasonably refused to accept Year Sun's own sealed offer to settle.

53 It was common ground that, with consensus of the parties, the drafting of the substantive and costs portions of the Award were undertaken by the Arbitrator at separate times even though the

Award as published dealt with the substantive issues and the issue of costs (see [35]). Nevertheless, that does not mean that the court should not read the Award as a whole. When so read, the picture that emerges is that express reference was made by the Arbitrator to the Arguments or aspects of them in *several* parts of the Award, even if not specifically under the issue of damages. Mr Lee submitted that the Arbitrator's summary of the Arguments in the costs section of the Award was merely an afterthought and only in response to costs submissions that had been made by the plaintiff where the Arguments had been mentioned. That did not mean, according to Mr Lee, that the Arbitrator had addressed his mind to the Arguments on the issue of damages.[note: 79] No plausible reason was given by the plaintiff as to why the Arbitrator would make reference to the Arguments in the costs section of the Award only as an afterthought, especially when some aspects of the Arguments *were* expressly referred to in the substantive sections of the Award (see [49]). I thus had no hesitation rejecting the plaintiff's submissions for the reasons given in this paragraph.

54 For all of the foregoing reasons, I conclude that the Arbitrator did not fail to consider the Arguments. Consequently, the plaintiff failed to persuade me that the 1st NJ Breach was made out.

55 This is sufficient to dispose of this part of the application. In any case, even if there was any breach of natural justice, I was not satisfied that the plaintiff demonstrated any prejudice that had been caused to it.

56 I turn next to the plaintiff's second ground.

Issue 2: whether the 2nd NJ Breach was made out

The parties' positions

57 The plaintiff's position was that the Tribunal had "wrongfully excluded expert evidence, thereby infringing on [the plaintiff's] right to be heard pursuant to Article 18 of the Model Law",[note: 80] which provides, *inter alia*, that "parties shall be given a full opportunity of presenting his case". The plaintiff relied on *CBS v CBP* [2021] SGCA 4 ("*CBS*") for the proposition that "the broad procedural powers of an arbitral tribunal are subject to the fundamental rules of natural justice" (at [62]).[note: 81] The expert evidence which the plaintiff intended to submit was on the specific point whether clauses such as Clause 26 "survive termination in the industry" and thus "remains enforceable after termination".[note: 82] Such expert evidence would have been relevant "for determining if an indemnification is to be granted", was not "duplicative", would have "required only a short opinion" and its "length and complexity [would have been] minimal". Thus, under rr 19.1 and 25.2 of the SIAC Rules (6th Edition, 2016) ("SIAC Rules"), such expert evidence ought to have been admitted.[note: 83]

58 According to the plaintiff, the exclusion of expert evidence led to the Arbitrator deciding that such clauses would survive the termination of the Contracts, thus "resulting in the Tribunal making the third dispositive order in the Award". That was the serious prejudice the plaintiff had suffered and which had altered the final outcome of the arbitral proceedings. Had the Arbitrator allowed the plaintiff's expert evidence, "the third dispositive order would not have been made".[note: 84]

59 The defendant submitted that the Arbitrator "concluded, after a full consideration of [the plaintiff's] submissions, that expert evidence" would "not be relevant and/or helpful in resolving the dispute between the parties".[note: 85] The defendant highlighted that the following chronology of events demonstrates clearly that there was no failure in the arbitral process as far as the Arbitrator's procedural ruling was concerned:

(a) 3 January 2020: the plaintiff sent an email to the defendant stating the specific questions that the plaintiff's expert witness would cover.[note: 86] The defendant replied that that was the "first time" that the plaintiff had "given notice of its intention to tender expert evidence on the [C]lause 26 issue". In that regard, "[n]o permission to tender evidence of this point was given when the [List of Issues] was finalised, nor was leave sought at any time prior to the submission of factual witness statements" and in any case, "the point raised is a legal one and not one for expert evidence".[note: 87]

(b) 6 January 2020: the Arbitrator directed the plaintiff to respond to the defendant's points and explain why expert evidence was required, having regard to the pleadings and the List of Issues.[note: 88]

(c) 7 January 2020: the plaintiff explained that "as final destination provisions are a relatively recent feature of the industry, with some major traders adopting this but others not, it might be helpful for the Tribunal to have industry expertise brought to bear".[note: 89]

(d) 8 January 2020: the defendant maintained that the plaintiff's application to adduce expert evidence on the Clause 26 issue should be disallowed "for the simple reason that the [C]lause 26 issue is strictly a legal issue and not an issue of 'industry practice' or one for expert evidence".[note: 90]

(e) 9 January 2020: the Arbitrator conveyed his decision to the parties by email, having "reviewed the pleadings again in detail as well as the various submissions filed by the parties" and having considered rr 19.1, 19.2 and 41.2 of the SIAC Rules. In respect of the issue in question, the Arbitrator did not "consider that industry expertise will assist in the proper construction of the contract and whether as a matter of law Clause 26 survives termination" and thus "decline[d] to permit expert evidence on this issue".[note: 91] I reproduce below the relevant parts of the Arbitrator's ruling:[note: 92]

> It is somewhat unusual to be faced with an application of this sort before the expert evidence has been filed. Without seeing the evidence, there is an element of conjecture in being able to determine what relevance and probative value such evidence might have. I must therefore proceed with caution in debarring evidence prior to seeing it. To be clear, the directions below are not a determination by me of the relevance, materiality and admissibility of the expert evidence to be filed.
>
> …
>
> Finally, I turn to issue 4(a). This issue is described as whether as a matter of industry practice Clause 26 survives the termination of the First Disputed Contract. The Claimant has elaborated to explain that "*as final destination provisions are a relatively recent feature of the industry, with some major traders adopting this but others not, it might be helpful for the Tribunal to have industry expertise brought to bear*". I do not consider that industry expertise will assist in the proper construction of the contract and whether as a matter of law Clause 26 survives termination. As a consequence, I decline to permit expert evidence on this issue.
>
> [emphasis in original]

60 The defendant submitted that from the chronology set out above, it is clear that the Arbitrator's ruling was made "after a full consideration of [the plaintiff's] submissions". In those circumstances, there was no breach of the rules of natural justice.[note: 93] Even if there was a breach, there was no prejudice occasioned by such breach. The defendant highlighted that the plaintiff "did have the opportunity to convince the Tribunal that Clause 26 did not survive the termination of the First Contract, and in fact fully exercised that opportunity". As the issue was one of construction of the First Contract which, in turn, was based on ascertaining the parties' intentions as to the scope of Clause 26, expert evidence on industry practice could have "no bearing on the issue".[note: 94]

61 The foregoing circumstances also made the present case distinguishable from *CBS*.[note: 95] In that case, the arbitrator directed that "there would be no witnesses presented at the hearing" and only allowed the hearing "*for oral submissions only*" [emphasis in original] (at [27]).

The applicable legal principles

62 It is well established that Article 18 of the Model Law, while providing that each party shall have a "full opportunity" of presenting its case, is understood to mean that each party has a right to have a reasonable opportunity to present its case (*ADG and another v ADI another matter* [2014] 3 SLR 481 ("*ADG*") at [104]). The "full opportunity" to present one's case is "not an unlimited one and must be balanced against considerations of reasonableness, efficiency and fairness" (*CBS* at [50]; *ADG* at [105]).

63 What amounts to a reasonable opportunity to be heard is, in turn, an intensely factual inquiry. The court's concern is whether the proceedings were "conducted in a fair manner" (*CBS* at [51]). Ultimately, the overarching enquiry is whether "what the tribunal did (or decided not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done" (*China Machine* at [98]).

64 In applying this test, the court assesses the tribunal's decision with reference to "*what was known to the tribunal at the material time*" [emphasis in original] (*China Machine* at [99]). Furthermore, the court accords a "margin of deference to the tribunal in its exercise of procedural discretion" precisely because an arbitration tribunal "possesses a wide discretion to determine the arbitral procedure" and such discretion "is exercised within a highly specific and fact-intensive contextual milieu, the finer points of which the court may not be privy to" (*China Machine* at [103]).

65 The foregoing principles are particularly apposite to a party's conduct *during* the arbitral proceedings and, in particular, with regard to procedural issues that may arise in the course of the arbitration. The Court of Appeal has made it clear that if a party "intends to contend that there has been a fatal failure in the process of the arbitration, then there *must* be fair intimation to the tribunal that the complaining party intends to take that point at the appropriate time if the tribunal insists on proceeding" [emphasis in original]. If a party so alleges that there has been such a fatal process failure and its hopes for a fair hearing have thereby been "irretrievably dashed by the acts of the tribunal", then it "cannot simply 'reserve' its position until after the award and if the result turns out to be palatable to it, not pursue the point, or if it were otherwise to then take the point" (*China Machine* at [168], [170]). As this court observed in *CAI v CAJ* [2021] SGHC 21 at [2], if an aggrieved party equivocates or keeps silent on the manner in which the arbitral proceedings are conducted only to raise objections subsequently in a setting aside application, such conduct would be viewed unfavourably by the court as an illegitimate attempt by that party to hedge its position.

My analysis and decision

My analysis and decision

66 Bearing these principles in mind, I conclude that there was no breach of natural justice occasioned by the Arbitrator's decision to exclude expert evidence on Clause 26. The Arbitrator's decision was reasoned and arrived at after considering the arguments raised by both parties. The manner in which the Arbitrator dealt with the application and issued his ruling on the plaintiff's application could not in any way be described as irrational or capricious. The Arbitrator's decision to disallow the plaintiff's application to tender expert evidence on the Clause 26 issue was well within the ambit of the wide discretionary powers of the Arbitrator to determine matters pertaining to procedure and evidence, as well as the deference given to arbitrators on such matters. Nor could it be said that what the Arbitrator did fell outside the range of what a reasonable and fair-minded tribunal in those circumstances might have done.

67 Further, there was no objection raised by the plaintiff to the Arbitrator's decision which was rendered on 9 January 2020. Mr Lee referred me to an email sent by the plaintiff's solicitors to the Arbitrator on 16 January 2020, where the plaintiff indicated that it "will comply, *but under protest*, with [the Arbitrator's decision rendered on 9 January 2020] (with compulsive force) for exchange of expert evidence, which has shifted from a full simultaneous exchange, which was Parties' longstanding agreement since the procedural architecture was fixed, to a part-simultaneous-part-sequential one" [emphasis added]. In this regard, the plaintiff indicated its "rights are respectfully reserved".[note: 96]

68 I disagreed with the plaintiff that this purported reservation of rights was adequate; on the contrary, it was clear to me that it was in fact woefully inadequate. I say this for several reasons.

69 First, the plaintiff's purported reservation of rights was *not* in fact directed at the Arbitrator's decision to disallow expert evidence on the Clause 26 issue. Rather, the plaintiff's complaint and purported reservation of rights was in relation to the Arbitrator's *further* procedural decision directing that part of the expert evidence be submitted *sequentially* instead of being exchanged. Thus, insofar as the Arbitrator's decision disallowing expert evidence on the Clause 26 issue was concerned, there was in fact *no* reservation of rights at all. Further, for completeness and as stated below at [74], even the complaint pertaining to sequential submission of expert evidence was dropped by the plaintiff and was no longer in issue in OS 51.

70 Second, the Arbitrator's ruling disallowing the expert evidence was made *prior to* the evidentiary hearing which took place in March 2020. Nevertheless, the plaintiff continued with the proceedings right through to the completion of the evidentiary hearing and closing submissions without demur.

71 In my judgment, the plaintiff's conduct was precisely the sort of hedging and equivocation that the Court of Appeal in *China Machine* had expressly cautioned arbitrants against (see above at [65]). It was thus not open to the plaintiff to belatedly raise the objection before this court that it was not afforded a reasonable opportunity to be heard by reason of the Arbitrator' procedural decision to disallow expert evidence on the Clause 26 issue.

72 In any event, I failed to see what prejudice was occasioned to the plaintiff. I accept the defendant's argument that, based on the Arbitrator's reasoning and conclusions reached on the substantive issue pertaining to Clause 26 (identified by the Arbitrator as Issue 13(a) in the List of Issues), any expert evidence led by the plaintiff, even if allowed, could not have reasonably made any difference to the outcome. It is clear that ultimately, the Arbitrator's decision on whether Clause 26 survived termination of the First Contract turned entirely on the construction of the First Contract and clause 26.[note: 97] In those circumstances, expert evidence would, in my judgment, have made

no difference to the Arbitrator's analysis and decision on this issue.

73 For the foregoing reasons, the 2nd NJ Breach alleged by the plaintiff was also not made out.

74 Finally and for completeness, the plaintiff also appeared to raise, in its supporting affidavit,[note: 98] certain further objections relating to the Arbitrator (a) disallowing expert evidence on the issue of the reasonableness of the defendant's decision to order/acquire gasoil to fulfil the Second Contract without the plaintiff having provided a letter of credit and (b) directing that part of the expert evidence be submitted sequentially, these further objections were dropped by the plaintiff and no longer pursued during the hearing before me.[note: 99]

Conclusion

75 For the reasons set out above, I dismissed the plaintiff's application in its entirety and awarded costs to the defendant. I fixed costs at S$15,000 (inclusive of disbursements) to be paid by the plaintiff to the defendant.

76 Finally, as the plaintiff's application was unsuccessful, there was no need for me to consider the defendant's alternative arguments on remitting the Award to the Arbitrator.

[note: 1]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 at paras 18–19.

[note: 2]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 at paras 21–22.

[note: 3]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 at para 23; Shanna Rani Ghose's Affidavit dated 24 February 2021 at para 12.

[note: 4]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at pp 270–273 (Defendant's letters dated 28 November 2018).

[note: 5]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at pp 243–245 (First Contract) and pp 263–264 (Second Contract).

[note: 6]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at pp 274–287 (Notice of Arbitration dated 21 December 2018, paras 16–20).

[note: 7]Shanna Rani Ghose's Affidavit dated 24 February 2021 at para 13; Plaintiff's Written Submissions ("WS") at para 14.

[note: 8]Plaintiff's WS at para 14; Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 at para 25.

[note: 9]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 at para 26, Exhibit TC–1 at pp 274–287 (Notice of Arbitration dated 21 December 2018).

[note: 10]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at p 34 (Final Award at para 12).

[note: 11]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at p 285 (Notice of Arbitration at para 39(a)(xi)).

[note: 12]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at p 316 (Notice of Arbitration at paras 39(b)(ii) and (c)(i)).

[note: 13]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at p 316 (Re-Amended Statement of Defence and Counterclaim at para 90).

[note: 14]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at pp 317, 319 (Re-Amended Statement of Defence and Counterclaim at paras 93–95, 101–104).

[note: 15]Plaintiff's WS at paras 19 and 43.

[note: 16]Plaintiff's WS at para 34.

[note: 17]Plaintiff's WS at paras 42–43.

[note: 18]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at p 39 (Award at para 45).

[note: 19]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at p 648 (Claimant's Written Closing Submissions dated 30 April 2020 at para 129) and p 410 (Respondent's Closing Submissions dated 30 April 2020 at para 111).

[note: 20]Transcript dated 21 April 2021 at p 11, lines 4–8; p 14, lines 22–29.

[note: 21]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at pp 343–344 and 423 (Re-Amended Statement of Rejoinder and Reply to Defence to Counterclaim dated 9 January 2020 at para 33A; Respondent's Closing Submissions dated 30 April 2020 at paras 151–154).

[note: 22]Shanna Rani Ghose's Affidavit dated 24 February 2021 at pp 95, 103–104 and 126–127 (Claimant's Amended Statement of Reply and Defence to Counterclaim dated 11 October 2019 at paras 43A, 68C–68H; Claimant's Written Opening Submissions dated 17 March 2020 at paras 83–86).

[note: 23]Defendant's WS at para 6.

[note: 24]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at pp 59–60 (Award at [137]–[140]).

[note: 25]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at pp 61–62 (Award at [148]–[155]).

[note: 26]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at pp 38, 70–72 (Award at [35] and [195]–[202]).

[note: 27]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at pp 62–63 and

65–70 (Award at [156] and [159]–[194]).

[note: 28]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at pp 78–79 (Award at [237]); Plaintiff's WS at para 2; Defendant's WS at para 7.

[note: 29]Plaintiff's WS at paras 22, 24 and 26.

[note: 30]Plaintiff's WS at para 27.

[note: 31]Plaintiff's WS at para 33.

[note: 32]Plaintiff's WS at paras 48–49.

[note: 33]Plaintiff's WS at paras 4 and 6.

[note: 34]Plaintiff's WS at para 69.

[note: 35]Plaintiff's WS at para 73.

[note: 36]Plaintiff WS at paras 5–6.

[note: 37]Defendant's WS at para 70.

[note: 38]Defendant's WS at paras 11–12.

[note: 39]Defendant's WS at para 38.

[note: 40]Plaintiff's WS at paras 66–68.

[note: 41]Plaintiff's WS at para 33.

[note: 42]Plaintiff's WS at paras 48–49.

[note: 43]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at p 43 (Award at para 64).

[note: 44]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at pp 1015, 1024–1025 (Transcript of Day 5 of the Evidentiary Hearing at p 68, lines 2–17 and p 77, line 24 to p 78, line 21).

[note: 45]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at p 864 (Expert Report of Jonathan Humphrey dated 17 January 2020 at paras 5.4.16 and 5.4.19); and p 902 (Expert Report of Jonathan Humphrey dated 2 March 2020 at paras 3.4.16–20).

[note: 46]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at pp 606–659 (Claimant's Written Closing Submissions dated 30 April 2020 at paras 9, 17, 22, 24, 124, and 126).

[note: 47]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at p 893 (Supplemental Expert Report of Jonathan Humphrey dated 2 March 2020 at para 2.4.4) and p 864 (Expert Report of Jonathan Humphrey dated 17 January 2020 at para 3.4.20).

[note: 48]Plaintiff's WS at paras 35, 40.

[note: 49]Plaintiff's WS at para 41.

[note: 50]Transcript dated 21 April 2021 at p 6, lines 16–18.

[note: 51]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at p 431 (Claimant's Oral Opening Submissions dated 17 March 2020 at p 6, lines 2–14).

[note: 52]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at p 617 (Claimant's Closing Submissions dated 30 April 2020 at para 25).

[note: 53]Shanna Rani Ghose's Affidavit dated 24 February 2021 Exhibit SRG–1 at pp 77 and 105 (Claimant's Amended Statement of Reply and Defence to Counterclaim dated 11 October 2019 at paras 4(e) and 69).

[note: 54]Transcript dated 21 April 2021 at p 8, lines 3–5.

[note: 55]Plaintiff's WS at paras 4, 81–82.

[note: 56]Defendant's WS at para 23.

[note: 57]Defendant's WS at paras 28 and 31.

[note: 58]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at p 73 (Award at para 209).

[note: 59]Defendant's WS at para 18.

[note: 60]Defendant's WS at para 19.

[note: 61]Defendant's WS at paras 20–21.

[note: 62]Defendant's WS at paras 18–19 and 22.

[note: 63]Transcript dated 21 April 2021 at p 14, lines 2–12.

[note: 64]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at pp 37–38 (Award at paras 29–30).

[note: 65]Transcript dated 21 April 2021 at p 14, lines 14–20.

[note: 66]Plaintiff's WS at paras 62 and 64.

[note: 67]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at pp 62–70 (Award at paras 159–194).

[note: 68]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at pp 62–63 (Award at paras 159–160).

[note: 69]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at p 64 (Award at para 166).

[note: 70]Transcript dated 21 April 2021 at p 7, lines 1–5.

[note: 71]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 at para 8.

[note: 72]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at p 410 (Respondent's Closing Submissions dated 30 April 2020 at paras 110–111).

[note: 73]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at pp 68–69 (Award at paras 186 and 193).

[note: 74]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at pp 63 and 68–69 (Award at paras 160; 164–166).

[note: 75]Transcript dated 21 April 2021 at p 4, lines 2–4.

[note: 76]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at p 48 (Award at paras 90–91).

[note: 77]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at p 48 (Award at para 91).

[note: 78]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at p 73 (Award at para 209).

[note: 79]Transcript dated 21 April 2021 at p 14, lines 2–12.

[note: 80]Plaintiff's WS at para 33.

[note: 81]Plaintiff's WS at para 77.

[note: 82]Plaintiff's WS at paras 71 and 73.

[note: 83]Plaintiff's WS at paras 72–76.

[note: 84]Plaintiff's WS at paras 83–84.

[note: 85]Defendant's WS at para 45.

[note: 86]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at pp 1308–1310 (Email from plaintiff's solicitors dated 3 January 2020 at 11:33 at S/N 4).

[note: 87]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at pp 1306–1308 (Email from defendant's solicitors dated 3 January 2020 at 8:12PM at S/N 4).

[note: 88]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at p 1306 (Email dated 6 January 2020 at 2:24PM).

[note: 89]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at p 1299 (Letter dated 7 January 2020 at para 9).

[note: 90]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at p 1304 (Email dated 8 January 2020 at para 16).

[note: 91]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at p 1323 (Email dated 9 January 2020 timed at 11:37).

[note: 92]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at pp 1321 and 1323 (Email dated 9 January 2020 timed at 11:37).

[note: 93]Defendant's WS at paras 45–47.

[note: 94]Defendant's WS at paras 49–55.

[note: 95]Defendant's WS at paras 56–60.

[note: 96]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at pp 1315 and 1323 (Email dated 16 January 2020 timed at 11:13).

[note: 97]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 Exhibit TC–1 at p 71 (Award at paras 197–199).

[note: 98]Terrence Chiu Ying Terng's 1st Affidavit dated 21 January 2021 at para 59.

[note: 99]Transcript dated 21 April 2021 at p 2, lines 35–38.

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