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

[2022] SGHC 267

Originating Application No 51 of 2022

Between

CNQ

… Claimant

And

CNR

… Respondent

JUDGMENT

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

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v
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Andre Maniam J:

Introduction

1 The parties were involved in two arbitrations before the same arbitrator. In both arbitrations, the respondent Seller claimed damages against the claimant Buyer for non-acceptance of goods under a sale and purchase contract. Each arbitration, however, involved a different period. There were also other differences, such as the Buyer's successful reliance on *force majeure* to excuse non-acceptance for two months of the period in the Second Arbitration.

2 Each arbitration resulted in an award against the Buyer for damages in favour of the Seller. The arbitrator applied the same measure of damages in both arbitrations.

3 The Buyer's application to set aside the First Award failed: *CNQ v CNR* [2021] SGHC 287.

4 The Buyer put forward different reasons in its application to set aside the Second Award[1] – the Buyer contended that the arbitrator had:

(a) *failed to attempt to understand* the ***new*** evidence and contentions in the Second Arbitration;[2] and

(b) *prejudged* the Second Arbitration, by being inclined to decide it in the same way as he had decided the First Arbitration.[3]

5 This is my judgment on the Buyer's application to set aside that Second Award.

Background

6 The goods in question are optical fiber preforms: rods made of synthetic quartz doped with germanium. Preforms are used to produce optical fiber, which would then be bundled to form optical fiber cables for sale to end users.[4] I refer to the goods contracted for as "Preforms", as distinct from "preform(s)" as a class of goods, because the Preforms were customised for the Buyer.

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1 Second Award, exhibited at 3ABD 2541.

2 Buyer's affidavit dated 14 April 2022 ("Supporting affidavit"), at paras 81–81.7 (1ABD 8 at 71–73); Buyer's submissions on setting-aside, at paras 26.1, 26.2, 26.3, 28–59.

3 Supporting affidavit, at paras 80–80.7 (1ABD 8 at 65–71); Buyer's submissions on setting-aside, at paras 26.4, 60–67.

4 First Award exhibited at 2ABD 939, at paras 122 and 236.

7 In both arbitrations, the arbitrator awarded the Seller damages based on the same measure of loss, namely, the difference between the contract price of the Preforms, and what the Seller termed the Hypothetical Market Price of preforms.[5] The Seller derived the Hypothetical Market Price of preforms using the market price of *optical fiber* (the end product) as a comparable product, rather than using the prices at which *preforms* were actually bought and sold at the relevant time.[6]

8 In applying to set aside the Second Award, the Buyer relies on the following grounds:

(a) it was unable to present its case, a ground under Article 34(2)(*a*)(ii) of the Model Law read with s 3 of the International Arbitration Act 1994 (2020 Rev Ed) ("IAA"); and

(b) there was a breach of the rules of natural justice in connection with the making of the Second Award by which the Buyer's rights have been prejudiced, a ground under s 24(*b*) of the IAA.

9 The Buyer says that these grounds are made out because the arbitrator:

(a) *failed to attempt to understand* the ***new*** evidence and contentions in the Second Arbitration; and

(b) *prejudged* issues in the Second Arbitration.

10 I address these contentions in turn.

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5 First Award, at para 230 (2ABD 938 at 999).

6 Seller's Quantification of counterclaim, at paras 16 to 19 (2ABD 1318 at 1324–1326).

Failure to attempt to understand new evidence and contentions

11 The Buyer says that the arbitrator failed to attempt to understand the *new* evidence and contentions in the Second Arbitration, in three respects:[7]

> (a) "The Arbitrator failed to consider the [Price Database] data as he had **erroneously** concluded that the parties agreed that the relevant benchmark was the 'monthly spot market price of preforms in [Country A]'" [emphasis in original];
>
> (b) "The Arbitrator failed to attempt to understand [the Buyer's expert's] method in estimating the market price of preforms in [Country A] during the relevant period"; and
>
> (c) "The Arbitrator failed to deal with [the Buyer's] fresh argument on mitigation".

12 The Price Database was a record relied on by the Buyer of the import prices of preforms in Country A during the relevant period (*ie*, the period of sale forming the subject of the Second Arbitration), Country A being the country in which the Preforms were supplied by the Seller to the Buyer.

Principles

13 Natural justice requires that an arbitrator attempt to understand the parties' evidence and contentions: *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM*") at [89]–[91]. If he does so, but makes an erroneous decision, that is not a breach of natural justice: *TMM* at [91].

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7 Buyer's submissions on setting-aside, at paras 26.1, 26.2, 26.3.

14 In *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 ("*Front Row*"), an award was set aside as the arbitrator failed to consider Front Row's submissions on a point that it had pleaded (at [46] and [54]). The arbitrator expressly noted that the point had been pleaded, but he disregarded the submissions Front Row had made on the point. He said that Front Row had ceased to rely on the point, but that was not so (at [18] and [29]).

15 In *Front Row*, there was an *explicit indication* that the tribunal had failed to consider the point in question: the tribunal said so. In the present case, however, the Buyer relies on *inferences* from the Second Award, and as the Court of Appeal held in *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 at [46], an inference that an arbitrator failed to consider an important pleaded issue "if it is to be drawn at all, must be shown to be clear and virtually inescapable." See further *CIX v CIY* [2021] SGHC 53 at [9]–[15].

16 From the proceedings in the Second Arbitration, including the Second Award, should I infer that the arbitrator had failed to attempt to understand the Buyer's new evidence and contentions?

Did the arbitrator fail to attempt to understand the import price data from the Price Database?

17 The first aspect of the Buyer's argument, is that the arbitrator failed to consider the Price Database data as he had erroneously concluded that the parties agreed that the relevant benchmark was the "monthly spot market price of preforms in [Country A]".[8]

[8] Buyer's submissions on setting-aside, at para 26.1.

18 The "Hypothetical Market Price" which the Seller used for its calculation of damages was a *spot* price. The Seller said that there was a strong correlation between the market price of optical fiber and the market price of preforms, particularly in *spot* transactions; and so "it is possible to calculate the prices that would have applied in the event that preforms, which were being supplied by [the Seller] to [the Buyer], were sold in the market for *spot* prices at that time based on a comparison with the trend of the market price of optical fiber" [emphasis added].[9]

19 The Buyer says that it had disputed that *spot* prices were the appropriate benchmark, but the arbitrator disregarded that because he mistakenly thought the parties were ***agreed*** on the use of *spot* prices.[10]

20 Had the Buyer disputed the use of *spot* prices? No. In its opening submissions in the arbitration, the Buyer's counsel said, "my financial witness has computed the possible damages based on the sale of preform [in Country A] to [a] party [of Country A] by the [Seller] on same *spot-rate* basis" [emphasis added].[11] The Buyer's counsel did not advance an alternative to using *spot* prices; instead, he said that the Buyer's expert had a different computation of damages, but one that was based on the "same spot-rate basis" as the Seller's computation. The difference was due to the Buyer's expert using a different "market price" from the Seller's Hypothetical Market Price, but both sides used the same spot-rate basis; the difference was not due to the Seller using *spot* prices, and the Buyer's expert using *non-spot* prices.

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9 Seller's witness statement, at para 88, see further paras 89–92, with a further reference to "spot transactions" in para 90 (2ABD 1336 at 1371).

10 Buyer's submissions on setting-aside, at paras 26.1, 37, 39, 41.

11 Day 1 Transcript, p 41 ln 9 to 11 (2ABD 1692 at 1734).

21 In the arbitration hearing, the Buyer's expert explained that he had, as a starting point, used the price of $163/kg in July 2018 – he agreed with the Seller's witness that "the $163 per kilogram that was agreed between the parties under the long-term agreement in July 2018 reasonably represents the *spot* price for preform at that point in time"[12] [emphasis added]. The Buyer's expert said, "I start with that price, because the parties seem to assume and agree that that is a good measure of *spot* price as of that date. So the question is how those prices have changed since then."[13] [emphasis added]. The Buyer's expert then conducted a trend analysis using data on import prices from the Price Database, to arrive at market prices for preforms in the relevant period. But since his starting point was a *spot* price, the market prices he arrived at were *spot* prices too.

22 Throughout the Buyer's expert's discussion with the tribunal at that juncture,[14] the expert never said that he was advocating the use of prices that were ***not*** *spot* prices. Indeed, the tribunal asked about what needed to be done "in order to arrive at the *spot* prices in January 2020 or February 2020"[15] [emphasis added]; queried what "the *spot* price might be in other months" [emphasis added], *ie*, months other than the expert's starting point of July 2018;[16] and asked for an explanation of the use of the trend analysis in arriving at "the *spot* price in a particular month"[17] [emphasis added]. At no point did the

12 Day 1 Transcript, p 142 ln 21 to p 143 ln 2 (2ABD 1692 at 1835–1836).

13 Day 1 Transcript, p 144 ln 12 to 15 (2ABD 1692 at 1837).

14 Day 1 Transcript, pp 140 to 149 (2ABD 1692 at 1833–1842).

15 Day 1 Transcript, p 144 ln 4 to 5 (2ABD 1692 at 1837).

16 Day 1 Transcript, p 146 ln 9 (2ABD 1692 at 1839).

17 Day 1 Transcript, p 146 ln 17 (2ABD 1692 at 1839).

Buyer's expert respond that he was not seeking to arrive at *spot* prices, but some other prices instead.

23 The Buyer's written reply closing submissions in the arbitration are in the same vein. The Buyer submitted at para 89:[18]

> It has been established that [the Buyer's expert] goes on a trend because the parties agree that it is a good measure of *spot* price, of USD 163 per kg in July 2018. Therefore, the relevant question only being how that price evolved in the period after July 2018 (in particular, after January 2020 – the period under dispute). This is best understood by looking at changes in preform prices (based on either the appropriate relationship between preform prices and optical fiber prices as assessed by [the Buyer's expert] using actual historical price data – instead of mere speculation by [the Seller's witness] without any evidence at all – or import prices for preform over the same period – again as adopted by [the Buyer's expert]). [emphasis added]

24 The Buyer did not contend that ***non-spot*** prices should be used; on the contrary, the Buyer's expert took the *spot* price of US$163/kg in July 2018 as a starting point, applied a trend analysis using the import prices from the Price Database, and purported to arrive at *spot* prices for the relevant period.

25 Indeed, the Buyer submitted in its closing submissions that the Price Database data was from *spot transactions*:[19]

> [The Buyer] has proved that not only does the [Price Database] data confirm that prices of the relevant product (preform) are available in the public domain, and for the relevant market ([Country A]), but the [Price Database] data also goes to show that these were spot transactions, and not under long term agreements.

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18 Buyer's reply closing submissions in the arbitration, at para 89 (3ABD 2296 at 2325); see also the Buyer's closing submissions in the arbitration, at para 330 (3AB 2116 at 2178).

19 Buyer's closing submissions in the arbitration, at para 346(e) (3ABD 2116 at 2182).

26 The arbitrator rejected this assertion that the Price Database data was derived from spot transactions: he noted at para 268 of the Second Award that the Buyer's expert admitted that he could not tell from the Price Database data which imports were spot transactions, and which were under long-term or mid-term transactions. The Buyer *now* accepts in these setting-aside proceedings that the Price Database data "did not distinguish between long-term, mid-term and spot basis contracts",[20] and notes that this was one of the reasons the arbitrator gave for not accepting the Buyer's expert's trend analysis. However, the Buyer attributes this to the arbitrator mistakenly thinking that the parties were agreed on the use of *spot* prices.[21]

27 There was ***no*** *mistaken conclusion* by the arbitrator that led him to disregard the Buyer's contention for some ***non-spot*** price. There was no such mistaken conclusion, and no such contention by the Buyer in the arbitration. Instead, both sides purported to use *spot* prices in their respective damages computations, and the arbitrator went along with that. Indeed, it is quite understandable why both parties and the arbitrator considered spot prices to be the relevant "market prices": in the First Award, the arbitrator had quoted *Benjamin's Sale of Goods* (Michael Bridge gen ed) (Sweet & Maxwell, 10th Ed, 2017) at para 16-064 for the proposition that in a case of non-acceptance of goods, "the seller's damages are calculated by deducting from the contract price the market price at the time and place fixed by the contract for acceptance"[22] – that indicates that a spot price is what is relevant, rather than a price that may

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20 Buyer's submissions on setting-aside, at para 39; Supporting affidavit, at para 81.6 (1ABD 8 at 72); Buyer's affidavit dated 1 July 2022, at para 13.3 (3ABD 2854 at 2861).

21 Buyer's submissions on setting-aside, at para 39.

22 First Award, at para 255 (2ABD 939 at 1009).

have been fixed earlier (before any non-acceptance) under a mid- or long-term contract.

28 Not only was there no *mistaken conclusion* as alleged by the Buyer, but it also appears from the Second Award that the arbitrator *had* considered the Price Database data, and the use which the Buyer's expert made of it:[23]

(a) the arbitrator noted the Buyer's expert's use of import price data from the Price Database: at para 258(b);

(b) he said that the Buyer's expert "[made] too many assumptions on both his starting input price in 2018 and the trend that he projected for the monthly spot market prices in 2020": at para 261;

(c) he said that the Buyer's expert "did not provide one set of figures for either the market price or damages, but three … [which] undermines confidence in any of the assumptions he made as to what is a fair representation of the market price": at para 262;

(d) he noted that the Buyer's expert "[used] the trend in import prices derived from the [Price Database] data"; he said he "accept[ed] that the [Price Database] data is a credible source of information on preform import prices in [Country A]"; but "[t]he question is whether it proves the monthly spot market price of preforms in [Country A] for the relevant period": at para 265;

(e) he noted that the Seller questioned the relevance of the Price Database data because the prices reflected are not necessarily monthly spot prices; in this vein, he found that the Buyer had shown that where

[23] Second Award, at paras 258 to 269 (3ABD 2541 at 2609–2614).

the [Price Database] data concerned sales by [the Seller] to its customers in [Country A], such information was likely to be correct: at para 266;

(f) he noted that the Seller said its sales to [Country A] in the relevant period were based on long-term contracts, but there could be additional shipments requested by customers for which the price would differ from the long-term contract price; however, the Seller was reluctant to provide more information about those sales: at para 266;

(g) he described the Seller's witness' evidence on those sales as "unsatisfactory", but he said "the most that [he] can make of the evidence is that some of the transactions can be inferred to be equivalent to spot transactions since some of them were likely to be specially negotiated prices for additional volume. However, these transactions by themselves do not establish the monthly spot prices for the relevant period.": at para 267;

(h) he noted that the Buyer's expert "applied a 'trend' to come up with the monthly prices based on the [Price Database] data", but said he was "unable to accept this 'trend' as an accurate estimate of the spot market prices in [Country A] for the relevant period": at para 268;

(i) at para 268, he gave three reasons why he could not accept the market prices put forward by the Buyer's expert:

(i) first, the Buyer's expert admitted that he could not tell from the Price Database data which imports were spot transactions, and which were under long-term or mid-term transactions;

(ii) second, the "trend" calculated by the Buyer's expert resulted in calculations that project higher prices in January 2020, February 2020 and May 2020 than the contract price (May 2020 being one of the months that the arbitrator found *force majeure* applied, and so the Buyer was not liable for non-acceptance of goods then) – the Buyer's expert said those higher prices were the "upper range" and he used a six-monthly average to average out (*ie*, lower) the prices, but the arbitrator found this a questionable solution that added to the inaccuracies in the expert's numbers, and did not reflect the parties' approach of ascertaining the market price on a monthly basis;

(iii) third, the fact that the Buyer's expert had to draw trends from preform import prices was a clear acknowledgment on his part that import prices are not equivalent to or representative of market prices – the expert would not have needed to conduct the trend analysis if he believed that the preform import prices from the Price Database were equivalent to preform spot prices; and

(j) the arbitrator concluded that he was unable to accept the numerous propositions and methods put forward by the Buyer's expert and derived no assistance from his reports; he found (as he had in the First Arbitration) that the most credible estimate of the monthly market prices of preforms was the Hypothetical Market Price computed by the Seller: at para 269.

29 Far from "ignoring (and failing to deal with) the case presented by [the Buyer] in respect of the [Price Database] data",[24] the Second Award shows that the arbitrator dealt with the Buyer's case at length.

30 Consequently, the first aspect of the Buyer's argument that the arbitrator failed to attempt to understand the new evidence and contentions in the Second Arbitration, fails.

Did the arbitrator fail to attempt to understand the Buyer's expert's method(s) in estimating the market price during the relevant period?

31 The second aspect of the Buyer's argument, is that "[t]he Arbitrator failed to attempt to understand [the Buyer's expert's] method in estimating the market price of preforms in [Country A] during the relevant period".[25]

32 The Buyer's expert put forward three different methods to determine the market price of preforms in Country A during the relevant period. The arbitrator referred to all three methods in the Second Award:[26]

> (a) the first method used the likely relationship between preform prices and optical fiber prices, to estimate the market price of preforms based on changes in optical fiber prices;[27]

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24 Buyer's submissions on setting-aside, at para 37.

25 Buyer's submissions on setting-aside, at para 26.2.

26 Second Award, at paras 257, 258(a), 258(b), 262 (3ABD 2541 at 2609–2611).

27 Second Award, at para 258(a) (3ABD 2541 at 2609).

(b) the second method used the import price data from the Price Database to derive the market price of preforms[28] – this is the method that was discussed in the preceding section (see [20]–[28] above);

(c) the third method used an average of the prices derived from the first and second methods.[29]

The first method

33 The Buyer acknowledges that in the Second Award, the arbitrator gave reasons for rejecting the first method, but contends that the reasons given show that the arbitrator made no attempt to understand the first method.

34 The arbitrator criticised the Buyer's expert's reports as "laden with variables and tentativeness"[30] – the Buyer says this shows that the arbitrator had not "meaningfully dissect[ed]" the analysis, and that he "failed to understand" it.[31] This strays away from the touchstone of whether the arbitrator had "failed *to attempt* to understand" the analysis: if he attempted to understand it, but still failed to understand it, that is not a breach of natural justice: *TMM* at [91], cited at [13] above. Likewise, the question is not whether the arbitrator had "meaningfully dissect[ed]" the analysis, but whether he had attempted to understand it.

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28 Second Award, at para 258(b) (3ABD 2541 at 2609–2610).

29 Second Award, at paras 257, 262 (3ABD 2541 at 2609–2611).

30 Second Award, at para 260 (3ABD 2541 at 2610).

31 Buyer's submissions on setting-aside, at para 51.1.

35 The arbitrator did not merely say the Buyer's expert's reports were "laden with variables and tentativeness" without further explanation – he said:[32]

> (a) the first method was "convoluted with too many layers of assumptions and too much room for inaccuracies";
>
> (b) even for the relationship between preform prices and optical fiber prices, the Buyer's expert had opined that with a 10% change in the optical fiber price, the resulting preform price would change by 6.4% or 4.2%, depending on whether his theoretical "intercept" was applied; and
>
> (c) the Buyer's expert's proposed regression equations were far apart, due to his reference to different data sources, although it had to be one or the other.

36 Further, in stating these views, the arbitrator referred to both reports from the Buyer's expert, as well as an extract from his testimony.[33] The Second Award indicates that the arbitrator had attempted to understand the Buyer's expert's first method.

37 The Buyer seeks to draw an analogy with the case of *Timwin Construction v Façade Innovations* [2005] NSWSC 548, where an adjudicator was found to have failed to attempt in good faith to exercise the power given to him (at [2] and [43]). In response to the claimant subcontractor's payment claim, the respondent builder had proposed to pay nothing because, among other reasons, "the amounts claimed in the payment claim as variations are amounts

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[32] Second Award, at para 260 (3ABD 2541 at 2610).

[33] Second Award, at paras 259–260, footnotes 172–174 (3ABD 2541 at 2610).

that should have been carried out pursuant to the contract" (at [5]). In his adjudication determination, the adjudicator said the respondent's argument did not "make sense" and referred to the argument with the remark "[w]hatever that means" (at [14]). The court found that these exemplified the adjudicator's "difficulty of understanding" the respondent's argument (at [27]). It was striking that the claimant however understood the respondent's argument – it provided a rebuttal to it – but it appeared that the adjudicator had not considered that rebuttal (at [28] and [37]). As the court observed (at [29]):

> If the adjudicator were seeking to understand what was meant by this portion of the payment schedule, one might have thought that he would have referred to the apparent understanding, and rebuttal, given by [the claimant] in its submissions. He did not do so. …

38 The present case is quite different: the arbitrator did not say that he *did not understand* the Buyer's expert's first method; on the contrary, he said what his understanding of that method was, and gave reasons for not accepting it; there was no need for the arbitrator to refer expressly to the Seller's rebuttal of that method.

39 The Buyer then cites para 261 of the Second Award, where the arbitrator said that the Buyer's expert had made too many assumptions on both his starting input price in 2018 and the trend that he projected for the monthly spot market prices in 2020.[34] The Buyer says that because the arbitrator did not identify the "many assumptions" he referred to, he must have "failed to engage with the assumptions in determining whether they were reasonable assumptions to make"[35] – it does not however follow from the arbitrator not identifying the assumptions, that he had failed to engage with them.

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34 Second Award, at para 261 (3ABD 2541 at 2610).

35 Buyer's submissions on setting-aside, at para 51.2.

40 More fundamentally, para 261 of the Second Award was not about the *first* method, it was about the *second* method. The arbitrator's reference to his questioning of the Buyer's expert on the rationale for using a trend rather than absolute prices, concerned the second method and not the first – footnote 175 to para 261 cites Transcript Day 1, at page 147 line 8 to page 149 line 9, which is about the second method, not the first.[36]

41 The arbitrator's questioning of the Buyer's expert further indicates that he *had* attempted to understand the expert's methods.

The second method

42 The Buyer's expert's second method, which used import price data from the Price Database, has been extensively discussed in the preceding section at [20]–[28], and I have concluded that the arbitrator *had* attempted to understand the data from the Price Database, and the use which the Buyer's expert made of it for the second method. There was no failure, or even reluctance, to attempt to understand the second method, as the Buyer contends.[37]

The third method

43 The third method used an average of the prices from the first and second methods. The arbitrator understood that full well, for he described it in the award.[38] He did not fail to attempt to understand it; having rejected the first and second methods, he rejected the third method, which was just an average of the results from the first two.

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36 Day 1 Transcript, p 147 ln 8 to p 149 ln 9 (2ABD 1692 at 1840–1842).

37 Buyer's submissions on setting-aside, at paras 55–59, in particular para 56.

38 Second Award, at paras 257, 262 (3ABD 2541 at 2609–2610).

Did the arbitrator fail to attempt to understand the Buyer's fresh arguments on mitigation?

44 In the First Arbitration, the arbitrator accepted the Seller's argument that the principle of mitigation is already assumed in the "contract price less market price" measure of loss, and that this also applied where the contract price was compared to the Hypothetical Market Price (First Award, paras 254–257 and 258(d)).

45 The Buyer contends[39] that in the Second Arbitration, it had made two fresh arguments as to why mitigation is *not* assumed in the aforesaid measure of loss:

(a) the Seller itself had said at para 133 of its closing submissions[40] that the issue to be determined is what a third-party buyer would have paid it for preforms (and so the Seller had to show that it had offered preforms at the Hypothetical Market Price to such buyers);[41] and

(b) there was evidence that the Seller was consistently operating at its maximum production capacity, so it did not have the capacity to supply the Buyer with the Preforms contracted for – thus it suffered no losses for which it should be entitled to relief.

46 What the Seller submitted at para 133 of its closing submissions was:[42]

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39 Buyer's submissions on setting-aside, at paras 44–47; Supporting affidavit, at paras 80–80.3 read with 73 (1ABD 8 at 59–67).

40 Seller's closing submissions in the arbitration, at para 133 (3ABD 2198 at 2246).

41 Buyer's reply closing submissions in the arbitration, at para 73 (3ABD 2296 at 2319–2321).

42 Seller's closing submissions in the arbitration, at para 133 (3ABD 2198 at 2246).

> … Given that the task before the Tribunal is to determine what a third party buyer on the spot market would have agreed to pay [the Seller] for preforms that were originally to be supplied to [the Buyer], [the Seller] submits that the methodology closest to commercial reality, namely the Hypothetical Market Price, should be preferred.

47 The Buyer latched on to that, submitting in its reply closing submissions that:[43]

> While the … Tribunal in the previous arbitration determined that duty to mitigate is assumed within … SOGA [*ie*, the Sale of Goods Act], it is [the Seller's] own case in para 133 of its Closing Submissions that issue to be determined is what a third-party buyer would have paid [the Seller] for preforms. On account of speculative and exaggerated claims made by [the Seller] (which are untenable), [the Seller] is duty bound to show that it offered such prices to any third party (especially when it has itself claimed that it expected to receive such prices in the market). Therefore, [the Buyer] maintains that in the present arbitration it is an important issue to be determined whether [the Seller] mitigated its losses.

48 In para 133 of its closing submissions, however, the Seller was not saying that the arbitrator should reverse his decision from the First Arbitration, on whether mitigation was assumed in the "contract price less market price" measure of loss. Indeed, in response to the Buyer's proposed issue, "Whether [the Seller] was duty bound to mitigate its losses, if any", the Seller had responded in the very same closing submissions:[44]

> This is a non-issue and does not require a determination. This is because the duty to mitigate is already assumed within the measure of [the Seller's] expectation loss … such that there is no need to separately prove mitigating steps taken by [the Seller]. The Tribunal determined that this is the correct legal position in the First Arbitration.

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43 Buyer's reply closing submissions in the arbitration, at para 73 (3ABD 2296 at 2321).

44 Seller's closing submissions in the arbitration, at para 12 (3ABD 2198 at 2208).

49 The reference in para 133 of the Seller's closing submissions to "what a third party buyer on the spot market would have agreed to pay [the Seller]" (for preforms that the Buyer had wrongfully not accepted), was simply a reference to "the market price of preforms" that was to be compared with the contract price of the Preforms in assessing damages. Indeed, given that the Seller put forward a Hypothetical Market Price, it was clearly not saying that it had *actual* offers, or *actual* sales, of preforms to third party buyers at that *hypothetical* price, or that it had to show such offers or sales to receive damages.

50 The arbitrator evidently did not think that para 133 of the Seller's closing submissions was an about-turn by the Seller from the position it successfully took in the First Arbitration regarding mitigation. He agreed with the Seller that the *legal* issue of whether mitigation was assumed in the measure of loss, should be decided in the same way that he had decided it in the First Arbitration. Thus, in the Second Award he referred to the First Award and reiterated:[45]

> (d) There is no requirement in law that a seller must have manufactured the goods or appropriated the goods to the contract, or demonstrate that it was ready and willing to supply the goods, before it can claim damages for non-acceptance by the buyer under Section 50 of the SOGA. The measure of loss … is the price of preforms under the Agreement less the market or current price of preforms at the time that the preforms ought to have been accepted.
>
> (e) There is already an assumption of mitigation built into the measure of loss based on the contract price less market price of the goods, so there is no room to make any further deduction from the measure of loss on account of alleged failure of mitigation.

51 The arbitrator thereby rejected the Buyer's contention that the Seller had to show that it had mitigated loss, by offering or selling the preforms that the Buyer had wrongfully not accepted, to third parties. The arbitrator did not *fail*

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[45] Second Award, at paras 253(d), (e) (3AB 2541 at 2608).

to attempt to understand the Buyer's contention, he *rejected* it. He had rejected essentially the same contention in the First Arbitration ("that [the Seller] cannot prove the efforts that it took to find buyers" and so its claim for damages fails or has to be reduced), following from his conclusion that the principle of mitigation is already assumed in the "contract price less market price" measure of loss.[46]

52 The Buyer's second "fresh argument" on mitigation, was that the Seller could not produce the quantities of the Preforms that the Buyer had contracted to buy. This was a *factual* contention that was strenuously disputed by the Seller, it was not a *legal* contention as to whether mitigation was assumed in the "contract price less market price" measure of loss. It followed from the arbitrator's conclusion that mitigation *was* assumed in the measure of loss, that even if the Buyer could show that the Seller was unable to produce the contracted quantities of the Preforms (and so the Seller could not have mitigated by producing that quantity of preforms for sale to third parties), this would not affect the Seller's claim for damages. In the circumstances, it was unnecessary for the arbitrator to resolve the factual dispute as to whether the Seller could have produced the contracted quantities of the Preforms.

53 For the above reasons, I reject all the Buyer's arguments that the arbitrator failed to attempt to understand the Buyer's new evidence and contentions in the Second Arbitration.

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[46] First Award, at para 254 (2ABD 939 at 1009).

Prejudgment

54 The Court of Appeal stated in *BOI v BOJ* [2018] 2 SLR 1156 at [107] and [109]:

> 107 The rule against prejudgment prohibits the decision-maker from reaching a final, conclusive decision before being made aware of all relevant evidence and arguments which the parties wish to put before him or her. The primary objection against prejudgment is the surrender by a decision-making body of its judgment such that it approaches the matter with a closed mind …
>
> …
>
> 109 To establish prejudgment amounting to apparent bias, therefore, it must be established that the fair-minded, informed and reasonable observer would, after considering the facts and circumstances available before him, suspect or apprehend that the decision-maker had reached a final and conclusive decision before being made aware of all relevant evidence and arguments which the parties wish to put before him or her, such that he or she approaches the matter at hand with a closed mind.

55 The Buyer's argument on prejudgment was: "The Arbitrator had pre-judged the issue[s] by displaying an unreasonable inclination to upholding his prior ruling in the [First Award]".[47]

56 The issues which the Buyer said the arbitrator had prejudged were the same two issues that it said the arbitrator had failed to attempt to understand, namely:[48]

(a) "The appropriate method to determine the market price of preforms in [Country A]"; and

(b) "Whether [the Seller] bore a duty to prove its efforts to mitigate".

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47 Buyer's submissions on setting-aside, at para 26.4.

48 Buyer's submissions on setting-aside, at para 61.

57 I cannot infer from the arbitration record that the arbitrator approached these issues with a closed mind.

58 In so far as the arbitrator was being asked to decide the same issues between the same parties, there was nothing inherently wrong in him deciding them the same way. *W v AW* [2021] HKCFI 1707, like the present case, involved the same parties being in two successive arbitrations involving some issues that were the same. Here, the same sole arbitrator presided over both arbitrations; in *W v AW*, each tribunal consisted of three arbitrators, with the two tribunals having one arbitrator in common. The applicant (W) applied to set aside the second award. The Hong Kong High Court held that the second award was invalid for the second tribunal had made findings that were inconsistent with those made on the same issues in the first arbitration, there was no explanation for such inconsistency, and the second tribunal had failed to give the parties the opportunity to address it on the first award before the second award was made (at [49]–[56]).

59 Here, the parties were given the opportunity to submit on the First Award. Indeed, the Buyer was also given the opportunity to put forward new evidence and contentions. The arbitrator considered the evidence and contentions, new and old, and stated that "[n]umerous arguments are irrelevant to a claim for damages under section 50 of the SOGA or repeat grounds which had been dealt with in the [First] Arbitration."[49] He then set out points from the First Award that he was deciding the same way in the Second Award.[50] He did not however say that in the Second Arbitration he was accepting the Seller's Hypothetical Market Price approach just because he had accepted it in the First

49 Second Award, at para 248.

50 Second Award, at para 253, generally.

Arbitration. Instead, he noted that the Buyer took "a different position on the basis for determining the market price", which he would address later in the Second Award.[51]

60 He proceeded to address the Buyer's expert's methods as some length, explaining why he could not accept each of them. In particular, he addressed the import price data from the Price Database, and the use which the Buyer's expert had made of it (for the expert's second method), before concluding that, as with the First Arbitration, "the most credible estimate of the monthly market prices of preforms is the Hypothetical Market Price computed by the Respondent [Seller]."[52]

61 On the issue of mitigation, the arbitrator considered the Buyer's contentions (including its new contention that the Seller could not produce the quantities of the Preforms that the Buyer had contracted to buy) before deciding the issue in the same way that he had in the First Arbitration: see [44]–[52] above.

62 There is nothing from which I can infer that the arbitrator had prejudged the issues in the Second Arbitration. Besides the treatment of new evidence and contentions from the Buyer in the Second Award, the arbitrator engaged with the Buyer's counsel and expert during the hearing (see, *eg*, [20]–[22] above): this demonstrates that he attempted to understand the Buyer's case in the Second Arbitration, and that he had not prejudged the issues in the Second Arbitration.

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51 Second Award, at para 253(b).

52 Second Award, at para 269.

Prejudice

63 Further, to justify setting-aside under s 24(*b*) of the IAA the rights of the Buyer must have been prejudiced by the breach of natural justice. Prejudice is not an element of the ground for setting-aside under Article 34(2)(*a*)(ii) of the Model Law, but the absence of prejudice remains a relevant consideration when the court decides whether to set aside an award: *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [98]–[100].

64 I am not satisfied that the Buyer has been prejudiced by the way in which the arbitrator handled the Second Arbitration. Absent such prejudice, I would not set aside the Second Award.

Conclusion

65 The arbitrator did not fail to attempt to understand the Buyer's new evidence and contentions in the Second Arbitration. He did not prejudge the issues in the Second Arbitration that were in common with the First Arbitration, he considered the Buyer's new evidence and contentions. The arbitrator's handling of the Second Arbitration did not prejudice the rights of the Buyer. In the circumstances, I dismiss the Buyer's application to set aside the Second Award.

66 It follows that the Seller is entitled to costs from the Buyer, such costs to be assessed if not agreed. If the parties are unable to agree on costs, they are to file and serve their costs submissions, limited to five pages excluding any

schedule of disbursements, within 14 days. For now, I simply observe that this second setting-aside application was not as complicated as the first.

Andre Maniam
Judge of the High Court

Tan Chuan Thye SC, Devathas Satianathan and Timothy James Chong Wen An (Rajah & Tann Singapore LLP) for the claimant;
Tay Yong Seng, Ng Si Ming, Ang Ann Liang and Lim Wan Jen Melissa (Allen & Gledhill LLP) for the respondent.