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

[2023] SGHC 267

Originating Application No 79 of 2023

Between

DBL

… *Claimant*

And

DBM

… *Defendant*

GROUNDS OF DECISION

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

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v
DBM

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Introduction

1 The claimant, [DBL], applied to set aside the award made in Singapore Chamber of Maritime Arbitration ("SCMA") Arbitration No [xxx] ("the Arbitration") in the defendant's ([DBM]'s) favour on the ground that the rules of natural justice had been breached. The award was issued on 13 April 2022 and corrected and delivered to the parties on 28 October 2022 ("the Award").[1]

2 [DBL]'s complaint was that:[2]

(a) it was not afforded a reasonable and fair opportunity to present arguments in respect of a demonstration made by [DBM]'s counsel

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1 1st Affidavit of [KNV] (1 Feb 2023) ("[KNV]-1") at para 4.

2 Claimant's Written Submissions (17 Jul 2023) ("CWS") at para 35.

during closing arguments, which demonstration was in breach of a hearing protocol issued by the tribunal ("the Tribunal") and improperly introduced extraneous evidence; and

(b) the Tribunal failed to consider or apply its mind to two defences raised by [DBL].

3 I dismissed [DBL]'s application. [DBL] has filed an appeal and I issue these grounds to explain my decision.

Background

4 Under a written sales contract ("the Sales Contract"), [DBL] agreed to sell 19,600mt (plus/minus 10%) of prime steel slabs ("the Goods") to [DBM]. The total contract value was expected to be US$9,074,800 (at a unit price of US$463.00/mt). The Sales Contract expressly specified that the goods were to be loaded at "any Port from K.S.A. [*ie*, the Kingdom of Saudi Arabia ("KSA")]".[3]

5 The Sales Contract was governed by English law and provided for arbitration in Singapore in accordance with the arbitration rules of the SCMA for the time being in force at the commencement of arbitration.[4]

6 The Goods were loaded on the M/V [FP] ("the Vessel"). On the face of the Bill of Lading No [xxx] ("B/L"), the Goods were loaded at "Dammam Port, Kingdom of Saudi Arabia" on 19 September 2023. The notify parties on the B/L

[3] [KNV]-1 at paras 9–11; p 379.

[4] [KNV]-1 at para 12; p 382.

were [FD] Bank (*ie*, [DBM]'s bankers), [DBM], and [GLK] (*ie*, [DBM]'s parent company).[5]

7 On 19 September 2013, [DBL] invoiced [DBM] for the sum of US$9,922,152.97 ("the Purchase Price"), and [FD] Bank released the Purchase Price to [DBL] under a letter of credit.[6]

8 A dispute subsequently arose between the parties over where the goods were loaded – [DBM] alleged that the Goods were loaded in Iran (which was a jurisdiction subject to sanctions), and therefore, [DBL] had breached the Sales Contract. On 24 September 2013, [FD] Bank wrote to [DBM] stating that they were "informed by [their] sources" that the Vessel arrived at Bandar Abbas, Iran, on 21 September 2013, and that they "suspect that [the Goods] were loaded in Bandar Abbas" and not Dammam Port, KSA.[7]

9 In the circumstances, [DBM] requested [DBL] to issue an "indemnity letter" to be submitted to [FD] Bank, a draft of which was provided by [DBM].[8] On 24 September 2013, [DBL] provided [DBM] with an "Indemnity Bond" ("the Bond"). The Bond expressly stated that it would "form part and parcel of the Sales Contract".[9] By way of the Bond, [DBL] confirmed that:[10]

(a) the Goods would originate from the KSA and be loaded from Dammam Port;

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5 [KNV]-1 at para 13; p 387.

6 [KNV]-1 at paras 14–15.

7 [KNV]-1 at para 16; p 393.

8 [KNV]-1 at para 17; pp 395–397.

9 [KNV]-1 at para 18; pp 400–401.

10 [KNV]-1 para 18; pp 400–401.

(b) if the bankers or the relevant authorities were not satisfied with the documentation in relation to the Goods, then the Sales Contract shall be terminated with all payments received refunded to [DBM] ("the Dissatisfaction Clause");

(c) in the event the Goods did not originate from the KSA and the documents provided were not to the satisfaction of the bankers and authorities, the Sales Contract would stand terminated and all payments received would be refunded by [DBL]; and

(d) [DBL] undertook to indemnify [DBM] for all costs and losses incurred by [DBM] consequent to such termination.

10 On 29 September 2013, [DBM] wrote to inform [DBL] that it was "cancelling the [Sales Contract]" and requested reimbursement of the Purchase Price.[11]

11 On or about 26 October 2013, [DBL] agreed to remit US$500,000 to [DBM].[12] Concurrently, [FD] Bank demanded that [DBM] repay the sums it had paid to [DBL]. On 17 February 2014, [FD] Bank debited these monies from [DBM]'s bank account. As [DBM]'s bank account did not have sufficient funds, it was placed in an overdraft and [FD] Bank charged [DBM] a penalty interest. As at March 2014, [DBM] claimed that the principal amount owed by [DBL] was US$9,422,177.97 ("the Outstanding Amount").[13]

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11 [KNV]-1 at para 19.

12 [KNV]-1 at para 20; p 405.

13 Defendant's Written Submissions (17 Jul 2023) ("DWS") at para 12; [KNV]-1 at p 81 (paras 35–36).

12 In April to May 2014, [DBM] and [DKL], a company under the [GBM] Group of companies, finalised an agreement for the purchase of nickel from [GBM] Group by [DBM]. In June 2014, [GBM] Group requested that the agreement be revised for the role of the seller to be assumed by [DBL] (which was closely associated with the [GBM] Group), so that [DBL] could supply nickel to [DBM] to set off the Outstanding Amount. The agreement for the purchase of nickel was thus revised and executed by [DBL] and [DBM] ("the Nickel Purchase Agreement"). Pursuant to the Nickel Purchase Agreement, [DBL] agreed to supply 500mt of nickel to [DBM].[14]

13 On 25 July 2014, [DBM] and [DBL] executed an Addendum to the Nickel Purchase Agreement ("the Addendum") which, amongst other things, recorded that:[15]

(a) [DBL] owed [DBM] the amount of US$9,422,177.97 (*ie*, the Outstanding Amount); and

(b) [DBM] confirmed that US$4,960,653.48, being the tentative value of nickel sold by [DBL] to [DBM], would be adjusted against the Outstanding Amount.

14 The parties then agreed on certain adjustments with respect to the value of nickel supplied. Adjusting the Outstanding Amount against the agreed purchase price of the nickel, it was [DBM]'s position that the new outstanding amount owed by [DBL] was US$4,683,418.77 ("the New Outstanding Amount").[16]

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14 DWS at para 13; [KNV]-1 at para 21; pp 82–83 (paras 37–41); pp 413–416.

15 [KNV]-1 at para 22; pp 418–419.

16 DWS at paras 15–17; [KNV]-1 at pp 84–85 (paras 43–46).

15 On 31 October 2015, [DBM] requested that [DBL] confirm the New Outstanding Amount. [DBM] also requested that if [DBL] disagreed with the figure, [DBL] was to send a statement of account to [DBM] to enable it to reconcile the figures.[17]

16 On 26 November 2015, [DBL] provided a signed and stamped confirmation ("the First Balance Confirmation") that the sum it owed [DBM] was US$4,610,707.65 (*ie*, the New Outstanding Amount less US$72,711.12). [DBL] did not provide any statement of account explaining the revised figure.[18]

17 After multiple requests for payment, [DBM] sent another letter on 10 April 2017, again requesting [DBL]'s confirmation that it owed [DBM] the New Outstanding Amount. [DBL] provided a signed and stamped confirmation that the net principal sum of US$4,610,707.65 was due to [DBM] ("the Second Balance Confirmation"). [DBL] similarly did not provide any statement of account to support this revised figure.[19]

18 Ultimately, [DBL] did not make any payment to [DBM].[20]

The Arbitration

19 On 24 July 2020, [DBM] commenced arbitration proceedings against [DBL].[21] The parties' pleadings were prolix and somewhat confusing. In

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17 DWS at para 18; [KNV]-1 at p 86 (para 49).

18 DWS at para 19; [KNV]-1 at p 87 (para 50).

19 DWS at para 20; [KNV]-1 at pp 88–89 (paras 55–56).

20 DWS at para 21; [KNV]-1 at p 91 (para 61).

21 [KNV]-1 at para 24.

essence, and material to this application, [DBM] sought, *inter alia*, the following reliefs:[22]

(a) damages for breach of the Sales Contract as varied by the Bond;

(b) alternatively, damages for breach of the Sales Contract.

In both cases, the pleaded breach was that the Goods were loaded at the port of Bandar Abbas in Iran.[23] [DBM] claimed to be entitled to the New Outstanding Amount. With respect to the principal claim, [DBM] sought, *in addition*, certain other losses, including the loss of revenue on the forward sale of the Goods and the penalty interest imposed by [FD] Bank.[24]

20 [DBM] further pleaded that its claim was not time-barred because the limitation period had been extended on account of various acknowledgements by [DBL] in:[25]

(a) the Nickel Purchase Agreement;

(b) the First Balance Confirmation; and

(c) the Second Balance Confirmation;

and these acknowledgments ("the Acknowledgments") met the requirements of the Limitation Act 1980 (c 58) (UK) ("the English Limitation Act").

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22 [KNV]-1 at pp 71, 105, 282, 296–297 (Exhibit B-3 at paras 2 and 109; Exhibit B-8 at paras 101 and 151).

23 [KNV]-1 at pp 99 and 105 (paras 88 and 110).

24 [KNV]-1 at pp 110–111 (para 130 and 133).

25 [KNV]-1 at p 97 (para 81).

21 [DBM]'s claims were denied by [DBL]. In [DBL]'s defence,[26] [DBL] asserted that:

(a) it was not in breach of the Sales Contract as the Goods were loaded on the Vessel in KSA;[27]

(b) the Bond was not enforceable as it was a gratuitous promise;[28] and

(c) the claim was time-barred, and the limitation period had not been extended as there had been no effective acknowledgment by [DBL] under the English Limitation Act.[29]

22 Prior to the evidentiary hearing, the Tribunal issued an agreed hearing protocol ("the Hearing Protocol") setting out the procedural steps parties had to take leading up to the evidentiary hearing in the Arbitration ("the Arbitration Hearing").[30] Amongst other things, the Hearing Protocol expressly provided that:[31]

> If any party intends to rely on demonstratives [*sic*] exhibits derived from evidence on the record, it must disclose such demonstratives [*sic*] exhibits by 14 October 2021. Any demonstrative exhibits should clearly set out the references to the final hearing bundle and they will be added to the final hearing bundle and the hearing index will be updated accordingly by the Claimant.

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26 [KNV]-1 at pp 222–247 (Exhibit B-7).

27 [KNV]-1 at pp 232–234.

28 [KNV]-1 at pp 234–236.

29 [KNV]-1 at pp 238–244.

30 [KNV]-1 at pp 40–46.

31 [KNV]-1 at p 45.

23 Prior to the Arbitration Hearing, [DBL] adduced a document titled "Vessel Finder Port Movements report" ("the Vessel Finder Report").[32] The Vessel Finder Report purported to set out the coordinates of the Vessel at various dates and points in time for the period of 1 September 2013 to 31 October 2013 ("the Period"). It did not have the Vessel's coordinates for 19 September 2013, but did for the morning of 20 September 2013.[33]

24 The Arbitration Hearing was held on 18 and 19 October 2021. During oral closing submissions, [DBM]'s counsel extracted data from the Vessel Finder Report, plotted them together with (a) the coordinates of Dammam Port; and (b) the maximum speed of the Vessel throughout the Period (15 knots), into a website known as the "Searoutes Website". The Searoutes Website has an application by which coordinates of two points can be entered and a route (via sea) between the two points will be suggested.[34]

25 By doing so, [DBM] submitted that it was not possible for the Vessel to have been at Dammam Port on 19 September 2023: Dammam Port was 1,261km from the Vessel's position on the morning of 20 September 2023 – even if the Vessel had travelled from Dammam Port at the maximum speed of 15 knots, it would have taken 45 hours at the minimum to reach that position.[35]

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32 [KNV]-1 at pp 407–408; DWS at para 49.

33 CWS at para 41; [KNV]-1 at p 407.

34 [KNV]-1 at paras 38–40; pp 690–692.

35 [KNV]-1 at para 38; pp 690–692.

The Award

26 The Tribunal largely found in [DBM]'s favour. In particular, it held that:[36]

(a) the Goods were not loaded on the Vessel in the KSA on 19 September 2013 and the Vessel was in Iran at the relevant time;[37]

(b) [DBL] was therefore in breach of cl 9 of the Sales Contract and in breach of the Bond;[38]

(c) [DBM] was entitled to terminate the Sales Contract and claim damages;[39]

(d) the claim was not time-barred as the Acknowledgments "gave rise to new causes of action and had the effect of interrupting any time bar";[40] and

(e) [DBL] was liable to pay [DBM] the New Outstanding Amount, "being the balance of the [Purchase Price] not previously repaid".[41]

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36 [KNV]-1 at pp 27–39 (Exhibit A-1).

37 [KNV]-1 at pp 31 and 35 (paras 18 and 38).

38 [KNV]-1 at pp 31, 35–36 (paras 17, 19, 40–41).

39 [KNV]-1 at pp 31 and 36 (paras 19 and 41).

40 [KNV]-1 at p 34 (para 30).

41 [KNV]-1 at p 37 (para 46).

27 The Tribunal declined to grant [DBM] damages for the other claimed losses, including the loss of revenue on the forward sale of the Goods or the penalty interest charged by [FD] Bank, as it found these too remote.[42]

[DBL]'s case

28 [DBL] relied on s 24(b) of International Arbitration Act 1994 (2020 Rev Ed) ("the IAA") to set aside the Award.[43] Section 24(b) reads:

> **Court may set aside award**
>
> 24. Despite Article 34(1) of the Model Law, the General Division of the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if —
>
> …
>
> (b) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

29 [DBL]'s case was that there was a breach of natural justice in two respects:[44]

(a) first, the Tribunal allowed [DBM] to introduce evidence via its demonstration using the Searoutes Website during its closing submissions ("the Searoutes Demonstration"), which [DBL] had no opportunity to respond to, and which demonstration contravened the Hearing Protocol;

(b) second, the Tribunal failed to consider its defences of time bar and the unenforceability of the Bond.

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42 [KNV]-1 at p 37 (para 45).

43 CWS at para 3.

44 CWS at para 35.

I elaborate on the first ground below, the second being self-explanatory.

30 The first ground concerned the issue of the Vessel's location on 19 September 2023, the date the Vessel was allegedly at Dammam Port, KSA, being loaded with the Goods.

31 The relevant extract of [DBM]'s counsel's oral submissions at the Arbitration Hearing is reproduced below:[45]

> … I agree that I don't have the coordinates of the vessel on 19 September 2013. That happens to be my bad luck, or a convenient position that the respondent has taken, that 19 September is the date that they put all their weight on because there is no data available for the 19th, but what we do have, sir, is data available for 7.49am on 20 September, and it is just impossible, given the location of the ship on 20 September at 7.49am, that it could have been loaded in Dammam the day before. And with your permission, sir, I just ask my colleague to do a very short demonstration by going on to a website called searoutes.com and putting data which is from all the documents that are on record.
>
> So what we're doing, sir, is that this is D-29, page 879. This is basically the coordinates for the ship at different points of time. I'm asking my colleague to copy/paste the coordinates, the latitude and the longitude for the first available time on 20 September 2013, ie at 7.49 am. We take those coordinates, we got on to this website called searoutes.com.
>
> Now, here we are putting Dammam, the port in Saudi Arabia, and below that we are putting the coordinates which my colleague just copied/pasted from there. Now, for the speed of the ship we have put 15 knots, which is the highest speed that the ship has had throughout its route. Most of the time the ship's speed was substantially less, 10, 12, 11 knots, but against myself I'm assuming that the speed of the ship for this journey would have been 15 knots. Now, if you just do this calculation, here is the route that the ship would have had to take from Dammam to the point at which it was near Chabahar on the 20th morning. You can see that the distance is 1,261 kilometres, which would take 45 hours at the minimum to complete.

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45 [KNV]-1 at pp 690–691.

> Therefore, it's impossible that the loading could have happened on the 19th and the ship could have been where it was on 20th morning. What makes it even more implausible that this could have happened is the fact that subsequently the data shows that the ship moves from Chabahar westwards. It's just implausible that the ship would be loaded in Dammam on the 19th, make its way to Chabahar the following day and then again go back westwards.

32 [DBL] argued that this submission was accepted by the Tribunal and relied on in respect of the Tribunal's finding that the Goods were not loaded in the KSA (see below at [51]).

33 [DBL] further argued that:

(a) the Searoutes Website was precisely a "demonstrative exhibit" covered by the Hearing Protocol, and in bringing it up only during oral closing submissions, [DBM] was in breach of the Hearing Protocol, taking [DBL] by surprise;[46]

(b) the Tribunal made no comment on the belated introduction of the Searoutes Website, thereby effectively allowing it;[47]

(c) the Tribunal allowed the Searoutes Website into evidence without giving [DBL] a reasonable opportunity to respond;[48] and

(d) [DBM]'s counsel also inserted or relied on (a) the coordinates of Dammam Port; and (b) the assumed speed of the Vessel (15 knots), although that evidence was not previously adduced.[49]

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46 CWS at para 44.

47 CWS at para 44.

48 CWS at para 45.

49 CWS at para 46.

The applicable law

34 In *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*"), the Court of Appeal (at [43]) endorsed the following passage, on the two pillars of natural justice, in the Australian decision of *Gas & Fuel Corporation of Victoria v Wood Hall Ltd & Leonard Pipeline Contractors Ltd* [1978] VR 385 at 396:

> The first is that an adjudicator must be disinterested and unbiased … *The second principle is that the parties must be given adequate notice and opportunity to be heard … it is important to bear in mind that each of the two principles may be said to have sub-branches or amplifications. One amplification of the first rule is that justice must not only be done but appear to be done … Sub-branches of the second principle are that each party must be given a fair hearing and a fair opportunity to present its case. Transcending both principles are the notions of fairness and judgment only after a full and fair hearing given to all parties.* [emphasis in original]

35 A party challenging an arbitration award as having contravened the rules of natural justice must establish four requirements (*Soh Beng Tee* at [29], citing *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443 at [18]):

(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.

36 [DBL]'s complaint engaged the principle that the parties should have an opportunity to present their respective cases as well as to respond to the case against them, which is a fundamental rule of natural justice: see *Soh Beng Tee*

at [42] and *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 ("*China Machine*") at [87].

37 This principle may be distilled into two aspects – the positive aspect comprises the opportunity to present the evidence and advance legal propositions on which the party relies on to establish its claim or defence, while the responsive aspect encompasses the opportunity to present the evidence and advance legal propositions necessary to respond to the case made against it: *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 ("*JVL Agro*") at [146].

38 The responsive aspect has several aspects to it (*JVL Agro* at [147]):

(a) the party must have notice of the case to which it is expected to respond;

(b) the party must be permitted to present the evidence and advance the propositions of law necessary to respond to it; and

(c) a tribunal could be construed as denying a party a reasonable opportunity to present its responsive case when it adopts a chain of reasoning in its award which it has not given the complaining party a reasonable opportunity to address.

39 Another essential facet of the right to a fair hearing is the right to be heard on, and have the tribunal consider, all pleaded issues: see *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN*") at [46].

40 Therefore, when a tribunal, in the course of reaching its decision, disregards parties' submissions and arguments on the pleaded issues without

considering their merits, the tribunal would be in breach of natural justice: see *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 ("*Front Row*") at [31], citing *Pacific Recreation Pte Ltd v SY Technology Inc* [2008] 2 SLR(R) 491 at [30].

41 There are, however, several important principles to keep in mind when assessing a complaint of breach of natural justice.

42 First, the threshold for a finding a breach is a high one. It is only in very limited circumstances that the tribunal's decision may be considered unfair – this gives effect to the balance between upholding minimal interference in the arbitral process and ensuring that the rules of natural justice are complied with: *Soh Beng Tee* at [65(d)]. Thus, it is only in exceptional cases that a court will find that the threshold for a breach of natural justice has been crossed: *China Machine* at [87], citing *Soh Beng Tee* at [54].

43 Second, and similarly in line with the policy of minimal curial intervention in international arbitrations, the court should be cautious not to allow a party to use fairness as a licence to effectively mount an appeal against the tribunal's decision. In this regard, the Court of Appeal in *Soh Beng Tee* cautioned (at [65(f)]) that "[i]t must always be borne in mind that it is *not the function of the court to assiduously comb an arbitral award microscopically* in attempting to determine if there was any blame or fault in the arbitral process; rather, *an award should be read generously* such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied" [emphasis added].

44 Third, the breach of the rules of natural justice must, at the very least, have changed the tribunal's decision in some meaningful way: *Soh Beng Tee* at

[91]. The applicant must show actual prejudice: see s 24(b) of the IAA and *Soh Beng Tee* at [86]. If the same result could or would ultimately have been attained, or if it can be shown that the complainant could not have presented any substantive evidence or submissions regardless, "the bare fact that the arbitrator might have inadvertently denied one or both parties some technical aspect of a fair hearing would almost invariably be insufficient to set aside the award": *Soh Beng Tee* at [91].

45 The Court of Appeal in *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 ("*L W Infrastructure*") clarified (at [51]) that *Soh Beng Tee* "should not be understood as requiring the applicant for relief to demonstrate affirmatively that a different outcome would have ensued but for the breach of natural justice". The material inquiry is whether the breach could *reasonably* have made a difference to the arbitrator, not whether it would *necessarily* have done so: *L W Infrastructure* at [54].

46 Fourth, the fact that an arbitrator did not discuss his reasoning or state his conclusion in respect of certain issues, does not necessarily mean that he did not apply his mind to parties' arguments on the said issues. In *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 ("*SEF Construction*"), the court held (at [60]) that "[n]atural justice requires that the parties should be heard; it does not require that they be given responses on all submissions made".

47 Likewise, in *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM*"), the court held (at [91]) that a situation where a tribunal, after applying its mind, fails to comprehend the submissions of a party, or comprehends them erroneously, and comes to a decision which is inexplicable, falls short of a breach of the rules of natural

justice. In this vein, the court cautioned (at [90]) against being too fixated with the explicability of a decision, as otherwise "[t]he general principle that errors of law do not found a basis for challenging an award would … be denuded of any significant meaning".

48 The evidential threshold for the court to find that an arbitrator had failed to apply his mind to an issue is therefore high. In *AKN*, the court held (at [46]) that the inference that an arbitrator had failed to consider an important pleaded issue, if such inference is to be drawn, "must be shown to be clear and virtually inescapable". Accordingly, the court held (also at [46]) that:

> … If the facts are also consistent with the arbitrator simply having 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 … then the inference that the arbitrator did not apply his mind at all to the dispute before him (or to an important aspect of that dispute) and so acted in breach of natural justice should *not* be drawn. [emphasis in original]

49 Finally, a party will not be allowed to hedge its position by complaining only after receiving an adverse award that its hopes for a fair trial had been prejudiced by the acts of the tribunal: *China Machine* at [168]. This requires the complaining party to indicate to the tribunal that it intends to take up the objection at a later point in the proceedings: *China Machine* at [170].

50 With these principles in mind, I turn to my decision.

My Decision

The Searoutes Demonstration

51 [DBL] argued that the Tribunal relied heavily on the Searoutes Demonstration in concluding that the Vessel was not loaded at Dammam Port, KSA on 19 September 2013. It relied on the following passages in the Award:[50]

> 18. The evidence which I have seen indicates quite clearly that the vessel could not have loaded in Dammam on 19 September because she would not have been able to sail there in order to arrive on 19 September. In this connection I was shown data from a vessel tracking website, *Searoutes.com*, which strongly suggests that loading did not take place in Dammam but is instead likely to have taken place in Iran.
>
> 19. I am therefore satisfied that there was a clear breach of the express terms of the Contract and that this breach entitled the Claimants to terminate the Contract and claim damages.

52 The Tribunal also referenced the Searoutes Demonstration at paragraph 41 of the Award:[51]

> 41. The evidence which I have seen indicates quite clearly that the vessel could not have been loaded in Dammam on 19 September. In this connection I was shown data entered onto a website called Searoutes.com which demonstrated that loading did not take place in Dammam but rather is likely to have taken place in Iran. I am accordingly satisfied that there was a clear breach of the express terms of the Contract which entitled the Claimants to terminate the Contract and claim damages.

53 [DBL] submitted that the Searoutes Demonstration contravened the Hearing Protocol, and [DBL] had no opportunity to respond to the Tribunal's decision to allow the Searoutes Demonstration during oral closing submissions at the Arbitration Hearing.

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50 [KNV]-1 at p 31 (paras 18 and 19).

51 [KNV]-1 at p 36 (para 41).

An objection to the Searoutes Demonstration would have made no difference

(1) Other evidence besides the Searoutes Demonstration was sufficient to establish that [DBL] was in breach of the Sales Contract

54 I address the Searoutes Demonstration itself below at [68]. However, the difficulty for [DBL] was that, even accepting its argument, the Tribunal did not rely on the Searoutes Demonstration alone in determining that [DBL] was in breach of the Sales Contract. In deciding the Vessel did not load the Goods at Dammam Port, KSA, the Tribunal relied on other findings as well. The following passages in the Award are relevant:[52]

> 34. I reject this alleged defence because the evidence before me showed that the vessel never called in Dammam *but instead called at Bandar Abbas in Iran at the relevant time*. In this connection, *an email from Mr. [J] dated 2 May 2020 stated that '[DBL] has already paid the shipper in Iran', which confirms this*.
>
> 35. The evidence relied upon by the Respondent in support of their claim that the vessel loaded in KSA revolved around the bills of lading. However, *there was no evidence apart from the bills of lading themselves to support the suggestion that loading had been carried out in KSA*, and I find that the bills of lading are most unlikely to be accurate.
>
> 36. On the contrary, I find it more likely that the vessel did not load in KSA, and as a result the Respondents were in breach of the Sale Contract in failing to ensure that the cargo was loaded in the KSA. This establishes that there was a clear breach of the terms of the Contract which stated that the cargo should have been sourced from the KSA.
>
> [emphasis added]

55 The Tribunal dealt again with the issue of the place of loading at another part of the Award, where it is stated:[53]

> 38. The second witness who gave evidence was Mr. [L], *who gave evidence on behalf of the Respondent that the vessel*

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52 [KNV]-1 at pp 34–35 (paras 34–36).

53 [KNV]-1 at p 35.

> *stopped in Saudi Arabia on 22 and 23 September*. He also confirmed that service of the notice of arbitration had been effected on the contractually agreed address of [xxx], and at [xxx], but not at the registered address of the Respondent's company in [xxx].
>
> 39. Having considered all the evidence, I find that the cargo was not loaded in the KSA, and on this basis the Respondents were in clear breach of the terms of the Contract.

56 It is clear from the Award that the Tribunal did not rely solely on the Searoutes Demonstration in deciding that the Goods were not loaded at Port Damman, KSA.

57 I do not accept [DBL]'s argument that the Searoutes Demonstration had tainted the Tribunal's assessment of the other evidence. On the face of the Award, the Tribunal dealt with the other evidence separately and independently. The Tribunal assessed that the evidence, in particular Mr [J]'s email of 2 May 2020, supported the conclusion that the Goods *were loaded in Iran*. This had nothing to do with the Searoutes Demonstration, which only dealt with the assertion that the Vessel was not at Damman, KSA on 19 September 2013.

58 Likewise, at paragraph 38 of the Award, the Tribunal relied on the evidence of [DBL]'s own witness, Mr [L], that the Vessel stopped in the KSA on 22 and 23 September 2013, which contradicted its case that the Vessel was in the KSA on 19 September 2013. This again had nothing to do with the Searoutes Demonstration.

59 Thus, these pieces of evidence, without considering the Searoutes Demonstration, were sufficient to support the Tribunal's conclusion that the Goods were loaded in Iran *and* the Vessel was not in the KSA on 19 September 2013. In so far as [DBL] argued that the above evidence was insufficient to establish that conclusion, or that the Tribunal had misunderstood the evidence,

that is an error of fact which is not a proper subject of review: *BLB and another v BLC and others* [2013] 4 SLR 1169 ("*BLB*") at [68].

(2) [DBL]'s own case would not have been improved by an objection to the Searoutes Demonstration

60 Even if [DBL] had successfully objected to the Searoutes Demonstration, it would still have been unable to show that the Goods were loaded in the KSA.

61 The only evidence adduced by [DBL] that the Goods were loaded in the KSA was the B/L, which the Tribunal regarded as "most unlikely to be accurate".[54] Although the Tribunal did not give reasons for this finding, the Tribunal is not obliged to give its reasons for all its findings. As was observed in *TMM* at [100] (citing *World Trade Corporation v C Czarnikow Sugar Ltd* [2005] 1 Lloyd's Rep 422 at [8]–[9]), arbitrators are "under no duty … to explain why they attach more weight to some evidence than to other evidence … arbitrators are not in general required to set out in their reasons an explanation for each step taken by them in arriving at their evaluation of the evidence and in particular for their attaching more weight to some evidence than to other evidence or for attaching no weight at all to such other evidence" [emphasis in original omitted]. In any event, the finding that the B/L was unreliable is supported by the Tribunal's findings at paragraphs 34 and 36 of the Award;[55] namely, that the evidence showed that the Vessel had called at Bandar Abbas in Iran at the relevant time and thus the Goods were not loaded in the KSA.

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54 [KNV]-1 at p 34 (para 35).

55 [KNV]-1 at pp 34–35.

62 Further, it was not [DBL]'s case that by depriving it of the opportunity to respond to the Searoutes Demonstration, the Tribunal had prevented it from adducing evidence to support its case that the Vessel was in the KSA on 19 September 2013. [DBL]'s best case was that it was unable to adduce evidence to persuade the Tribunal to disregard the Searoutes Demonstration.

63 Even on [DBL]'s argument that if it had been given notice that [DBM] intended to use the Searoutes Website, it would have had the opportunity to consider whether to lead evidence (including expert evidence) on how the Searoutes Website worked and the accuracy of the Searoutes Website in plotting routes, [DBL] would still not have suffered actual prejudice. In this regard, [DBL] pointed out that Vessel Finder itself, *ie*, the source of the data which was plotted into the Searoutes Website, had in emails to both parties' counsel stated that there were "several gaps in the data" and acknowledged that "there is always the possibility of discrepancies" and "detailed information … can not [*sic*] be guaranteed".[56]

64 However, [DBL] did not adduce any evidence to even suggest that the margin of error in the data, if accepted in [DBL]'s favour, might have made a difference to the outcome. There was no elaboration on what the "several gaps in the data" or "the possibility of discrepancies" were, and more importantly, how these might have changed the result in [DBL]'s favour.

65 Thus, even assuming there was a breach of natural justice in the Tribunal's allowing of the Searoutes Demonstration, [DBL] did not suffer prejudice.

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[56] CWS at para 49; [KNV]-1 at pp 421–422 and 424–429.

66 I add that it was unclear to me what "data" the Tribunal relied on in making its finding at paragraph 18 of the Award, and how it related to the Searoutes Demonstration. The Tribunal held that the evidence showed "that the vessel could not have loaded in Dammam on 19 September *because she would not have been able to sail there in order to arrive on 19 September*" [emphasis added].[57] On the face of that finding, the Tribunal must have been referring to the location of the Vessel *before* 19 September 2013, which had nothing to do with the Searoutes Demonstration which dealt with the Vessel's location on 20 September 2013.

67 My findings above are sufficient to dispose of [DBL]'s first ground. For completeness, I deal with the parties' arguments with respect to the Searoutes Demonstration itself.

The allowing of the Searoutes Demonstration was not in breach of natural justice

68 [DBM] argued that the Searoutes Demonstration did not introduce new evidence and that the Searoutes Website was merely a presentation tool using evidence that had been adduced. What the Searoutes Website did was to plot a route between the coordinates of two points.[58] [DBM] pointed out that:

(a) the coordinates it entered were derived from the Vessel Finder Report, which set out the location of the Vessel on various dates in the Period. In particular, the coordinates of the Vessel on 20 September 2013 were in the Vessel Finder Report and not disputed;[59]

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57 [KNV]-1 at p 31.

58 DWS at paras 48–50.

59 1st Affidavit of [KMG] (5 Jul 2023) at para 13.

(b) all it did was to use the simple formula of "speed x time = distance", with 15 knots being the maximum speed recorded by the Vessel in the Period, to show that the Vessel could not be anywhere near its (undisputed) location on 20 September 2013 if it had been at Port Damman, KSA on 19 December 2013; and[60]

(c) the Searoutes Website therefore did not introduce evidence, nor was it a demonstrative exhibit – it was "simply a visual presentation tool that presents the information within the [Vessel Finder Report], i.e. the movement and location of the Vessel, in the form of a visual map".[61]

69 [DBL] pointed out that the data used by [DBM] was not entirely derived from the Vessel Finder Report. [DBL] also submitted that "extraneous information" was fed into the Searoutes Website by [DBM]'s counsel, namely (a) the geographical co-ordinates of Damman Port; and (b) the speed of the Vessel.[62]

70 While it might have been ideal for [DBL] to have responded to the Searoutes Demonstration, I rejected its submission that the allowing of the Searoutes Demonstration was in breach of natural justice as:

(a) the data used by [DBM] was already in evidence and was uncontroversial; and

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60 Minute Sheet (24 Jul 2023) at p 2.

61 DWS at para 50.

62 CWS at para 46.

(b) [DBL]'s conduct throughout the Arbitration did not evince an intention on its part to object to the Searoutes Demonstration.

I elaborate below.

(1) The data used by [DBM] was already in evidence and was uncontroversial

71 The formula relied on by [DBM] above and the geographical co-ordinates of Port Damman were uncontroversial and were matters the Tribunal could take judicial notice of: see *iVenture Card Ltd and others v Big Bus Singapore City Sightseeing Pte Ltd and others* [2022] 1 SLR 302 at [155]. It was not required to be adduced as evidence, much less expert evidence. Further, the use of the speed of 15 knots was also uncontroversial. According to the Vessel Finder Report, that was the *fastest* speed the Vessel attained during the Period and [DBM] was giving [DBL] the benefit by using that figure. Importantly, it was not [DBL]'s case that the data, or the calculation used, were incorrect.

72 It was from these data points that the Searoutes Website derived the Vessel's route, and therefore the distance between the Vessel and Dammam Port. It was not [DBL]'s case that the distance measured was incorrect.

73 In this regard, I also note that the court should not carry out a "hypercritical" analysis of the Tribunal's decision, especially where the Tribunal is experienced in the relevant technical field and the area of law concerned: see *CDI v CDJ* [2020] 5 SLR 484 at [31(c)], citing *TMM* at [44].

(2) [DBL]'s conduct throughout the Arbitration did not evince an intention on its part to object to the Searoutes Demonstration

74 Throughout the Arbitration, [DBL] did not object to the Searoutes Demonstration, or even raise questions about the accuracy of the data or the Searoutes Website although, on its own case, it was aware of the same. The chronology of events is important:

(a) [DBM] was first to make its oral closing submissions at the Arbitration Hearing, during which [DBM]'s counsel performed the Searoutes Demonstration. [DBL]'s counsel did not raise any objection, nor even suggest that the Searoutes Demonstration was in breach of the Hearing Protocol;[63]

(b) after [DBM] concluded, [DBL]'s counsel requested, and was granted, an adjournment to "take account of what's been said" before making [DBL]'s own closing submissions. [DBL] pointed out that the break was only ten minutes, but [DBL]'s counsel did not ask for a longer break, nor does [DBL] suggest that a request for one would likely have been refused;[64]

(c) when the Arbitration Hearing resumed, [DBL]'s counsel immediately began making oral closing submissions, in which he did not address or object to the Searoutes Demonstration; neither did he ask for more time to deal with [DBM]'s arguments;

(d) in the period of about six months between the last day of the Arbitration Hearing on 19 October 2021 and the issuance of the Award

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63 [KNV]-1 at pp 691–692.

64 [KNV]-1 at p 704; CWS at para 52(b).

on 13 April 2022,[65] [DBL] did not seek leave to address the Searoutes Demonstration; and

(e) [DBL] also remained silent in the period leading up to the issuance of the corrected Award on 28 October 2022.[66]

75 In the circumstances, [DBL], through its conduct, evidenced an intention to see the Arbitration through to its conclusion. Its conduct suggested that it did not regard the Searoutes Demonstration objectionable at all. It was only by way of this application that [DBL] alleged that the Searoutes Demonstration introduced extraneous evidence and amounted to a breach of the rules of natural justice.

76 [DBL] argued that it did object at the Arbitration Hearing to a piece of evidence that was introduced by [DBM]'s counsel prior to the Searoutes Demonstration.[67] When cross-examining [DBL]'s witness, [DBM]'s counsel referred to a moving, live map (on Google Maps) ("the Live Map") showing the Vessel's path, although only a static map was disclosed in evidence.[68] [DBL]'s counsel objected to the introduction of the Live Map, noting that "this document is not in evidence".[69] [DBM]'s counsel then suggested that if [DBL]'s counsel had a genuine objection, he could make that objection in his submissions or in the re-examination. The Tribunal allowed [DBM]'s counsel to proceed, without

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65 [KNV]-1 at paras 6 and 37.

66 [KNV]-1 at para 6.

67 CWS at para 44.

68 [KNV]-1 at para 45.

69 [KNV]-1 at p 615.

ruling on the issue. For clarity, I set out the relevant portion of the transcript of the Arbitration Hearing:[70]

> Mr Gupta [[DBM]'s counsel]: … This, Mr [L], is the actual movement of the ship between 20th and 27th September and to make things easier for you we will just put it on Google Maps now, the same illustration, so that I can precisely show you where the vessel was on 22 and 23 September according to your chart.
>
> …
>
> Mr De Wolff [[DBL]'s counsel]: Excuse me, Mr Hickey [the arbitrator], but this document is not in evidence.
>
> Mr Gupta: Mr Hickey, this is not a document. It's exactly the same link which is there in D-98. There's no – there's nothing problematic about this.
>
> Mr De Wolff: I would ask Mr Gupta please to click on the link but not to generate a new Google report.
>
> Mr Gupta: It is Google Maps. Mr Hickey, maybe this can be taken up later. *If Mr De Wolff genuinely thinks that I have shown the witness anything which is inconsistent with the documents on the record, he can make that point in his submissions or in the re-examination.*
>
> Arbitrator: What I'm seeing at the moment is a very familiar view of the Gulf.
>
> Mr Gupta: Yes, there's no problem with this. Can I continue then?
>
> Arbitrator: Yes, please do.
>
> [emphasis added]

77 In oral submissions before me, [DBL]'s counsel argued that after [DBL]'s objection to the Live Map was "brushed aside" by the Tribunal, it seemed "pointless" for [DBL] to object to the later introduction of the Searoutes Website.[71] However, even taking the prior objection to the Live Map as an objection to the Searoutes Demonstration as well, this objection was not

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70 [KNV]-1 at pp 614–615.

71 Transcript (24 Jul 2023) at p 38 lines 7–12.

followed up at any point thereafter, despite [DBM]'s counsel's suggestion for [DBL]'s counsel to bring up the objection during its submissions or re-examination. As noted above at [74], [DBL] did not pursue the point in its oral closing submissions despite it taking place immediately after [DBM]'s oral closing submissions, which was when the Searoutes Demonstration took place. Neither did [DBL] raise this objection at any point up till the issuance of the corrected Award – a total period of more than a year.[72]

78 In this regard, as noted earlier at [49], the Court of Appeal warned in *China Machine* (at [168]) that:

> … An aggrieved party cannot complain after the fact that its hopes for a fair trial had been irretrievably dashed by the acts of the tribunal, and yet conduct itself before that tribunal "in real time" on the footing that it remains content to proceed with the arbitration and obtain an award, only to then challenge it after realising that the award has been made against it. In our judgment, such tactics simply cannot be countenanced.

This squarely described [DBL]'s conduct. [DBL]'s belated objection to the Searoutes Demonstration in this application was inexcusable and opportunistic.

79 Further, the court in *China Machine* (at [170]) elaborated that the complaining party must have indicated to the Tribunal that it intended to take up the objection at a later point in the proceedings:

> 170 … 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*. This would ordinarily require that the complaining party, at the very least, *seek to suspend the proceedings until the breach has been satisfactorily remedied (if indeed the breach is capable of remedy) so that the tribunal and the non-complaining party has the opportunity to consider the position.* This must be so because if indeed there has been such a fatal

[72] [KNV]-1 at paras 6 and 37.

> failure against a party, then it cannot simply "reserve" its position until after the award and if the result turns out to be palatable to it, not pursue the point, or if it were otherwise to then take the point. …
>
> [emphasis added]

80 In the present case, the suggestion to bring up the objection at a later point in the proceedings was not even raised by [DBL]'s counsel. Rather, it was [DBM]'s counsel who said that "[i]f Mr De Wolff [*ie*, [DBL]'s counsel] genuinely thinks that I have shown the witness anything which is inconsistent with the documents on the record, he can make that point in his submissions or in the re-examination".[73] [DBL]'s counsel did not add anything to this point, neither confirming that he intended to take up the objection later nor actually doing so at any point in the proceedings thereafter. There was clearly no "fair intimation" on [DBL]'s part to the Tribunal that it intended to take up the objection to the Searoutes Demonstration at a later point in the proceedings.

81 In the circumstances, the Tribunal's allowing of the Searoutes Demonstration did not constitute a breach of the rules of natural justice.

The limitation defence

82 It was undisputed that [DBM]'s cause of action for breach of the Sales Contract accrued in September 2013, when the Goods were loaded onto the Vessel, and that the six-year limitation period under English law ("the Limitation Period") would have expired prior to the Arbitration commencing in July 2020.[74]

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73 [KNV]-1 at p 615.

74 [KNV]-1 at para 58.

83 Before the Tribunal, [DBM]'s case was that its claim was not time-barred on account of the Acknowledgments.[75] [DBL]'s position was that none of the Acknowledgments had the effect of extending the Limitation Period as they failed to meet the requirements under ss 29 and 30 of the English Limitation Act. These requirements included that an acknowledgment be signed by its maker, made in writing to the creditor, and related to a liquidated pecuniary sum.[76]

84 In the Award, the Tribunal found that each of the Acknowledgments had the effect of extending the Limitation Period:[77]

> 29. … In addition, [DBM] argue[s] that the limitation period was extended because of various "acknowledgements" given by [DBL] to [DBM].
>
> 30. My decision is that the acknowledgements of the debt given by the Respondents on various dates gave rise to new causes of action and had the effect of interrupting any time bar. These occurred when [DBL] acknowledged to [DBM] that they owed the debt, and it follows that the claims brought in this arbitration are not time-barred.
>
> 31. In addition, I find that each acknowledgement had the effect of giving rise to a fresh cause of action, including the First and Second Balance Confirmations.
>
> 32. Accordingly, I find that the causes of action remain live, and were not time barred on the date when the Notice of Arbitration was given.

85 [DBL] argued that the Award failed to reference or address any of [DBL]'s arguments on the prescribed requirements under s 29 of the English

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75 [KNV]-1 at para 59; p 272.

76 [KNV]-1 at para 60; pp 320–322.

77 [KNV]-1 at pp 33–34 (paras 29–30).

Limitation Act, and that this failure gave rise to the irresistible inference that the Tribunal had failed to consider [DBL]'s arguments on this point at all.[78]

86 I rejected this submission. It was evident from the Award that the Tribunal had clearly considered [DBL]'s defence of limitation and found in favour of [DBM]'s response that the Acknowledgments had extended the Limitation Period. What [DBL] was essentially complaining about was the Tribunal's failure to explain *why* the Acknowledgments satisfied s 29 of the English Limitation Act. But all the Tribunal is required to do is to deal with the essential issues in the Award, and not with every argument canvassed under each of the essential issues: see *AKN* at [46] and *SEF Construction* at [60]. Put another way, on the face of the Award, it was not a "clear and virtually inescapable" inference that the Tribunal had failed to consider [DBL]'s argument that the requirements of the English Limitation Act had not been met: *AKN* at [46].

87 [DBL] relied on the cases of *Front Row*, *AKN*, and *BRS v BRQ and another and another appeal* [2021] 1 SLR 390 ("*BRS*") to support its argument that the Tribunal's failure to consider these arguments constituted a failure to consider material arguments or submissions and was therefore a breach of natural justice. However, the factual matrices in these three cases, which led the courts in them to find that there was a breach of natural justice, were very different. In this regard, the Court of Appeal's holding in *AKN* at [47] is pertinent:

> … [There is] 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

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78 CWS at para 85.

> 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.

88 In *Front Row*, *AKN*, and *BRS*, the latter limb described in *AKN* was operative – *ie*, the tribunals failed to even consider the relevant arguments. *Front Row* provides the clearest example – the court there held (at [45]) that the arbitrator "had *explicitly stated*, at paras 55 and 56 of the Award, that he was *disregarding* the issue concerning Daimler's obligation to organise, brand and promote the Asian Cup Series". Hence, the court concluded that the tribunal's failure to consider this important argument constituted a breach of natural justice: *Front Row* at [46].

89 The same is true of *AKN*. There, the tribunal found an important issue in the dispute to be inconsequential as the tribunal mistakenly believed that the parties pursuing the issue had conceded it. Hence, the tribunal failed to consider the merits of the parties' submissions in relation to that issue: *AKN* at [98]–[102]. However, the court found that the parties had in fact never conceded the issue (*AKN* at [101]), and hence the court's failure to consider the merits of their submissions constituted a breach of natural justice.

90 Finally, in *BRS*, the parties *agreed* that the tribunal had failed to consider, whether explicitly or implicitly, the claimants' evidence and submissions in respect of an important issue in the dispute: *BRS* at [102] and [106]. The court found that this undisputed omission on the tribunal's part amounted to a breach of natural justice: *BRS* at [106].

91 In these three cases, it was abundantly clear that the tribunals failed to consider the relevant submissions, whether implicitly or explicitly. However, in the present case, the Award made clear that the Tribunal did consider [DBL]'s

limitation defence but rejected it in favour of [DBM]'s arguments. While that was not definitive proof that the Tribunal did consider [DBL]'s specific arguments relating to s 29 of the English Limitation Act, it certainly did not lead to a "clear and virtually inescapable" inference that the Tribunal had failed to do so.

92 A useful parallel may be drawn between the present case and *SEF Construction*. The court in *SEF Construction* found (at [60]), after reviewing the adjudication determination, that the adjudicator did consider the submissions of the parties, their responses, and other material placed before him. Although he did not explicitly state his reasoning and conclusions as to two of the four main issues in the dispute, it did not mean that he did not consider the related submissions. Rather, the court found that "[i]t may have been an accidental omission on his part to indicate expressly why he was rejecting the submissions since [he] took care to explain the reasons for his other determinations and even indicated matters on which he was not making a determination … [or] he may have found the points so unconvincing that he thought it was not necessary to explicitly state his findings": *SEF Construction* at [60]. Hence, no breach of natural justice was found.

93 In contrast to the adjudicator in *SEF Construction*, the Tribunal did state its conclusion as to the limitation issue. Hence, there was a stronger argument that the Tribunal did consider [DBL]'s arguments in relation to s 29 of the English Limitation Act.

94 In so far as [DBL] was complaining that the Tribunal did not correctly understand or apply the requirements under s 29 of the English Limitation Act, that was a complaint with respect to an error of law, which was beyond this review: *BLB* at [68].

The enforceability of the Bond

95 [DBL] argued before the Tribunal that the Bond was unenforceable under English law as:[79]

(a) it contained a gratuitous promise from [DBL] to [DBM], which was not enforceable; and

(b) in addition, the Bond was not validity executed as a deed under English law as it did not meet the requirements under ss 1(2)(a) and 1(2)(b) of the Law of Property (Miscellaneous Provisions) Act 1989 (c 34) (UK).

96 It was clear from the face of the Award that the Tribunal did not address these arguments, or deal with the issue of the enforceability of the Bond.

97 [DBM] argued that as the Tribunal found [DBL] liable for breach of the Bond, it implicitly found that the Bond was enforceable, or that it was at least not a "clear and inescapable" inference that the Tribunal had failed to deal with the issues and arguments in relation to the unenforceability of the Bond. Taking [DBM]'s argument to its logical conclusion, it would mean that a tribunal which allows a party's claim or defence must necessarily have agreed with all its arguments or dismissed those of its adversary. That clearly goes too far. There must be some indication, on the face of the documents and the tribunal's award, that the tribunal had considered the critical issues and arguments: see *TMM* at [90] and *AQU v AQV* [2015] SGHC 26 at [33]. It will often be a matter of inference rather than explicit indication that the tribunal failed to consider an important issue: *AKN* at [46]. However, in the present case, there was neither

[79] CWS at para 66; [KNV]-1 at pp 235, 315.

an explicit nor implicit indication in the Award that the Tribunal had considered the issue of the enforceability of the Bond. This was very different from the issue of limitation discussed above at [82]–[94].

98 But that did not mean that there was a breach of natural justice which entitled [DBL] to set aside the Award.

99 [DBL]'s argument that it was prejudiced was premised on the following:

(a) [DBM]'s pleaded claims were "under the Sales Contract as varied by the [Bond]";[80]

(b) [DBM] sought, and the Tribunal awarded, a refund of the Purchase Price, and that remedy was only expressly provided in the Bond, not the Sales Contract – all that the Sales Contract provided was that in the event of any breach of the Sales Contract "[b]oth Parties shall indemnify and keep indemnified the other Party against *all actions, suits and proceedings and all costs charges expenses loss or damages incurred or suffered by or caused to the non-defaulting Party by reason of any breach* ... by the defaulting Party of its obligations under this Contract and any applicable law" [emphasis added];[81]

(c) on the contrary, the Bond expressly contained the Dissatisfaction Clause, under which a refund (and termination of the Sales Contract) was available if the relevant bankers/authorities were not satisfied with documentation showing that the Goods originated from the KSA;[82] and

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80 CWS at para 77.

81 CWS at para 63; [KNV]-1 at p 384.

82 [KNV]-1 at pp 400–401.

(d) in the circumstances, the Tribunal's failure to deal with the enforceability of the Bond was a breach of natural justice which caused it prejudice.[83]

100 Importantly, [DBL]'s argument mis-stated or mischaracterised:

(a) [DBM]'s pleaded case; and

(b) the Award.

[DBM]'s pleadings in the Arbitration

(1) [DBM]'s two heads of claim and the respective remedies sought

101 [DBM] relied on the following heads of claim and, *inter alia*, the respective reliefs:

(a) for breach of the Sales Contract as varied by the Bond, refund of the balance due to [DBM] from [DBL] and indemnification for all losses and costs incurred by [DBM] as a result of the breach;[84] and

(b) alternatively, damages for breach of the Sales Contract *simpliciter*.[85]

102 [DBM] relied on a further alternative claim in unjust enrichment;[86] however, the Tribunal did not rule on that, and it is not relevant in the context of this application.

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83 CWS at para 78.

84 [KNV]-1 at p 94 (para 71).

85 [KNV]-1 at p 94 (para 72).

86 [KNV]-1 at p 116 (para 151).

103 The heads of claim and the respective reliefs referred to at [101] above were laid out in paragraphs 2, 71, 72 and 109 of [DBM]'s Statement of Claim ("SOC"):[87]

> 2. In the present proceedings, [DBM] brings claims against [DBL] under a sales contract executed between [DBM] and [DBL], as varied by [the Bond]. Under this head of claim, [DBM] seeks to be indemnified for losses sustained by it on account of [DBL], or in the alternate, seeks damages payable by [DBL] as a result of [DBL]'s breaches of the sales contract. …
>
> …
>
> 71. … [DBM]'s claim under the Sales Contract as varied by [the Bond] is for the refund of the balance due to [DBM] from [DBL], along with indemnification for all losses and costs incurred by [DBM] following the termination of the Sales Contract due to [DBL]'s breaches of the same. …
>
> 72. In the event [DBM]'s claim for indemnification fails, [DBM] seeks to recover losses in the form of damages payable by [DBL] on account of [DBL]'s breaches of the Sales Contract.
>
> …
>
> 109. In the alternate to [DBM]'s claim for indemnity under the Sales Contract as varied by [the Bond], [DBM] seeks damages for breach of the Sales Contract by [DBL].

104 Similarly, paragraphs 101 and 151 of [DBM]'s Amended Reply to the Defence ("the Reply") stated:[88]

> 101. As already particularised in its Statement of Claim, [DBM] through these proceedings seeks refund of the New Balance Outstanding and the indemnification of all its costs and losses from [DBL] because of [DBL]'s breaches of the [Sales Contract and the Bond]... In the event [DBM]'s claim for indemnification fails, [DBM] seeks to recover its losses in the form of damages payable by [DBL] on account of [DBL]'s breaches of the [Sales Contract].
>
> …

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87 [KNV]-1 at pp 71, 94, 105.

88 [KNV]-1 at pp 282, 296–297.

> 151. [DBM] clarifies that in the alternate to [DBM]'s claim for indemnity under the Sales Contract as varied by [the Bond], [DBM] seeks damages for breach of the Sales Contract by [DBL].
> …

105 Importantly, the basis for *both* heads of claim was the same – *ie*, [DBL]'s failure to load the Goods in the KSA.[89] This was a breach of a term which existed in both the Bond and the Sales Contract. Further, [DBM] did not rely on breach of the Dissatisfaction Clause (described above at [9(b)]) – that term was included only in the Bond and not the Sales Contract, and thus if [DBM] had relied on breach of that term and succeeded solely on that ground, the Tribunal's failure to consider the enforceability of the Bond would certainly have caused prejudice to [DBM].

(2) The remedies sought under both heads of claim were the same in one material respect

106 With respect to the amount it was claiming under both heads of claim, [DBM]'s pleadings made no distinction between (1) the refund of the balance moneys (owed by [DBL] to [DBM]) for breach of the Sales Contract as varied by the Bond; and (2) the damages for breach of the Sales Contract *simpliciter*. In both cases, the pleadings made clear that [DBM] was seeking the same amount – *ie*, the New Outstanding Amount.

107 This was made clear by paragraph 130 of the SOC:

> 130. As noted in paragraphs 93, 95 and 111, [DBM] claims the following amounts under its various claim [*sic*] under the Sales Contract as varied by the Indemnity Deed:
>
> (a) the balance amount of the Admitted Dues yet to be repaid to [DBM] [ie, the New Outstanding Amount];

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89 [KNV]-1 at pp 99–100, 105 (paras 87–89, 109–110).

> (b) losses [DBM] incurred as a result of the termination of the Sales Contract, including the loss of revenue on forward sale of the Steel Slabs;
>
> (c) costs incurred by [DBM] for the establishment and maintenance of the L/C;
>
> (d) penalties imposed upon [DBM] by [FD] Bank as a result of non-refund of Purchase Consideration by [DBL] under the L/C; and
>
> (e) interest on the above amounts.

Under paragraph 130, [DBM]'s claimed remedy in respect of breach of the Sales Contract as varied by the Bond was for the New Outstanding Amount (under sub-paragraph 130(a)), plus various other losses (under sub-paragraphs 130(b)–130(d)). In its Reply, [DBM] referred to these various other losses as the "Consequential Losses",[90] and I will refer to them as such.

108 Importantly, the claimed amounts under paragraph 130 of the SOC were *also being claimed in respect of breach of the Sales Contract simpliciter*. The first sentence of paragraph 130 stated "[a]s noted in paragraphs 93, 95 *and 111*, [DBM] claims the following amounts …" [emphasis added] – this was followed by the list of amounts in paragraphs 130(a)–130(e). For context, I set out paragraphs 109–111 of the SOC:[91]

> 109. In the alternate to [DBM]'s claim for indemnity under the Sales Contract as varied by the Indemnity Deed, [DBM] *seeks damages for breach of the Sales Contract by [DBL].*
>
> 110. Since [DBL] had loaded [the Goods] onto the Vessel from the Bandar Abbas Port in Iran, a sanctioned country, [DBM] was unable to proceed with the transaction …
>
> …
>
> 111. Consequently, *[DBM] is entitled to damages*. In this regard, [DBM] acknowledges that its claim for damages would

90 [KNV]-1 at p 298 (para 158).

91 [KNV]-1 at p 105.

> be subject to Clause 16(ii) of the Sales Contract, which bars the recovery of consequential losses.
>
> [emphasis added]

Thus, paragraph 111 of the SOC addressed [DBM]'s *claim for damages in respect of breach of the Sales Contract simpliciter*. Read together with paragraph 130, it was clear that [DBM] was also seeking the New Outstanding Amount in respect of this head of claim.

109 Thus, *under both heads of claim*, [DBM] sought the refund of the New Outstanding Amount as its claimed remedy. The only difference between the amounts sought was the Consequential Losses. Under paragraph 111 of the SOC, the claim for "damages" due to breach of the Sales Contract *simpliciter* excluded the recovery of the Consequential Losses (*ie*, the amounts listed in sub-paragraphs 130(b)–130(d)).

110 This reading of the claim for damages for breach of the Sales Contract *simpliciter* was corroborated by paragraph 131 of the SOC, where it was stated that "[a]s noted *in Section V(A) above*, [DBL] is liable to *refund* to [DBM] the Admitted Dues, the principal amount of which amounts to USD 9,922,152.97" [emphasis added].[92] Paragraph 133 then clarified that the net balance of the Admitted Dues to be paid back was the New Outstanding Amount (after setting off the amounts due to [DBL] under the Nickel Purchase Agreement).[93] Section V(A) of the SOC referred to both claims for breach of the Sales Contract as varied by the Bond *and* breach of the Sales Contract *simpliciter*;[94] hence, the

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92 [KNV-1] at p 110 (para 131).

93 [KNV-1] at p 111 (para 133).

94 [KNV]-1 at pp 101 and 105 (paras 94 and 109).

effect of paragraph 131 of the SOC was that the New Outstanding Amount was to be refunded to [DBM] under both heads of claim.

111 I observe that [DBM]'s pleadings were prolix and confusing: see [19] above. Nevertheless, in arbitration proceedings generally, a more generous approach is taken towards pleadings, and pleadings are not determinative in the same way they might be in court litigation: see *Phoenixfin Pte Ltd and others v Convexity Ltd* [2022] 2 SLR 23 at [50]. The crucial question is whether the relevant issue was known to all the parties, even if it was not part of the stated pleadings: *TMM* at [52].

112 In any case, [DBM]'s alternative claim for damages from breach of the Sales Contract *simpliciter*, and the damages it was seeking for that breach, was clear enough on the face of its pleadings (see [103]–[104] above). Importantly, as [DBL]'s counsel acknowledged, [DBL] was not taken by surprise by this alternative claim.[95]

The Award

113 The Award did not expressly refer to [DBM]'s alternative claim based on breach of the Sales Contract *simpliciter*. It referred to the primary claim – *ie*, breach of the Sales Contract as varied by the Bond.[96] Admittedly, the wording of the Award was somewhat confusing, with "breach of the Indemnity Deed [*ie*, the Bond]", "breach of the express terms of the Contract" and "breach of the Sale Contract" seemingly used interchangeably.[97]

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95 Transcript (24 Jul 2023) at p 84 lines 1–2.

96 [KNV]-1 at pp 31, 35–36 (paras 17, 40).

97 [KNV]-1 at pp 31, 35–36 (paras 17–19, 36, 40–41)

114 Nevertheless, the Award made clear that [DBL] had breached terms in *both* the Sales Contract as well as the Bond.[98] This breach related to the condition that the Goods were to be loaded in the KSA, which was a condition contained in both the Sales Contract and the Bond.[99] Paragraphs 19, 36 and 39–41 of the Award stated:

> 19. I am therefore satisfied that there *was a clear breach of the express terms of the Contract* and that this breach entitled [DBM] to terminate the Contract and claim damages.
>
> …
>
> 36. … I find it more likely that the vessel did not load in KSA, and as a result [DBL] were *in breach of the Sale Contract* in failing to ensure that the cargo was loaded in the KSA. This establishes that there was a *clear breach of the terms of the Contract* which stated that the cargo should have been sourced from the KSA.
>
> …
>
> 39. Having considered all the evidence, I find that the cargo was not loaded in the KSA, and on this basis [DBL] were in *clear breach of the terms of the Contract*.
>
> 40. The *first basis is the Indemnity Deed* [*ie*, the Bond] and be [*sic*] second basis is unjust enrichment. The breach of contract identified by [DBM] is the fact that if they are correct then [*sic*] the vessel did not load in KSA, *which would be a breach of Clause 9* [*sic*]. In addition, *the Indemnity Deed stated that shipment of the steel slabs would be from Dammam port*. The Indemnity Deed provided that if its terms were broken then [DBM] would be entitled to terminate the Sales Contract, obtain a refund of the purchase price and be indemnified for all losses and costs incurred by [DBM].
>
> 41. The evidence which I have seen indicates quite clearly that the vessel could not have been loaded in Dammam on 19 September. In this connection I was shown data entered onto a website called Searoutes.com which demonstrated that loading did not take place in Dammam but rather is likely to have taken place in Iran. I am accordingly satisfied that there

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98 [KNV]-1 at pp 31, 35–36 (paras 17, 19, 40–41).

99 [KNV]-1 at pp 99 (para 98), 379, 400.

> was a clear breach of the express terms of the Contract which entitled [DBM] to terminate the Contract and claim damages.
>
> [emphasis added]

115 In the Award, the Tribunal rejected [DBM]'s claim for the Consequential Losses as being "too remote".[100] Hence, the Tribunal awarded the New Outstanding Amount alone.[101] This was the same amount claimed under both heads of claim in [DBM]'s pleadings.

116 In the circumstances, it was clear that:

(a) the pleaded heads of claim were for, *inter alia*, breach of the Sales Contract as amended by the Bond; and alternatively, breach of the Sales Contract;

(b) for both heads of claim, the relevant breach was the failure to load the Goods in the KSA;

(c) for both heads of claim, [DBM] sought an amount equivalent to the New Outstanding Amount;

(d) the only difference in claimed amounts under both heads of claim was that [DBM] was, for breach of the Sales Contract as varied by the Bond, additionally seeking the Consequential Losses. These were in any event not awarded by the Tribunal;[102]

(e) the Tribunal found a breach of cl 9 of the Sales Contract for failure to load in the KSA, and did not appear to distinguish between a

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100 [KNV]-1 at p 37 (para 45).

101 [KNV]-1 at p 37 (para 46).

102 [KNV]-1 at p 37 (para 45).

breach of the Sales Contract as varied by the Bond and breach of the Sales Contract *simpliciter*;

(f) the Tribunal found that [DBM] was entitled to terminate the Sales Contract and claim *damages* for the breach; and

(g) the Tribunal awarded the New Outstanding Amount to [DBM].

117 Thus, it appeared that the Tribunal saw no distinction between [DBM]'s *claimed remedies* under the two heads of claim. That may explain why the Tribunal did not distinguish between the "refund" claimed for breach of the Sales Contract as varied by the Bond, and the "damages" claimed for breach of the Sales Contract *simpliciter*. In either case, the amount which [DBM] sought to recover was the New Outstanding Amount, as was made clear by the pleadings.

118 This equivalence between the amounts sought by [DBM] under both heads of claim was acknowledged twice by [DBM]'s counsel in the hearing before me.[103] Similarly, [DBL]'s counsel agreed that the remedy under both heads of claim would have been "equivalent".[104] Further, [DBL]'s own pleadings and submissions did not draw any distinction with respect to the direct damages, *ie*, the New Outstanding Amount, which [DBM] would be entitled to under both heads of claim – [DBL]'s counsel, in relation to whether this distinction appeared in [DBL]'s own pleadings and submissions in the Arbitration, admitted that it was "unfortunately not stated there".[105]

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103 Transcript (24 Jul 2023) at p 64 lines 17–21; p 72 lines 12–20.

104 Transcript (24 Jul 2023) at p 82 line 27.

105 Transcript (24 Jul 2023) at p 81 line 21; see also Transcript (24 Jul 2023) at p 72 line 25–p 83 line 31.

119 In the circumstances, there was no need for the Tribunal to decide on the enforceability of the Bond as it had dismissed [DBM]'s claim for the Consequential Losses. In other words, it did not reasonably appear that the failure was an omission, but simply that it was not necessary to decide the issue.

There was no prejudice to [DBL] in any event

120 For the same reason, [DBL] suffered no prejudice. Under both heads of claim, the granted remedy would have been the return of the New Outstanding Amount. This was evident from the Award, in which the Tribunal essentially held that the "damages" for breach of the Sales Contract were equivalent to the New Outstanding Amount:

> 41. … I am accordingly satisfied that there was a clear breach of the express terms of the Contract which entitled [DBM] to *terminate the Contract and claim damages*.
>
> …
>
> 46. [DBL] are liable for breaching the Contract and should pay to [DBM] the sum of US$4,683,418.97 [*ie*, the New Outstanding Amount] being the balance of the purchase price not previously repaid.
>
> [emphasis added]

121 Thus, even if the Tribunal had accepted [DBL]'s argument that the Bond was unenforceable, and had considered only the Sales Contract *simpliciter*, it would have reasonably arrived at the same result.

122 In this regard, the entire basis of [DBL]'s argument that it suffered prejudice was incorrect. [DBL] argued that the Tribunal "took the view that [DBM]'s entitlement to terminate the Sales Contract and obtain a refund of the Purchase Price *arose by reason of the bond*", pointing to the fact that only the

Bond "expressly provided for such a refund".[106] Similarly, [DBL] submitted that "the contractual basis for [DBM]'s claim for a refund "*lies in the Bond*".[107] Hence, if the Tribunal had considered the enforceability of the Bond and found it to be unenforceable, the foundation of [DBM]'s claim for a refund would fall away.

123 [DBL]'s argument was incorrect in two aspects. First, the Bond expressly provided for a refund of the payments received by [DBL] where the *Dissatisfaction Clause* is relied on.[108] I set out the relevant portion of the Bond:[109]

> … [DBL] hereby covenants with [DBM] that the supply of Goods would be in compliance in [*sic*] the terms and conditions of the Sales Contract and in particular that the Goods will originate from the Kingdom of Saudi Arabia and all necessary document(s) in support of the same will be provided to [DBM] to the satisfaction to [*sic*] the concerned Authorities including the Bankers and the statutory authorities at the Port of Discharge and *in the event the Bankers/Authorities are not satisfied with such documentation*, [DBL] agrees that the Contract shall notwithstanding the terms of the contract shall [*sic*] stand terminated and *the Payments received shall be forthwith refunded* by [DBL] and [DBL] further undertakes to indemnify all costs and losses incurred by [DBM] consequent to such termination. [emphasis added]

Given that [DBM]'s case in the Arbitration, and the Tribunal's decision, relied on the failure to load the Goods in the KSA, and not the Dissatisfaction Clause, the Tribunal's decision to award the New Outstanding Amount did not arise from that section of the Bond.

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106 CWS at paras 61, 64.

107 CWS at paras 61, 65.

108 [KNV]-1 at pp 400–401.

109 [KNV]-1 at pp 400–401.

124 Second, and relatedly, [DBM]'s pleadings in the Arbitration and the Tribunal's reasoning in the Award *did not* base [DBM]'s entitlement to obtain a refund of the New Outstanding Amount on the Bond. [DBM] sought, in its pleadings, the New Outstanding Amount as "damages" for breach of the Sales Contract *simpliciter* (as observed above at [108]). The Tribunal, in the Award, gave "damages" for breach of the Sales Contract which were equivalent to a refund of the New Outstanding Amount (as observed above at [120]).

125 Hence, [DBL] erred in submitting that [DBM]'s entitlement to a refund of the New Outstanding Amount was premised only on the Bond. This reinforces the conclusion that even if the Bond was unenforceable, [DBL] suffered no prejudice.

Conclusion

126 None of the various grounds relied on by [DBL] met the high threshold required to establish a breach of natural justice which warranted the setting aside of the Award. Hence, I dismissed the application.

Hri Kumar Nair J
Judge of the High Court

Prakash Pillai, Koh Junxiang and Charis Toh Si Ying (Clasis LLC) for the claimant;
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