

**IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE**

[2025] SGHC(I) 24

Originating Application No 4 of 2025

Between

DNO

... Applicant

And

DNP

... Respondent

JUDGMENT

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

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DNO

v

DNP

[2025] SGHC(I) 24

Singapore International Commercial Court — Originating Application No 4 of 2025

Anthony James Besanko IJ

19 May 2025

18 September 2025

Judgment reserved.

Anthony James Besanko IJ:

Introduction

1 SIC/OA 4/2025 (“OA 4”) is an application brought by DNO seeking an order setting aside an arbitral award dated 25 July 2024 (the “Award”), in an arbitration administered by the Singapore International Arbitration Centre (the “SIAC”). The respondent to these proceedings is DNP.

2 DNP is a commodities trading company incorporated in Singapore; it was the claimant in the arbitration. The respondent in the arbitration was a partnership firm, which I shall refer to as the “Partnership”. The Partnership carried on the business of exporting and marketing cashew nuts. DNP and the Partnership were parties to agreements which were central to the dispute before the sole arbitrator in the arbitration (the “Tribunal” or the “Sole Arbitrator”). DNO (the applicant in the present proceedings) contends that the Partnership

was converted into the company, DNO, on 30 March 2024, and that DNO has standing to challenge the Award in these proceedings. DNP contends that DNO bears the onus of establishing that it has standing and that it has failed to discharge that onus. DNP has adduced some evidence that, it contends, demonstrates the continued existence of the Partnership. I will address the issue of standing at the beginning of my consideration of the issues.

3 There are two grounds of challenge to the Award. First, DNO alleges that breaches of the rules of natural justice occurred in connection with the making of the Award, whereby its rights have been prejudiced: see s 24(b) of the International Arbitration Act 1994 (2020 Rev Ed) (the “IAA”). Secondly, DNO contends that the Award is in conflict with the public policy of Singapore: see First Schedule of the IAA, Art 34(2)(b)(ii) of the UNCITRAL Model Law on International Commercial Arbitration (the “Model Law”).

4 The Tribunal delivered lengthy reasons explaining in detail the basis upon which it made the Award. In the proceedings before this court, each party provided detailed written submissions; those submissions were supplemented by oral submissions. As I will explain, a number of DNO’s submissions seemed to proceed on the mistaken view that OA 4 involved an appeal on questions of fact and law.

5 The Tribunal awarded DNP damages of US\$33,009.53 and INR22,432,076.68 plus simple interest. A counterclaim brought by the Partnership was dismissed. I reproduce below a table summarising the damages awarded to DNP:

Claim Head		USD	INR
Difference between the contract price and resale price		USD145,750.98	
The Clearing Charges			
	Arrived Cargo Clearing Charges		INR1,683,930.80 INR25,928,897.94
	Remaining Cargo Clearing Charges		INR8,826,548.94
	Warehouse rents (costs associated with the storage of the Cargo)		INR469,625.00
	Warehouse upgrade costs (costs associated with the storage of the Cargo)		INR182,900.00
	Surveyor charges incurred for the Remaining Cargo		INR308,400.00
	Cargo insurance premium		INR231,774.00
The [Partnership's] partial payment		(-USD 112,741.45)	(- INR 15,200,000.00)
[DNP's damages]:		USD33,009.53	INR22,432,076.68

6 One of the key documents in the dispute between the parties is a Memorandum of Understanding dated 24 July 2020 (the “MOU”). The parties to the MOU are DNP and the Partnership. The MOU contains the arbitration clause, which is to the effect that any disputes arising out of the MOU shall be

governed under Singapore laws and be subject to arbitration in Singapore under the Singapore International Arbitration Centre Rules 2016 (the “SIAC Rules”).

7 The other participant in the relevant events should be mentioned at this stage – I will refer to this participant as “Company N”. DNP owns 99.998% of the shares in Company N, and the balance of the shares are owned by the chairman of DNP. Company N is effectively a subsidiary of DNP, and I will refer to it in this way.

8 The principal witnesses before the Tribunal and before this court in OA 4 were a director of DNO (“Mr A”) and a senior executive director of DNP (“Mr Z”).

The Facts

The Sales Contracts

9 Between 12 February 2020 and 15 May 2020, DNP and the Partnership entered into eight sale-and-purchase contracts whereby DNP agreed to sell and the Partnership agreed to purchase a total of 4,700mt (+/-10%) of raw cashew nuts (the “Cargo”) of either Ivory Coast or Burkina Faso or Ghana origin, to be shipped to Mangalore, India on a cost-and-freight basis (the “Sales Contracts”).

10 The broad details of the Sales Contracts were set out in para 227 of the Award, reproduced below:

#	Date of Sales Contract	Contract No.	Origin	Cargo Quantity (MT) (+/- 10%)	Price per MT (USD)
1	12.02.2020	015/RCNSG/2020-21 (“ 015 S&P ”)	Ivory Coast	500	1,260.00
2	19.02.2020	022/RCNSG/2020-21 (“ 022 S&P ”)	Ivory Coast	500	1,185.00
3	19.02.2020	023/RCNSG/2020-21 (“ 023 S&P ”)	Burkina Faso	700	1,125.00
4	21.02.2020	024/RCNSG/2020-21 (“ 024 S&P ”)	Ivory Coast	500	1,150.00
5	27.02.2020	034/RCNSG/2020-21 (“ 034 S&P ”)	Burkina Faso	1,000	1,050.00
6	15.05.2020	083/RCNSG/2020-21 (“ 083 S&P ”)	Ghana	500	950.00
7	15.05.2020	084/RCNSG/2020-21 (“ 084 S&P ”)	Ivory Coast	500	950.00
8	15.05.2020	085/RCNSG/2020-21 (“ 085 S&P ”)	Burkina Faso	500	900.00

11 Each Sales Contract comprised the details of the particular contract and DNP's general terms and conditions for all sales contracts concerning the sale and purchase of raw cashew nuts. There are clauses in the Sales Contracts which are relevant to particular disputes between the parties, which I will set out in the relevant context.

12 As a result of a lockdown in India due to the COVID-19 pandemic, there were extensions of the delivery dates of the Cargo effected by addendums to the various Sales Contracts. It is not necessary for me to set out the details of these addendums.

13 From around 4 April 2020 to 30 June 2020, DNP shipped approximately 4,825.80mt of Cargo to the Mangalore port in India. As of 24 July 2020, approximately 1,850mt of the Cargo had arrived at the Mangalore port (the "Arrived Cargo"). The remaining cargo that had been shipped, but which had not yet arrived, consisted of approximately 2,975.80mt of Cargo (the "Remaining Cargo").

14 The Partnership was required to pay monies under the Sales Contracts, consisting of advances in some cases, and the purchase price. It had not done so, and this led to correspondence between the parties.

The MOU

15 On 24 July 2020, DNP and the Partnership entered into the MOU. It is an important document, which I set out in full below. It may seem that some of the phrasing in the MOU is less than perfect, but that was not an issue before the Tribunal or before this court.

Memorandum of Understanding

This Memorandum of Understanding (MOU) made on 24th July 2020 between [DNP] and [the Partnership].

[DNP] has sold and shipped 4,825.80 MT (list attached) of Raw Cashew Nuts of Ivory coast, Ghana & Burkina origin under various contracts (as per attached list) and about 1850 MT already arrived at destination port waiting for payment of documents submitted to bank of [the Partnership].

[The Partnership] has informed to [DNP] that they are unable to make payment of bills due to Covid-19.

To avoid demurrage cost further on cargo, [the Partnership] and [DNP] both parties agreed as below:

- 1 [DNP] will appoint [Company N] as custodian of cargo.
 - a) For the arrived about 1850 MT which is already custom manifested in the Mangalore port, [DNP] will arrange to sent a bank instruction to release full set of documents to representative of [Company N]. [The Partnership] will pay for release the cargo from port and transfer the cargo to [Company N] by issuance of local sale invoice for [Company N] which is transfer of title. [Company N] will not make any payment to [the Partnership] for goods value since it is holding the goods on behalf of [DNP] which is ultimately an unpaid seller. [The Partnership] will pay all cost of local clearing/handling/warehouse and insurance cost of goods. [The Partnership] further agree to buy back the cargo from [Company N] at same value of invoice which they have transferred to [Company N] plus interest @7% and also adding further cost incurred by [Company N] on holding of this stock (if any) which is not paid/reimbursed by [the Partnership]. [The Partnership] will keep paying to [DNP] under the foreign liability bill and against such payment [Company N] will keep releasing goods to [the Partnership] as may be directed by [DNP]. It is responsibility of [the Partnership] to clear foreign liability of seller [DNP]. In case of inability of [the Partnership] to pay [DNP] within agreed time of 90 days, [DNP] is free to instruct [Company N] to sale to the goods to any third party and remit the sales proceeds to [DNP] directly or via [the Partnership]. All risk of foreign exchange loss and/or any market loss in such case would be liability of [the Partnership].
 - b) For remaining cargo yet to arrive:

For arriving cargo all custom manifest will be filed in name of [Company N] and [the Partnership] guarantee to pay [Company N] cost of goods as per contract price of [the Partnership] and [DNP] plus all cost incurred by [Company N] clear and hold the cargo plus 7% towards interest. A local sales contract to be entered between [the Partnership] and [Company N] to facilitate this transaction.

- 2 [Company N] is representative of [DNP] and is acting custodian of cargo and [Company N] cashew will help in clear the cargo in their name and store in a safe location in Mangalore port area. Cargo will be kept by [Company N] for [the Partnership] to take delivery against payment of cargo value as per [DNP] bill and interest @7% plus all other handling/holding cost of cargo.
- 3 Landed quality and weight at the time of discharge of cargo as may determined by RBS, shall be final and binding on [DNP] and [the Partnership]. Being RCN on commodity naturally have some moisture weight or outturn variation during storage, [Company N] will not be responsible for any such weight and/or quality variation during storage in warehouse. All such losses shall be on account of [the Partnership].
- 4 All clearing cost, Demurrages and warehouse rental, insurance, security charges of warehouse to be paid by [the Partnership] to [Company N] within 10–15 days of clearing of cargo from port. Cargo to be kept in Edelweiss warehouse and/or any other independent warehouse may be recommended by [the Partnership] to [Company N] and a separate agreement can be made between warehouse service provider and [Company N]. cargo to be kept in warehouse under title of [Company N] till [the Partnership] has not paid full value of stock to [DNP]/[Company N] and once the value of goods is paid with other cost as per this MOU, title of goods to be transferred to [the Partnership] in same warehouse ([unclear] without lifting). a separate agreement on this matter can be entered between [Company N], Edelweiss & [the Partnership].
- 5 [The Partnership] will agree to pay interest on cargo value 7% w.e.f. date of arrival till the date of actual payment.
- 6 [The Partnership] will may payment of deposit 10% of arrived cargo value within 30 days to [Company N] from this MOU date. similarly 10% advance direct to [DNP] for already arrived and cleared cargo value. [The

Partnership] will clear all goods against payment within 90 days.

- 7 Payment to be made to [Company N] in INR for equal dollar value. Any exchange gain/loss will be on account of [the Partnership]. For cargo cleared in [the Partnership] name, [the Partnership] will make payment directly to [DNP] and [Company N] will release goods to [the Partnership] once [DNP] confirm receipt of cargo value.
- 8 [Company N] is only a custodian of cargo and act as representative of [DNP] as unpaid seller. All terms of contracts remain unchanged.
- 9 This MoU shall be governed under Singapore Laws and subject to Arbitration in Singapore under SIAC Rules.

[Signatures of DNP, the Partnership, Company N, and a witness]

16 The preamble in this document identifies some of the important events which led to the execution of the MOU.

17 Clause 6 of the MOU required the Partnership to make a deposit payment amounting to 10% of arrived cargo value to Company N, within 30 days from the date of the MOU (the “10% Deposit”). The Partnership was also required to pay an advance amounting to 10% of the already arrived and cleared cargo value to DNP within the same timeframe (the “10% Advance”). The Tribunal referred to these payments together as the “MOU Advances”, a convenient description which I adopt in these reasons.

18 The effect of cl 6 was to require that the Partnership pay the MOU Advances by 23 August 2020. The Tribunal found that the value of the Arrived Cargo, as of 24 July 2020, was approximately US\$2,174,824.41. Therefore, cl 6 required the payment of approximately US\$217,482.44 for the 10% Deposit and the same amount for the 10% Advance.

19 Clause 4 of the MOU is also important in terms of the events as they transpired. The effect of that clause was that the Partnership agreed to pay “all clearing cost, [d]emurrages and warehouse rental, insurance, security charges of warehouse” to Company N within 10 days of clearing the Cargo from the port. The Tribunal referred to all of these charges by the single expression of “Clearing Charges”, and I will adopt the same description.

20 Before the Tribunal, DNP contended that the last batch of Cargo was cleared on or about 6 August 2020 and that therefore, the due date for payment of the Clearing Charges was no later than 21 August 2020. DNP also contended that the Clearing Charges amounted to INR38,874,020.89 as at 19 August 2020 and US\$529,192.14 as at 30 September 2020.

21 In addition to the obligations with respect to MOU Advances, cl 6 of the MOU required the Partnership to “clear all goods against payment within 90 days” (*ie*, by 22 October 2020). On this analysis, and bearing in mind the effect of cl 1 of the MOU, the amount payable by the Partnership by 22 October 2020 would have been the total of (a) the balance 80% of the purchase price of the Arrived Cargo; (b) the purchase price of the Remaining Cargo; and (c) the further Clearing Charges incurred by Company N on DNP’s behalf. The Partnership was to take delivery of all of the Cargo by 22 October 2020.

22 A particular point about the third Sales Contract dated 19 February 2020 (the 023 S&P, or the “third Sales Contract”) should be noted at this stage. The subject of that contract was Cargo originating from Burkina Faso, West Africa (the “Burkina Faso 023 Cargo”). The Burkina Faso 023 Cargo was cleared on 1 August 2020, but did not meet the quality specifications (known as “outturn rates”) in the 023 S&P. The outturn rates of the Burkina Faso 023 Cargo were

between 43.48/b per 80kg to 45.70/b per 80kg, whereas the contract provided for a rate of about 48/b per 80kg.

23 The parties had discussions about the matter. While the contract provided for a penalty, the Partnership sought a discount in addition to the penalty. There were discussions between the parties about a possible discount, but the Tribunal found that nothing was agreed. DNO complains about this conclusion, and I will consider that complaint later in these reasons.

24 By 23 August 2020, the Partnership had paid INR6,000,000 (equivalent to US\$80,145.52), which was less than one-fifth of the MOU Advances and the Clearing Charges. Those Advances and Charges were already due under the MOU. DNP became increasingly concerned that the Partnership had not paid amounts that had fallen due.

25 In early September 2020, the Partnership made a payment of US\$50,000 against the 10% Advance. Further correspondence passed between the parties concerning the Partnership's request for a discount in relation to the Burkina Faso 023 Cargo delivered under the third Sales Contract, and DNP indicated to the Partnership that it wanted to take back that cargo.

26 The Tribunal found that towards the end of September 2020, DNP and the Partnership agreed that the Partnership would pay the MOU Advances and the Clearing Charges by 30 September 2020 and that if it did not do so, DNP would be able to terminate the MOU and sell the Cargo to third parties. The balance of the amounts which were due or would become due was to be paid within 90 days, that is, by 22 October 2020.

27 The Partnership made a payment of US\$112,776.45 towards the 10% Deposit on 9 September 2020, and payments totalling INR15,200,000 towards the Clearing Charges from 17 August 2020 to 16 September 2020. However, it was not disputed by the Partnership that the bulk of the MOU Advances and Clearing Charges had not been paid by 30 September 2020.

Termination of the MOU

28 On 1 October 2020, DNP gave notice to the Partnership that it considered that the MOU was at an end, and that it was free to sell the Cargo to third parties. It sold the goods to third parties in the second half of October 2020.

29 DNP's claim for damages in the arbitration comprised (a) an amount representing the difference between the contract price and the amount received by DNP on resale of the Cargo to third parties; and (b) amounts for the various items which I have described as the Clearing Charges. It was not in dispute that payments made by the Partnership were to be deducted from these amounts.

30 The Partnership's counterclaim for damages (the "Counterclaim") was based on the allegation that it had lawfully terminated the MOU on 22 October 2020. The Tribunal found that the Partnership's purported termination had no legal effect, having regard to its eventual finding that DNP was entitled to, and *did* terminate, the MOU on 1 October 2020.

The Indian Court Proceedings

31 The Partnership provided eight post-dated cheques to Company N in respect of Clearing Charges. The Partnership alleged that due to concerns about the quality of supplied cashews and a suspicion that DNP was selling the Cargo to third parties, it issued stop-payment instructions to its bank for these cheques,

on the basis that the sums reflected in the cheques were neither due nor payable by the Partnership. Five of the cheques which the Partnership gave to Company N were not honoured.

32 Between 22 January 2021 and 9 April 2021, Company N commenced five proceedings in the Indian courts, seeking to recover INR30,300,000 in respect of the Clearing Charges (the “Indian Court Proceedings”). Company N alleged that as custodian of the Cargo, it had provided services to the Partnership and was entitled to recover that amount. A claim for that amount in respect of Clearing Charges was also made by DNP in the arbitration.

A Brief Overview of the Issues

33 I set out below the issues before this court:

- (a) Does DNO have standing to pursue its claim for an order setting aside the Award?
- (b) Did the Tribunal’s refusal of the Partnership’s application to amend its Defence and Counterclaim in the arbitration (the “Amendment Application”) involve a breach of the rules of natural justice in connection with the making of the Award, whereby the rights of the Partnership/DNO have been prejudiced?
- (c) With respect to four particular matters in the Award, did the Tribunal’s findings and conclusions as to those matters or any one of them involve a breach of the rules of natural justice in connection with the making of the Award, whereby the rights of the Partnership/DNO have been prejudiced?

- (d) Does certain conduct of DNP, which I identify, mean that the Award is in conflict with the public policy of Singapore?

34 A recurring claim in DNO's submissions is that if any party was entitled to recover the amounts claimed by DNP in the arbitration (a claim which DNO denied), it was Company N *and not* DNP. Alternatively, DNO claimed that DNP did not establish that it was entitled to claim the amounts. I address this matter at [201]–[206] below.

The Standing Issue

35 DNO is the applicant in these proceedings. The Partnership was the respondent in the arbitration. DNO is a company, whereas the Partnership was a registered partnership. Generally speaking, the onus is on the applicant in the proceedings to establish that it has standing to bring the action (*Phoa Eugene v Oey Liang (alias Henry Kasenda)* [2024] 4 SLR 1108 at [43]). In some circumstances, there might be an evidential onus on the party asserting that the other party does not have standing. However, I do not need to consider that issue, because I have reached the conclusion that DNO has established standing to bring this action.

36 It is important to identify the area of dispute at the outset. In view of the documents before the court, I am prepared to accept that the relevant authorities in India had the power to register as a company limited by shares an entity that was previously a registered partnership. DNP has not asserted otherwise. Instead, the point that DNP makes is that DNO has not established that the Partnership is no longer in existence; DNP has produced some evidence that suggests that it does. The onus is on DNO to persuade the court that on the whole of the evidence, a conversion of the registered partnership to a company had taken place.

The Relevant Legal Principles

37 In the circumstances of this case, the legal principles relevant to standing are as follows.

38 First, the law of the place of incorporation of a foreign corporation governs issues relating to the incorporation, including whether an entity exists as a matter of law and has a separate legal existence, and whether a corporation has been dissolved (*JX Holdings Inc and another v Singapore Airlines Ltd* [2016] 5 SLR 988 at [21]; *Dicey, Morris and Collins on The Conflict of Laws* vol 1 (Lord Collins of Mapesbury and Professor Jonathan Harris gen ed) (Sweet & Maxwell, 16th Ed, 2022) at paras 30-010–30-012). In this case, the court must look to the law of India.

39 Secondly, the legal test which DNO must satisfy in order to establish standing has been expressed as whether the legal personality of the Partnership merged into and was assumed by DNO such that they are, for all intents and purposes, the same entity (*National Oilwell Varco Norway AS (formerly known as Hydralift AS) v Keppel FELS Ltd (formerly known as Far East Livingston Shipbuilding Ltd)* [2022] 2 SLR 115 at [24]–[25]). This is the test I will apply.

40 Thirdly, the content and effect of foreign law is a matter of fact and is to be proved in the same way as any other matter of fact (*EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR(R) 860 at [54]; *Pacific Recreation Pte Ltd v SY Technology Inc and another appeal* [2008] 2 SLR(R) 491 (“*Pacific Recreation*”) at [54]). Ordinarily, proof of the content and effect of foreign law will come from an expert in the foreign law in issue. There is authority that “raw sources” of foreign law may be admissible pursuant to s 59 (1)(b) of the Evidence Act 1893 (2020 Rev Ed) (*Pacific Recreation* at [55]–[60]). However, the court is not obliged to accord

evidentiary weight to raw sources. In *Pacific Recreation* (at [60]), the Court of Appeal identified matters relevant to whether the court will accord evidentiary weight to raw sources. An example of a case where the evidence adduced by a party was not sufficient to establish the content and effect of foreign law is *Abdul Rashid bin Abdul Manaf v Hii Yui Ann* [2014] 4 SLR 1042 (“*Abdul Rashid*”). In that case, the High Court held that a party who had adduced several English cases as to English law had not discharged the burden of establishing to the court’s satisfaction, the content and effect of English law (*Abdul Rashid* at [30]–[32]).

41 Fourthly, the Singapore International Commercial Court Rules 2021 (the “SICC Rules”) contain rules dealing with the adducing of expert evidence (see O 14 of the SICC Rules). The permission of the court is required to adduce expert evidence. The SICC Rules specify the matters which are to be included in an expert’s report; these include the expert’s sources, the facts (assumed or otherwise) relied on by the expert, and the reasons for the expert’s opinion. There is another avenue in the SICC Rules which is available to a party who wishes to put before the court material as to the content and effect of foreign law. This may be done by following the procedure in O 16 of the SICC Rules. If that is done, the court may order that the question of foreign law be determined on the basis of submissions instead of proof. In this case, DNO did not pursue either avenue for the purpose of establishing Indian law. In fact, on more than one occasion during the pre-trial hearings, counsel for DNO said that DNO would not be adducing expert evidence on Indian law and did not consider it necessary to do so.

The Relevant Facts

42 I turn now to the facts.

43 In Mr A’s first affidavit, he makes one statement relevant to the standing of DNO, and that is that the Partnership was converted into the company, DNO, on 31 March 2024. In Mr Z’s affidavit in response, he addresses the matters which form the basis of DNP’s submissions on DNO’s standing to challenge the Award. Some of the matters in his affidavit are submissions rather than evidence of facts; such submissions are to be ignored for the purposes of determining the facts.

The GST Returns

44 Mr Z states that DNP had conducted a search of the relevant records in India, and that he had formed the opinion that the Partnership and DNO “appeared to be 2 separate entities and [the Partnership] continues to exist as an ‘active entity’”. The records to which he refers are Goods and Services Taxation Returns (“GST Returns”). According to Mr Z, the Partnership continued to file GST Returns for itself after the incorporation of DNO on 30 March 2024, and did so as recently as October 2024. Mr Z’s affidavit was affirmed on 5 November 2024.

45 Mr Z refers to the information to be included in the GST Returns as indicated in the forms themselves, including details of the outward supplies of goods and services and the purpose of the GST Returns, namely, “for taxpayers to declare their summary GST liabilities for a particular tax period and discharge these liabilities”. Mr Z produces the GST Returns, which also refer to Mr A as a registered partner of the Partnership.

DNO's Certificate of Incorporation

46 Mr A filed an affidavit dealing with the question of standing in response to Mr Z's affidavit. Like Mr Z, he makes a number of submissions in the affidavit. Those submissions are to be ignored.

47 Mr A begins by referring to DNO's Certificate of Incorporation, which he exhibits in his affidavit. The certificate establishes that DNO was incorporated on 30 March 2024 pursuant to the Companies Act, 2013 (India) (the "Indian Companies Act") and the Companies (Incorporation) Rules, 2014 (India).

Application under Section 366 of the Indian Companies Act

48 Mr A exhibits documents pertaining to an application made under s 366 of the Indian Companies Act. I will return to this provision when considering DNO's reliance on various legislative provisions. At this juncture, it suffices to note that, as DNO asserts, s 366 of the Indian Companies Act deals with the power of a partnership firm to register as, among other alternatives, a company limited by shares.

49 Mr A produces part of a form titled "Form No. URC-1" (the "Form"). On the face of the Form, it is an application by the Partnership under s 366 of the Indian Companies Act. The Partnership is named as the "existing entity", a partnership firm. DNO is listed as the "proposed company", a company limited by shares. Mr A completed the Form as a proposed director of DNO on 29 March 2024.

50 In his affidavit, Mr A exhibits the documents which accompanied the application. I summarise the pertinent documents below:

- (a) a list of members of the Partnership dated 20 March 2024;
- (b) consent of the former partners of the Partnership to act as members of DNO dated 20 March 2024;
- (c) an affidavit dated 19 March 2024 executed by the former partners of the Partnership affirming that the Partnership stands dissolved and will carry on business in the name of DNO;
- (d) an advertisement dated 23 February 2024 published in two Indian newspapers, putting out a notice that the Partnership was going to be registered as a company limited by shares within 15 days of the notice;
- (e) a resolution passed by the Partnership on 18 January 2024 where its members unanimously resolved to convert the Partnership to a “private limited company”;
- (f) “No Objection Certificates” dated 25 March 2024 issued by secured creditors of the Partnership, wherein the secured creditors confirmed that they had no objections to the conversion of the Partnership to DNO; and
- (g) an undertaking dated 11 March 2024 of all directors of the Partnership that they would comply with the Indian Stamps Act 1899.

51 Mr A also refers to the steps DNO undertook in order to be able to commence business. In the course of his description, he refers to the relevant sections of the Indian Companies Act and the relevant rules.

Document Signed by DNO's Chartered Accountant

52 In addition to the aforementioned documents, DNO sought to rely on a document signed by its chartered accountant, dated 21 May 2020. This document refers to the conversion of the Partnership to DNO. DNP submits that the court should not place any reliance on this document. I did not hear detailed argument on the point. It seems to me that DNP is right, because the basis upon which the chartered accountant was able to make the statement is quite unclear.

DNO's Evidence on the GST Returns

53 I turn now to Mr A's evidence with respect to the fact that the Partnership was filing GST Returns after the incorporation of DNO. Mr A gave the following evidence:

18. With respect Mr [Z]'s affidavit dated 5 November 2024, he relies on in the Goods and Services Tax ("GST") registration of [the Partnership] and [DNO] to allege that [the Partnership] is an active entity and different from [DNO]. This statement is wholly misconceived and premised on an incorrect presumption that GST registration of an entity is conclusive evidence of an entity's incorporation status. An entity's GST registration is by no means conclusive evidence of its incorporation status.

19. [DNO] is in the process of de-registering [the Partnership's] GST registration, and I admit that [the Partnership] has been filing Form GSTR-3B. However, it is clarified that [the Partnership] has been filing its GST statements (Form GSTR-3B) on a zero-rated basis since June 2024, as summarised below [...]

54 Mr A's evidence does not explain why the Partnership continued to file GST Returns after the incorporation of DNO, and is only now in the process of de-registering its GST registration.

Applicable Provisions of Indian Law

55 Section 366 of the Indian Companies Act, as relied upon by DNO, is in the following terms:

366. Companies capable of being registered.—(1) For the purposes of this Part, the word "company" includes any partnership firm, limited liability partnership, cooperative society, society or any other business entity formed under any other law for the time being in force which applies for registration under this Part.

(2) With the exceptions and subject to the provisions contained in this section, any company formed, whether before or after the commencement of this Act, in pursuance of any Act of Parliament other than this Act or of any other law for the time being in force or being otherwise duly constituted according to law, and consisting of 1 [two or more members], may at any time register under this Act as an unlimited company, or as a company limited by shares, or as a company limited by guarantee, in such manner as may be prescribed and the registration shall not be invalid by reason only that it has taken place with a view to the company's being wound up:

Provided that—

(i) a company registered under the Indian Companies Act, 1882 (6 of 1882) or under the Indian Companies Act, 1913 (7 of 1913) or the Companies Act, 1956 (1 of 1956), shall not register in pursuance of this section;

(ii) a company having the liability of its members limited by any Act of Parliament other than this Act or by any other law for the time being in force, shall not register in pursuance of this section as an unlimited company or as a company limited by guarantee;

(iii) a company shall be registered in pursuance of this section as a company limited by shares only if it has a permanent paid-up or nominal share capital of fixed amount divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in the one way and partly in the other, and formed on the principle of having for its members the holders of those shares or that stock, and no other persons;

(iv) a company shall not register in pursuance of this section without the assent of a majority of such of its members as are present in person, or where proxies are

allowed, by proxy, at a general meeting summoned for the purpose;

(v) where a company not having the liability of its members limited by any Act of Parliament or any other law for the time being in force is about to register as a limited company, the majority required to assent as aforesaid shall consist of not less than three-fourths of the members present in person, or where proxies are allowed, by proxy, at the meeting;

(vi) where a company is about to register as a company limited by guarantee, the assent to its being so registered shall be accompanied by a resolution declaring that each member undertakes to contribute to the assets of the company, in the event of its being wound up while he is a member, or within one year after he ceases to be a member, for payment of the debts and liabilities of the company or of such debts and liabilities as may have been contracted before he ceases to be a member, and of the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount.

[(vii) a company with less than seven members shall register as a private company.]

(3) In computing any majority required for the purposes of subsection (1), when a poll is demanded, regard shall be had to the number of votes to which each member is entitled according to the regulations of the company.

56 I am prepared to place weight on s 366 of the Indian Companies Act, but only to a limited extent. The section, together with the documents previously referred to at [48]–[50] above, establishes that there is power for a registered partnership to register as a company limited by shares in India. I should say that proposition is supported by the documents *alone*.

57 DNO also set out in its written submissions ss 10A and 370 of the Indian Companies Act, which are provisions concerning, respectively, the commencement of business and the continuation of pending legal proceedings. It is not necessary for me to set out those provisions, as it is not entirely clear

what reliance DNO is asking the court to place on these sections. Insofar as DNO submits that it “relies on Indian law only to [...] address the [DNP’s] misunderstandings [that the Partnership and DNO are two different entities under Indian law]”, I consider this purpose to be irrelevant.

Conclusion

58 I have given the question of standing anxious consideration. Having regard to the whole of the evidence, I am satisfied that on or about 30 March 2024, the legal personality of the Partnership was merged into and assumed by DNO, such that they are, for all intents and purposes, the same entity. In my opinion, the application, the documents accompanying the application, and the fact that the Certificate of Incorporation for DNO was issued almost immediately after the date of the application, provide strong support for that conclusion.

59 The existence of the GST Returns must be taken into account, but to my mind, it is significant that they recorded nil taxable supplies inward and outward, and Mr A gave evidence that DNO was in the process of cancelling the Partnership’s GST registration. In other words, I am prepared to infer that it was open for the Partnership’s GST registration to be cancelled at or about the time of DNO’s incorporation.

60 For these reasons, I have reached the conclusion that DNO has standing to challenge the Award and apply to have it set aside. In the following sections of the judgment, I use the terms “DNO” and the “Partnership” interchangeably; they should be taken as referring to the same entity for present purposes.

The Natural Justice Issue

61 DNO contends that breaches of natural justice occurred in connection with the making of the Award, whereby its rights have been prejudiced. For convenience, I will refer to this ground as the “breach of natural justice ground”; I do not overlook the fact that there are two other elements in the ground, namely that (a) the breach must have occurred in connection with the making of the Award; and (b) the breach must have caused prejudice to DNO’s rights.

62 DNO has alleged two separate breaches of natural justice in relation to (a) the Tribunal’s denial of the Amendment Application; (b) purportedly “inconsistent and/or defective” reasoning on the part of the Tribunal in the Award. I will address the breaches in turn.

The Amendment Application

63 DNO contends that there was a breach of natural justice in connection with the Tribunal’s refusal of an application by the Partnership to amend its Defence and Counterclaim before the evidentiary hearing (the Amendment Application). It is important to note at the outset that DNO does not contend that it was prevented in any way from putting to the Tribunal on the hearing of the Amendment Application all the submissions it wished to put. Nor did DNO contend that the Tribunal’s summary of its submissions on the Amendment Application was in any way deficient.

64 It was not always clear from the submissions, precisely what acts in connection with the Amendment Application, DNO contends gave rise to the breach of natural justice. The mere refusal of the Amendment Application by the Tribunal does not constitute a breach of natural justice.

65 Furthermore, it is not entirely clear whether DNO was advancing an argument that the Tribunal committed a breach of natural justice in refusing the Amendment Application because it erred *in the way it carried out the balancing exercise* required in deciding whether to allow the application. The relevant considerations in this case were (a) delay in making the application; (b) disruption in progressing the arbitration to a substantive hearing; (c) prejudice to DNP if the application was allowed; and (d) prejudice to the Partnership if the application was not allowed. The last matter came down to a consideration of the prospects of success of the matters raised by proposed amendments. To the extent DNO relies on no more than an error in the balancing exercise (assuming an error is made out), such an error cannot amount to a breach of natural justice. Among other reasons which I will identify, the decision whether to allow an application to amend pleadings is a case management decision and a discretionary decision par excellence.

66 As I understand DNO's submissions, the substance of the argument which it puts in relation to the Amendment Application is as follows: The Tribunal addressed the four considerations to which I have previously referred (at [65] above); the fourth consideration being the prospects of success of the matters raised by the proposed amendments. DNO's submission is that the Tribunal committed a breach of natural justice in relation to this matter. It follows, so the argument goes, that the Tribunal should have allowed the Amendment Application and had it done so, the outcome of the arbitration, "would have been different". I should mention that DNO did advance some minor criticisms of the Tribunal's reasons with respect to the other three relevant considerations. None of those criticisms are justified.

The Procedural Timeline

67 The Tribunal set out its reasons for its refusal of the Amendment Application in a procedural order dated 23 August 2023 (“Procedural Order 4” or “PO4”). It began by setting out a comprehensive summary of the procedural steps taken in the arbitration from 2 May 2022 to 21 August 2023. I will identify some of the earlier steps and then reproduce many (not all) of the steps set out by the Tribunal.

- (a) On 2 September 2021, DNP filed a Notice of Arbitration with the SIAC.
- (b) On 16 November 2021, the Partnership filed its Notice of Response to the Notice of Arbitration.
- (c) On 31 March 2022, the Sole Arbitrator was appointed by the President of the SIAC.

68 The following summary is taken from PO4:

- 1. On 2 May 2022, the Sole Arbitrator issued Procedural Order No. 1, in which the Procedural Rules and the Provisional Timetable were set out.
- 2. On 4 July 2022, [DNP] filed its Statement of Claim.
- 3. On 20 September 2022, the [Partnership] filed its Statement of Defence and Counterclaim.
- 4. On 25 October 2022, [DNP] filed its Reply and Defence to Counterclaim.
- [...]
- 7. On 22 November 2022, upon the Sole Arbitrator’s invitation dated 17 November 2022, the [Partnership] commented on [DNP’s] email of 17 November 2022, stating that it maintained its position as set out in its email of 14 November 2022. The [Partnership] further informed the Sole Arbitrator that it intended to amend paragraph 20(c) of its Defence and Counterclaim dated

20 September 2022 and provided its proposed timetable regarding this amendment.

[...]

12. On 4 January 2023, [DNP] informed the Sole Arbitrator of the Parties' agreement on the [Partnership's] request to amend the Defence and Counterclaim and the costs of the amendment and requested the Sole Arbitrator to issue an order reflecting the Parties' agreed terms.
13. On the same date, 4 January 2023, the Sole Arbitrator issued Procedural Order No. 2, reflecting the Parties' agreed terms on the [Partnership's] request to amend the Defence and Counterclaim and the costs of the amendment conveyed to the Sole Arbitrator on 4 January 2023 by [DNP].
14. On 9 January 2023, [DNP] filed its amended Reply and Defence to Counterclaim.
15. On 10 January 2023, the [Partnership] filed its amended Defence and Counterclaim.

[...]

29. On 28 April 2023, based on the Parties' confirmation, the Sole Arbitrator fixed the hearing dates for 18 to 20 October 2023.

[...]

34. By email of 31 May 2023, Selvam LLC, the law firm which was representing the [Partnership], informed the Sole Arbitrator that it would no longer be acting for the [Partnership] and requested the Sole Arbitrator to direct all further correspondence to the [Partnership's] representatives directly.
35. On 1 June 2023, the Sole Arbitrator sent an email to the Parties stating that according to the Sole Arbitrator's records, the [Partnership] was represented in this arbitration also by Mr. M.P. Shenoy, and invited the [Partnership] to clarify whether it was represented by Mr. M.P. Shenoy only, or whether it would like to retain additional or new counsel in these proceedings, and if so, to inform the Sole Arbitrator of the contact details of the additional or new counsel. Furthermore, the Sole Arbitrator invited [DNP] to inform her whether the Parties were able to exchange the list of witnesses (which was due by 31 May 2023) and to provide any comments on the Selvam LLC's email of 31 May 2023.

36. On 6 June 2023, the [Partnership's] representative, Mr. [A], informed the Sole Arbitrator that the [Partnership] was in the process of appointing new counsel based in Singapore and requested until 25 June 2023 to identify new counsel to be briefed in the proceedings. Mr. [A] further stated that Mr. M.P. Shenoy was not appearing in the proceedings. He added that the [Partnership] wished to appoint Uday Shankar Associates, Indian counsels, and requested that all email correspondence for the [Partnership] be sent to the Uday Shankar Associates' email addresses.

[...]

38. On 9 June 2023, the Sole Arbitrator granted the [Partnership] until 23 June 2023 to appoint and brief new counsel and directed it to update the Sole Arbitrator by the same deadline.

[...]

41. On 5 July 2023, the [Partnership's] representative, Mr. [A], informed the Sole Arbitrator that the [Partnership] had engaged PDLegal LLC to represent it, and that Mr. Peter Sir along with his team would be appearing in the arbitration proceedings and would be filing the relevant documents shortly.

42. On 7 July 2023, PDLegal LLC informed the Sole Arbitrator that it had just been instructed to act for the [Partnership]. On behalf of the [Partnership], counsel requested an extension of 4 weeks (i.e., up to 4 August 2023) to serve the [Partnership's] witness statement (which was due by 10 July 2023) and an extension of 14 days (i.e., to 21 July 2023) to take instructions from the [Partnership] on the document production issue.

[...]

52. On 30 July 2023, [DNP] requested an extension of four working days, until 4 August 2023, for the Parties to exchange the Factual Witness Statements. [DNP] informed the Sole Arbitrator that it had conferred with the [Partnership], and the [Partnership] had confirmed that it had no objection to extension, provided that the deadlines in S/N 2 and 3 of the Revised Procedural Timetable (service of reply factual witness statements and submission of Joint List of Issues) were extended to 25 August 2023 and 8 September 2023, respectively; and that the deadlines in S/N 4 to 6 (Pre-Hearing Conference, Submission of Opening statements and Hearing Bundles and Hearing) remained as fixed.

53. On 30 July 2023, the Sole Arbitrator approved the request and issued a revised Procedural Timetable for the remainder of the proceedings, based on the Parties' agreement. According to the Revised Procedural Timetable dated 30 July 2023, the next step in the proceedings was for the Parties to serve their factual and expert witness statement(s) by 4 August 2023.
54. On 3 August 2023, the [Partnership] filed an application to amend its Defence and Counterclaim ("Amendment Application"), which contained the [Partnership's] proposed further amendments to the amended Defence and Counterclaim that had been filed on 10 January 2023.
55. On 4 August 2023, the Sole Arbitrator invited [DNP] to comment on the [Partnership's] application by 8 August 2023. The Sole Arbitrator further informed the Parties that the deadline of 4 August 2023 for the "Parties to serve their factual and expert witness statement(s)" was not extended and remained the same and the Parties were expected to serve their factual and expert witness statement(s) on 4 August 2023.
56. On the same date, 4 August 2023, based on [DNP's] request, the Sole Arbitrator granted the Parties until 8 August 2023 to serve their factual and expert witness statements. The Sole Arbitrator informed the Parties that the remaining submissions and deadlines in the revised Procedural Timetable dated 30 July 2023 remained unchanged.
57. On 9 August 2023, the Parties filed their respective Factual Witness Statements.
58. On 11 August 2023, [DNP] filed its response to the [Partnership's] Amendment Application.
59. On 17 August 2023, the [Partnership] filed its reply to [DNP's] response to the [Partnership's] Amendment Application.
- [...]
61. On the same date, 21 August 2023, the Sole Arbitrator informed the Parties that she would decide on the [Partnership's] Amendment Application in due course. The Sole Arbitrator further informed the Parties that the remaining submissions and deadlines in the Procedural Timetable dated 30 July 2023 remain unchanged.

The Proposed Amendments

69 The Tribunal then set out the Partnership’s summary of the effect of its proposed amendments. The summary is as follows:

62. In its Amendment Application dated 3 August 2023, the [Partnership] seeks leave to amend its amended Defence and Counterclaim dated 10 January 2023. The [Partnership] summarizes the proposed amendments to its pleading as follows:

- After PDLegal LLC was appointed as counsel for the [Partnership], it was instructed by the [Partnership] that [Company N] had initiated five proceedings against the [Partnership] before the Karkala Court, Udupi District, Karnataka, India (“Indian Court Proceedings”) under the provisions of Section 138 of the Negotiable Instruments Act, 1881. As per the Memorandum of Understanding dated 24 July 2020 (“MOU”) between [DNP] and the [Partnership], [Company N] was appointed as the “custodian of cargo.”
- Although the [Partnership] had provided post-dated cheques to [Company N] for demurrage charges, clearing costs, warehouse rental charges, insurance charges, and security charges, due to concerns about the quality of supplied cashews and the suspicion that [DNP] was selling the cargo to third parties, the [Partnership] issued stop payment instructions to its [banker], for these cheques on the basis that the sums reflected in the cheques were neither due nor payable by the [Partnership].
- Out of eight cheques given to [Company N], five were dishonoured due to the stop payment instructions.
- [Company N] initiated the Indian Court Proceedings on 22 January 2021 and 9 April 2021 (i.e., before [DNP] initiated the current arbitral proceedings) for the recovery of a total sum of INR 30,300,000 for demurrage charges, clearing costs, warehouse rental charges, insurance charges, and security charges. [Company N] alleged that it was entitled to that amount since it provided services to the [Partnership] as a custodian of the cargo, “which comprises part of the subject matter of the present dispute based on which identical reliefs for charges have been claimed by [DNP] in the present proceedings.”

- [DNP], in paragraph 33 its Statement of Claim, sought to demonstrate losses totaling INR 52,692,796.74, the calculation of which included amounts paid towards demurrage charges, clearing costs, warehouse rental charges, insurance charges, and security charges. While [DNP] stated in paragraph 13.3 of its Statement of Claim that the [Partnership] was to make payments for these charges to [Company N], [Company N] had already initiated proceedings against the [Partnership] for the recovery of INR 30,300,000, even prior to the commencement of the present arbitral proceedings.
- Accordingly, [DNP] is not entitled to claim any amounts towards demurrage charges, clearing costs, warehouse rental charges, insurance charges, and security charges, as calculated in paragraph 33 of the Statement of Claim. Such sums were not payable to either [DNP] or [Company N]. At present, the Indian Court Proceedings are ongoing with the next case hearing scheduled for 14 August 2023.

70 The Tribunal proceeded on the basis that this summary of the proposed amendments was correct, as did DNP. The Tribunal then set out, in considerable detail, a summary of the submissions made by the respective parties. As I have said, the DNO did not suggest that the Tribunal’s summary of its submissions was in any way deficient. In other words, it did not point to any submission it made to the Tribunal which was not included in the summary, or which was misstated.

The Tribunal’s Reasons

71 I turn now to summarise the Tribunal’s reasons for refusing the Amendment Application.

72 The Tribunal began by referring to r 20.5 of the SIAC Rules, which provides that a party may “amend its claim, counterclaim or other submissions unless the Tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other

circumstances”. The Tribunal also referred to r 19.1 of the SIAC Rules, which requires the Tribunal to ensure “the fair, expeditious, economical and final resolution of the dispute”. The Tribunal referred to the commentary on the SIAC Rules and observed, by reference to the commentary, that the right to be heard was not an unlimited right, but a reasonable one. The Tribunal also referred to three paragraphs in a procedural order issued on 2 May 2022 (Procedural Order No 1). It is not necessary for me to refer to those paragraphs.

73 The Tribunal identified four considerations as being relevant to the question of whether the Amendment Application should be allowed (see [65] above); these are ordinarily considered in an application to amend pleadings, and DNO did not suggest that there was any other consideration or matter which the Tribunal should have addressed.

74 The first consideration was delay by the Partnership in making the application. The Tribunal said that the application was made belatedly, and at a late stage of the proceedings. The Indian Court Proceedings brought by Company N against the Partnership were commenced between 22 January and 9 April 2021, which was at least five months before DNP filed the Notice of Arbitration with the SIAC. The Partnership had known about the Indian Court Proceedings for approximately 28 months before it made the Amendment Application. The Tribunal rejected a submission made by the Partnership to the effect that weight should be placed on the fact that the Amendment Application was made within a reasonable time after *new* counsel were made aware of the Indian Court Proceedings. The Tribunal observed that the Partnership was represented by counsel of its choice from the commencement of the arbitration.

75 The second consideration was the disruption and undue delay in the arbitration which would or may result from allowing the Partnership’s

Amendment Application. The Tribunal outlined the interlocutory steps that would need to be carried out should the Amendment Application be allowed. The Tribunal rejected the Partnership's submission that allowing the Amendment Application would not unduly delay the timetables and that the scheduled dates for the evidentiary hearing would be maintained, finding that allowing the amendments "would necessarily result in delaying the Hearing dates and the proceedings for several months".

76 The third consideration was prejudice DNP would suffer if the Amendment Application was allowed. The Tribunal said that to allow the Amendment Application would cause prejudice to DNP – the proceedings had already been substantially delayed, and DNP had an interest "in having its claims adjudicated without further delay and expense". The Amendment Application could have been filed at a much earlier stage of the arbitration, and to allow it at such a late juncture was very likely to lead to further delay in the adjudication of DNP's claims. The Tribunal said that DNP would suffer prejudice due to delay and added costs if the Amendment Application was allowed and that DNP should not be penalised for the Partnership's failure to raise the alleged relevance of the Indian Court Proceedings at an earlier stage of the arbitration. It would be unfair to DNP to allow the Amendment Application "at this late stage".

77 The fourth consideration was the prejudice to the Partnership if the proposed amendments were not allowed. This, in turn, raised the issue of the prospects of success of the matters raised by the proposed amendments. As I have said, this was the focus of DNO's challenge to the Tribunal's decision to refuse its Amendment Application, in the present proceedings before this court.

78 The Tribunal said that it did not consider that the proposed amendments, if allowed, would directly affect the claim in question or the quantum of the claim sum. The Tribunal said the following:

97. Finally, the Sole Arbitrator notes that she does not consider that the [Partnership's] proposed amendments (even if they were to be allowed) directly affect the claim in question or the quantum of the claim sum. Based on the Parties' submissions, the Sole Arbitrator observes that the Indian Court Proceedings were initiated by [Company N] against the [Partnership] on the basis that the cheques that were presented to [Company N] were dishonoured. However, as rightly stated by the [Partnership], [Company N] is not a party to the MOU, which means that it is not a party to the arbitration agreement between [DNP] and the [Partnership]. In this arbitration, [DNP] claims the loss [DNP] (and not [Company N]) has allegedly suffered. Thus, it is the Sole Arbitrator's understanding that the Indian Court Proceedings do not affect the claim or the quantum in this proceeding. This conclusion seems to be accepted, albeit indirectly, by the [Partnership] as well, which has stated that [Company N] "is not a party to the arbitration agreement and therefore, the decisions by the Tribunal would not have any effect on the Indian Court Proceedings." Furthermore, the Sole Arbitrator is not convinced by the [Partnership's] argument regarding "double recovery." Based on the Parties' submissions before her, it is the Sole Arbitrator's understanding that the issue of "double recovery" (if any) would only arise in the event that [Company N] succeeds in obtaining a judgment against the [Partnership]. In fact, [Company N] has not yet obtained a judgment against the [Partnership], nor has it been compensated based on such judgment.

DNO's Criticism of the Tribunal's Reasons

79 I mentioned earlier that DNO advanced some minor criticisms of the Tribunal's treatment of the first three considerations. None of those criticisms are justified. I turn to address those matters.

(a) First, DNO criticises the Tribunal's treatment of delay, and submits that there was no delay, as its new legal counsel and representatives took no more than a reasonable time after they had been instructed to bring the Amendment Application. That may be accepted.

The difficulty for DNO is that, as the Tribunal pointed out, there was substantial delay in making any application *before* its new legal representatives were appointed. During the course of oral submissions, I asked counsel for DNO whether this delay was or could be explained in some way. He said that he was unable to comment. Therefore, the substantial delay identified by the Tribunal remains unexplained. In those circumstances, the Tribunal did not err in its approach to the issue of delay.

(b) Secondly, DNO criticises the Tribunal's treatment of the issue of prejudice to each party. It submits that there was very little prejudice to DNP if the Amendment Application was allowed.

(i) Insofar as the Tribunal relied on the fact that witness statements had been filed before the Amendment Application was determined, DNO's submission was that the Tribunal erred because it should have suspended the orders for the filing of witness statements until after the Amendment Application had been determined. In my opinion, the Tribunal did not err in taking the course it did. A late application to amend was made, and in those circumstances, the Tribunal was perfectly entitled to leave the existing orders in place to facilitate the hearing of the matter on the dates which had been fixed.

(ii) DNO submits in the alternative, that even if the Tribunal was justified in leaving the existing orders in place, it erred in failing to recognise that supplementary witness statements could have been filed without a great deal of further delay. This submission must be rejected. The Tribunal did not overlook this possibility. DNO's submission approaches the matter of further

delay from the wrong starting point. The Tribunal approached the issue by a consideration of the consequences of allowing the proposed amendments; one consequence was that it could lead to further witness statements. It is immaterial to that issue whether witness evidence was adduced by way of witness statements or supplementary witness statements.

(iii) Allied to these points above is a submission by DNO that allowing the amendments would not have resulted in the vacation of the hearing dates. That submission was made in writing, but it did not seem to be pursued in oral submissions. There is nothing in this point. The Tribunal said that allowing the amendments “would necessarily result in delaying the Hearing dates and the proceedings for several months”. That was a conclusion that the Tribunal was perfectly entitled to reach.

(iv) DNO criticised the Tribunal for taking into account the expenses DNP would incur if the amendments were allowed, and failing to take into account the Tribunal’s power to make an order for costs against it, in favour of DNP. DNO referred to the Tribunal’s power to compensate DNP by an order for costs in its submissions, and this is recorded in PO4. The Tribunal did not expressly refer to this matter in its treatment of prejudice to DNP if the amendments were allowed. It is hard to think that it overlooked this matter, but, in any event, it is a very minor matter and if there be error, it falls well short of a breach of the rules of natural justice.

80 I cannot leave this section of my reasons without making the following observation. As I was working my way through DNO’s criticisms with respect

to the first three considerations, it became increasingly apparent to me how far they are removed from a breach of natural justice, even if they are accepted.

81 I examine the relevant authorities below. There are authorities which identify the general principles, and I will refer to those authorities to the extent it is necessary. There are also authorities which address the application of one or more of the sub-principles of the rules of natural justice: see *Singapore Civil Procedure 2025* vol II (Cavinder Bull SC gen ed) (Sweet & Maxwell, 2025) (“*Singapore Civil Procedure*”) at pp 873–878. I do not need to examine the authorities which address sub-principles which are not relevant. In order to identify the sub-principles which are relevant in this case, I turn to DNO’s submissions and how it puts its case that there has been a breach of natural justice.

82 As I have already said, DNO identifies the fourth consideration in the Tribunal’s reasons as involving a breach of natural justice:

- (a) First, DNO submits that the issue of double recovery “was real and was left unconsidered by the Tribunal”.
- (b) Secondly, DNO submits that the issue of whether DNP could pursue the claim for the Clearing Charges in the arbitration in circumstances where Company N was also seeking to recover those charges in the Indian Court Proceedings was a key issue which the Tribunal “brushed aside”.
- (c) Thirdly, DNO submits that the Tribunal’s reasoning with respect to the issue of whether DNP had the right to recover the Clearing Charges “was devoid of any analysis on the rights and obligations of [Company N] under the [MOU]”.

(d) Fourthly, DNO submits that the Tribunal did not take into account that the Amendment Application was “critical” to DNP’s entitlement to claim the Clearing Charges.

(e) Finally, DNO submits that the Partnership’s right to a fair hearing was breached by the Tribunal, “because key pleadings regarding [DNP’s] standing to pursue claims that [Company N] had standing for was not considered, which deprived [the Partnership] of the opportunity to rely on an important and essential issue”.

83 The authors of *Singapore Civil Procedure* identify four duties (referred to as “sub-principles”), wherein a failure by the tribunal to comply with the relevant duty will or may constitute a breach of natural justice (*Singapore Civil Procedure* at para F/24/14). The authors acknowledge that the list of duties is not exhaustive. Nevertheless, in my opinion, they provide a useful guide as to the *type* of breaches which will or may constitute a breach of natural justice.

84 Doing the best I can by reference to DNO’s submissions, it seems that DNO is alleging that with respect to the fourth consideration, the Tribunal failed to deal with essential issues and failed to attempt to consider and comprehend the parties’ submissions.

The Relevant Authorities

85 I turn now to the authorities.

86 The rationale for the principle of minimal curial intervention in arbitral proceedings, the prohibition on interference with the merits of a decision, and the need to assess the real nature of a complaint of a breach of natural justice were discussed by the Court of Appeal in *AKN and another v ALC and others*

and other appeals [2015] 3 SLR 488 (“*AKN v ALC*”). The passage is a lengthy one, but it bears repetition because of the importance of the matters discussed by the court. Sundaresh Menon CJ, on behalf of the court, said the following (*AKN v ALC* at [37]–[39]):

37 A critical foundational principle in arbitration is that the parties choose their adjudicators. Central to this is the notion of party autonomy. Just as the parties enjoy many of the benefits of party autonomy, so too must they accept the consequences of the choices they have made. The courts do not and must not interfere in the merits of an arbitral award and, in the process, bail out parties who have made choices that they might come to regret, or offer them a second chance to canvass the merits of their respective cases. This important proscription is reflected in the policy of minimal curial intervention in arbitral proceedings, a mainstay of the Model Law and the IAA (see *BLC v BLB* [2014] 4 SLR 79 (“*BLC*”) at [51]–[53]).

38 In particular, there is no right of appeal from arbitral awards. That is not to say that the courts can never intervene. However, the grounds for curial intervention are narrowly circumscribed, and generally concern process failures that are unfair and prejudice the parties or instances where the arbitral tribunal has made a decision that is beyond the scope of the arbitration agreement. It follows that, from the courts’ perspective, the parties to an arbitration do not have a right to a “correct” decision from the arbitral tribunal that can be vindicated by the courts. Instead, they only have a right to a decision that is within the ambit of their consent to have their dispute arbitrated, and that is arrived at following a fair process.

39 In the light of their limited role in arbitral proceedings, the courts must resist the temptation to engage with what is substantially an appeal on the legal merits of an arbitral award, but which, through the ingenuity of counsel, may be disguised and presented as a challenge to process failures during the arbitration. A prime example of this would be a challenge based on an alleged breach of natural justice. When examining such a challenge, it is important that the court assesses the real nature of the complaint. Among the arguments commonly raised in support of breach of natural justice challenges are these:

- (a) that the arbitral tribunal misunderstood the case presented and so did not apply its mind to the actual case of the aggrieved party;

(b) that the arbitral tribunal did not mention the arguments raised by the aggrieved party and so must have failed to consider the latter's actual case; and

(c) that the arbitral tribunal must have overlooked a part of the aggrieved party's case because it did not engage with the merits of that part of the latter's case.

Although such arguments may be commonly raised, more often than not, they do not, in fact, amount to breaches of natural justice.

87 The court in *AKN v ALC* also made the point (at [46]) that a failure by a tribunal to consider an important issue that has been pleaded in an arbitration is a breach of natural justice because in such a case, the arbitrator will not have brought his mind to bear on an important aspect of the dispute before him. It will ordinarily be a matter of inference as to whether that has occurred, and for the inference to be drawn, it must be shown to be clear and virtually inescapable. The court went on to say the following (*AKN v ALC* at [46]):

... 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 (notwithstanding that this view may have been formed based on a misunderstanding of the aggrieved party's case), 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.

88 There was a further discussion of these matters by the Court of Appeal in *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 ("*China Machine*") (at [86]–[104]). One important point made by the court was that in order to establish a breach of natural justice, an applicant must establish the following:

- (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 did or could prejudice its rights.

(*China Machine* at [86]; see also *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [29]).

89 A further manifestation of the principle of minimal interference with an arbitral award is that it is not a breach of natural justice for a tribunal simply to have made an error of fact or law or mixed fact and law.

90 In *CDX and another v CDZ and another* [2021] 5 SLR 405 (“*CDX v CDZ*”) (at [34]), the High Court set out the legal principles as to what *might be* a breach of natural justice and what *is not* a breach of natural justice. I highlight two points. First, one of the obligations of natural justice is that a tribunal must make “some attempt *bona fide* to understand, engage with and apply its mind” to a party’s case on issues in respect of which the opposing party must give reasonable and fair notice and any other issues in respect of which the tribunal must give reasonable and fair notice (*CDX v CDZ* at [34(d)(iii)] and [34(h)(iv)]). Secondly, the court addressed the applicable test where the alleged breach of natural justice relates to the manner in which the tribunal exercised a discretion in its procedural management of the arbitration. The court said the following (*CDX v CDZ* at [34(f)]):

... [T]he proper approach a court should take is to ask itself if what the tribunal did (or decide not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done’. This test is a fact-sensitive inquiry to be applied from the arbitrator’s perspective: *China Machine* at [98] and [104(c)]–[104(d)].

(See also *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 (“*Gokul Patnaik*”) at [118]–[127]).

91 DNP submits that regardless of whether the Tribunal’s decision was incoherent, incoherence is not, in and of itself, a breach of the rules of natural justice. There is certainly authority to the effect that the inexplicability of a tribunal’s decision is not, in and of itself, a breach of natural justice: see *BZV v BZW* [2021] SGHC 60 (“*BZV v BZW*”) at [52(g)]. I do not need to examine this matter further because I find that the Tribunal’s decision in this case is neither incoherent nor inexplicable.

92 DNO relies on certain observations of the High Court in *BZV v BZW*. In that case, the court found that there had been a breach of natural justice and explained its reason for so concluding as follows (at [226]):

226 [...] An analysis of the award and the chain of reasoning in it reveals that this is not a case in which the tribunal posed the correct questions to itself but, through error of fact or law, arrived at the wrong answers to those questions. This is a case in which the tribunal failed entirely to appreciate the correct questions it had to pose to itself, let alone apply its mind to determining those questions. It therefore rendered its award in breach of the fair hearing rule and in breach of natural justice.

93 *BZV v BZW* is a helpful case in that it contains a clear statement of the applicable principles (see *BZV v BZW* at [52]). However, I am not sure how DNO seeks to deploy the case. The principles referred to in *BZV v BZW* (at [226]) do not go beyond the principles articulated in the authorities discussed above. The case was referred to in the context of a discussion about the significance of inconsistencies in a tribunal’s reasoning – the presence of inconsistencies in a tribunal’s reasoning is certainly a relevant factor, but it is not enough by itself. The court in *BZV v BZW* identified inconsistencies in the tribunal’s reasoning (see, for example, *BZV v BZW* at [162]–[163]), but that was

in the context of the court working its way to the conclusions expressed in [226]. In any event, in this case, there are no inconsistencies in the Tribunal's reasoning with respect to the Amendment Application.

Whether a Breach of Natural Justice was Established in Respect of the Amendment Application

94 I turn now to consider whether DNO has established that the Tribunal's refusal of its Amendment Application involved a breach of the rules of natural justice.

95 Leaving to one side for the moment DNO's challenge to the Tribunal's reasoning with respect to the fourth consideration, there is simply no basis to conclude that the Tribunal acted in breach of the rules of natural justice. The Tribunal considered the submissions of the respective parties; the case was one that involved the exercise of a discretion with respect to a matter of case management; and the Tribunal's decision was well within the range of decisions a reasonable and fair-minded tribunal in the circumstance might make.

96 DNO's challenge to the Tribunal's treatment of the fourth consideration requires an examination of para 97 of PO4; that paragraph is set out above at [78].

97 I had a debate with counsel during oral submissions, as to the test to be applied on an amendment application when considering the prospects of success of the matters raised by the proposed amendments. The debate was as to whether the test was a *probability* of success or a *possibility* of success. I do not consider that either formulation is correct. Instead, the test is whether the matters raised by the proposed amendments are *reasonably arguable*. Although the Tribunal did not use the phrase "reasonably arguable", it reached the conclusion that the

matters raised by the proposed amendments had no prospects of success or, at least, insufficient prospects to justify granting leave to amend. That conclusion necessarily encompasses a conclusion that the matters were not reasonably arguable.

98 DNO's submission is that by the proposed amendments, it sought to raise two matters which, if successful at trial, would constitute a defence to DNP's claim for recovery of the Clearing Charges. Both matters rely on the fact that Company N had brought the Indian Court Proceedings, and that those proceedings were pending. Those two matters are addressed in the next paragraph. It is important to note that the matters raised by the proposed amendments relate to the Clearing Charges and not the other amounts awarded to DNP, and that the basis of DNO's argument was the Indian Court Proceedings. I mention those matters because there is another argument raised by DNO as to DNP's entitlement to recover all amounts other than the 10% Advance, on grounds other than the Indian Court Proceedings. *That* argument arises in connection with the Award itself, and I deal with it at [128]–[171] below.

99 First, DNO submits that in the circumstances, there is real issue as to whether DNP is entitled to recover the Clearing Charges. The Tribunal said that the proposed amendments did not directly affect the claim for the Clearing Charges or the quantum of that claim; it noted that Company N's claim in the Indian Court Proceedings was based on the cheques which had been dishonoured. The Tribunal accepted the Partnership's submission that Company N was not a party to the MOU (which meant that Company N was not a party to the arbitration agreement between DNP and the Partnership). I pause to emphasise that the Tribunal was dealing directly with a submission *made by the Partnership*, that Company N "[was] not a party to the arbitration agreement

and therefore the decisions by the Tribunal would not have any effect on the Indian Court Proceedings”. The Tribunal said that the Partnership, in making the above submission, had indirectly accepted the conclusion that the Indian Court Proceedings did not affect the claim or quantum in the arbitration. In the arbitration, DNP was claiming the loss that it, *and not Company N*, had allegedly suffered. It follows from what I have said that it cannot be said that the Tribunal had “brushed aside” the issue as alleged by DNO.

100 Secondly, the Tribunal addressed the issue of double recovery. It said that the issue would only arise in the event that Company N succeeded in obtaining a judgment against the Partnership. The fact was that Company N had not yet obtained a judgment against the Partnership, nor had it been compensated based on such judgment. The Tribunal directly addressed the issue of double recovery and there is no substance at all in DNO’s submission that the issue was “left unconsidered by the Tribunal”.

101 I remind myself that the authorities are to the effect that a mere error of fact or law (or mixed fact and law) does not amount to a breach of natural justice. The Tribunal complied with its duty to deal with the essential issues. It complied with its duty to consider and comprehend the parties’ submissions. Even if the Tribunal had reached the wrong conclusion, it certainly attempted to consider and comprehend the parties’ submissions. As I have said, even if the Tribunal erred in fact or law, that is not sufficient to establish a breach of natural justice.

102 Despite the fact that it had refused the Amendment Application, the Tribunal considered (at paras 606–613 of the Award) the matters raised by the proposed amendments and concluded that they should be rejected for the same reasons it gave on the Amendment Application. It referred to para 97 of PO4.

103 For these reasons, I reject DNO's submission that the Tribunal's refusal of the Amendment Application involved a breach of natural justice.

Whether DNO is Precluded from Relying on the Breach

104 DNP submits that there are two other reasons why DNO's case that there was a breach of natural justice in connection with the Amendment Application should be rejected. Each reason, if established, is sufficient in itself to lead to rejection of DNO's case.

105 First, DNP submits that even if a breach of natural justice is established in connection with the making of the Award, DNO has not established that the Partnership's rights were prejudiced as a result. On DNO's case, the refusal of the Amendment Application meant that the Partnership was precluded from raising the two issues previously identified. The Partnership was precluded from raising in the arbitration an issue of double recovery, that is, that DNP was seeking to recover the Clearing Charges while its subsidiary, Company N, was seeking to recover the Clearing Charges in the Indian Court Proceedings. The Partnership was precluded from raising an issue to the effect that, if any entity was entitled to recover the Clearing Charges, it was Company N and not DNP.

106 Secondly, DNP submits that in relation to the refusal of its Amendment Application, the Partnership has hedged against an adverse result and the authorities indicate that a party is not permitted to do that. If the Partnership has hedged against an adverse result, then its challenge based on a breach of natural justice will be rejected on that ground.

(1) Whether there was an absence of prejudice

107 I start with the absence of prejudice.

108 The Indian Court Proceedings are not yet resolved, and Company N does not have a judgment in its favour, nor has it received any compensation in respect of the Clearing Charges.

109 It is not clear to me precisely *what* DNO contends was the proper course for the Tribunal to take, had it found that there was a prospect of double recovery and that some action was required. Was it suggested that the arbitration should have been stayed until the outcome of the Indian Court Proceedings was known? Was it suggested that the Tribunal should have taken some action with respect to the Indian Court Proceedings and, if so, *what* action would prevent double recovery of the Clearing Charges? The lack of obvious answers to these questions suggests to me that the real point DNO was seeking to raise by the proposed amendments was that the Indian Court Proceedings were an item of evidence which supported the conclusion that DNP was not entitled to recover the Clearing Charges, or at least, that DNP had not established that it was entitled to recover the Clearing Charges. Even if I am wrong about that, the Tribunal was clearly correct in how it dealt with the issue of double recovery in its reasons in PO4. As I have said, in the Award, the Tribunal reiterated and confirmed the conclusions it had reached in the Amendment Application.

110 The broader issue, and in my view, the more significant issue raised by the proposed amendments, is whether DNP or Company N was the proper party to seek the recovery of the Clearing Charges. In my opinion, there is no prejudice resulting from the refusal of the Amendment Application, because the Tribunal answered that question in the Award.

111 In the Partnership's Post-Hearing Brief in the arbitration, DNO raised what the Tribunal described as a new allegation. The allegation was that the claims in the arbitration were not made by the proper claimant. This allegation

was raised in the case of all the claims, except for the claim in respect of the 10% Advance. In essence, the Partnership alleged that the proper claimant was Company N, not DNP. That allegation was based largely on the identification of the party to whom payments were to be made by the Partnership, as set out in the MOU. The following payments were to be made to Company N: (a) the 10% Deposit; (b) the Clearing Charges; and (c) the contract price for the Arrived Cargo and the Remaining Cargo. In addition to those matters, the Partnership asserted, contrary to the position it took in the Amendment Application (see [99] above), that Company N was a party to the MOU, and therefore, the arbitration agreement. The Partnership further asserted that title to the Cargo had been transferred to Company N. The Partnership submitted that, by reason of those matters, it was *Company N* which was owed various obligations by the Partnership to make payments, and it was *Company N* which suffered loss and damage when those payments were not made.

112 The Tribunal rejected the Partnership's argument that Company N was the only proper party to seek the recovery of the amounts due under the MOU, other than the 10% Advance. The Tribunal said that there were four reasons for rejecting the Partnership's argument:

- (a) the cover page and the preamble to the MOU made it clear that the MOU was entered into by DNP and the Partnership, and Company N was not a party;
- (b) the MOU provided that "[Company N was] only a custodian of cargo and act[ed] as representative of [DNP] as unpaid seller" and the signing of the MOU by Company N did not alter that fact;

- (c) the Partnership's allegation was in "total contradiction" with its Amendment Application, wherein the Partnership clearly stated that Company N was not a party to the MOU and the arbitration agreement; and
- (d) whether the alleged losses claimed by DNP were allegedly incurred by Company N is a separate issue and does not affect DNP's standing in the arbitration – the Tribunal went on to say that it found that the claimed damages were *in fact* damages incurred by DNP.

113 For these reasons, it can be seen that in the Award the Tribunal addressed the *very argument* the Partnership sought to raise by the Amendment Application. It dealt with the issue, and I do not consider that it can be argued that the Tribunal did not comprehend and consider the submissions of the respective parties.

114 In my opinion, DNO has not established real or actual prejudice by the assumed breach of natural justice in relation to the Amendment Application in the sense required by the authorities; that is, the outcome of the arbitration would or could reasonably be different had the assumed breach of natural justice not occurred.

(2) Whether the Partnership/DNO hedged against an adverse result

115 I turn now to DNP's submission that the Partnership had hedged against an adverse result. A further reason DNO's challenge to the Tribunal's decision to refuse the Amendment Application on the ground of a breach of natural justice must be rejected is that a party who has such a complaint is not permitted to hedge against an adverse result or, put another way, a party cannot warehouse

a complaint of a breach of natural justice until that party knows the outcome of the arbitration.

116 There are two reasons for this principle. First, fairness in the conduct of an arbitration involves fairness not only to the complaining party, but also to the other party and the tribunal itself. To allow the complaining party to hedge against an adverse result would be unfair to the process itself, the other party, and the tribunal. Secondly, to allow a party to reserve to itself a complaint of a breach of natural justice, which it will say, if the result goes against it, is a ground for setting aside an award, while at the same time indicating that it is ready and willing to proceed with the arbitration is inimical to the process itself. Such an approach deprives the tribunal and the other party of the opportunity to consider the position.

117 In *China Machine* (at [170]), Menon CJ, delivering the judgment of the court, said:

170 In our judgment, there is a principle to be drawn from this and it is this: 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 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. After all, the requirement of a fair process avails both parties in the arbitration and to countenance such hedging would be fundamentally unfair to the process itself, to the tribunal and to the other party. In the final analysis, it is a contradiction in terms for a party to claim, as CMNC now does, that the proceedings had been irretrievably tainted by a breach of natural justice, when at the material time it presented itself as

a party ready, able and willing to carry on to the award. If a party chooses to carry on in such circumstances, it does so at its own peril. The courts must not allow parties to hedge against an adverse result in the arbitration in this way.

118 In this case, the Partnership had ample opportunity to advise the Tribunal and the other party that it considered that there had been a breach of natural justice in connection with the refusal of its Amendment Application.

119 In its written submissions, DNP identified various examples of the Partnership's conduct between August 2023 to April 2024 which, it claims, "shows that [the Partnership] was ready, able and willing to see the Arbitration through to the end":

- (a) The Tribunal delivered its decision on the Amendment Application on 23 August 2023. On 4–5 September 2023, the Partnership's lawyers wrote to the Tribunal to state its position that the evidentiary hearing should be held virtually.
- (b) On 6 September 2023, the Partnership filed its Reply Factual Witness Statements.
- (c) On 15 September 2023, the Partnership (through its lawyers) attended a Pre-Hearing Conference before the Tribunal.
- (d) On 4 October 2023, the Partnership filed its written Opening Statement.
- (e) On 18 December 2023, parties attended the 1st day of the evidentiary hearing, and the Partnership's lawyers made their oral Opening Statements.
- (f) On 2 February 2024, 26 February 2024 and 12 March 2024, parties filed, respectively, their Post-Hearing Briefs, Responses

to the Post-Hearing Briefs, and Replies to the Responses to the Post-Hearing Briefs.

120 DNO submits that it had not waived the breach of natural justice or hedged against an adverse result. It submits that *China Machine* was distinguishable from the facts in this case, and in developing that submission, it referred to the decision in *CAJ and another v CAI and another appeal* [2022] 1 SLR 505 (“*CAJ v CAI*”).

121 At the outset, it is important to keep in mind that whether a party has waived a breach of natural justice or hedged against an adverse result will depend on the facts and circumstances of the particular case. The facts and circumstances are likely to be different in every case and what may be significant in one case may not be significant, or as significant, in another case.

122 In *CAJ v CAI*, the respondent to an arbitration sought to raise a new defence for the first time in its closing submissions. The claimant in the arbitration objected to the respondent raising a new defence. The tribunal allowed the respondent to raise the new defence, and it was successful. The claimant appealed to the High Court seeking an order that the award be set aside in part. One of the grounds of its application was that the award had been made in breach of natural justice. The claimant was successful.

123 The respondent in the arbitration then appealed to the Court of Appeal and one of its grounds was that the claimant had waived its right to complain of a breach of natural justice. The Court of Appeal rejected that ground. The court said that the claimant had done enough to rebut the argument of waiver by including in its closing submissions in the arbitration an “unequivocal and fair intimation” to the Tribunal of its objection to the raising of the new defence and

it was sufficient and appropriate that in its closing submissions the claimant had clearly set out the reasons why it objected to the Tribunal's consideration of the defence. It was sufficient for the claimant to set out the substance of its objection and it was not necessary for it to have specifically intimated to the Tribunal that it intended to commence setting-aside proceedings if its objection was ignored.

124 It is clear that the present case is quite different from *CAJ v CAI*. In this case, the act which is said to be a breach of natural justice is the refusal of the Partnership's Amendment Application. That occurred at an interlocutory stage of the arbitration process and sometime before the evidentiary hearing. Thereafter, the Partnership proceeded on the basis that it was ready, willing, and able to participate in the arbitration, which it subsequently did. It did not complain about the alleged breach of natural justice until after the Tribunal issued the Award.

125 It is true that the court in *CAJ v CAI* reached a different conclusion from the conclusion reached in *China Machine*, but that was because the facts were different. In fact, the distinguishing features between *CAJ v CAI* and *China Machine* as identified by the court in the former case are also those which are present in this case. The Court of Appeal in *CAJ v CAI* said the following (at [66]–[67]):

66 While the respondent referred only to procedural unfairness (*ie*, breach of natural justice) and did not expressly mention excess of jurisdiction, we agreed with counsel for the respondent, Mr Cavinder Bull SC ("Mr Bull"), that the Tribunal nevertheless had sufficient notice of the gist of the respondent's objection, *ie*, that the EOT Defence was new and unpleaded. Such an objection was equally relevant to the excess of jurisdiction point. In other words, we did not think it necessary in this case for the respondent to have explicitly identified the specific *ground* for setting aside (*eg*, breach of natural justice or excess of jurisdiction). It was sufficient that the respondent had set out the *substance* of its objection. This was unlike in *China Machine* where, despite the setting-aside applicant's contention

that “the prospects of a fair arbitration had been irretrievably lost as a result of the [t]ribunal’s management of its procedure”, the applicant never raised this objection at all to the tribunal for its consideration. Instead, the applicant’s conduct during the arbitration had at all times suggested that it was ready, able and willing to proceed with the hearing (see *China Machine* at [165]–[172]). This was clearly not the case here.

67 Finally, we took the view that it was not necessary for the respondent to have specifically intimated to the Tribunal that it intended to commence setting-aside proceedings if its objections were ignored. In this regard, our observation in *China Machine* that a complaining party would ordinarily be required to “seek to suspend the proceedings until the breach has been satisfactorily remedied” must be understood in the context of that case, where the complaint in question was that there had been a “fatal failure in the process of the arbitration” such that the “prospects of a fair arbitration had been irretrievably lost” (see *China Machine* at [165] and [170]). Furthermore, the alleged breach of natural justice in *China Machine* pertained to a relatively early stage of the arbitration, before the main evidentiary hearing had commenced. In those circumstances, it was only fair that the complaining party should have raised its objections rather than keeping silent and proceeding with the arbitration.

[emphasis in original]

126 In my opinion, having regard to the matters I have identified, DNP’s submission is correct. At no point in the events described did DNO/the Partnership raise any objections regarding the Tribunal’s decision on its Amendment Application, or any concerns regarding a potential breach of natural justice. Thus, as DNP submits, DNO/the Partnership had “consistently expressed its intention and acted in a manner that [was] consistent with wanting to see the Arbitration through to its conclusion, notwithstanding PO4”.

Conclusion

127 In conclusion, I reject DNO’s arguments that the Tribunal’s refusal of the Amendment Application gave rise to a breach of the rules of natural justice.

In any event, I found that DNO would have been unable to rely on any said breach, given the absence of prejudice and its hedging against an adverse result.

Four Separate Matters addressed by the Tribunal in the Award and said by DNO to involve Inconsistent and/or Defective Reasoning

128 DNO contends that there had been a breach of natural justice in connection with the making of the Award, concerning four separate matters addressed by the Tribunal in the Award. In its submissions before this court, DNO dealt with these matters as a group, under the heading of “Inconsistent and/or Defective Reasoning”.

(a) The first matter arose in the following way. The Burkina Faso 023 Cargo, which was the subject of the third Sales Contract (023 S&P), did not meet the specifications in the contract. DNP did not dispute that fact in the arbitration. The contract provided for a penalty in circumstances where the Cargo did not meet the specifications in the contract. The Tribunal found that the penalty was not relevant. DNO contends that had the Tribunal found that the penalty was relevant, that would have led to the calculation of a reduced amount for the contract price of the Arrived Cargo and thus the calculation of the 10% Deposit and 10% Advance. As already stated (at [5] above), the first item of damages claimed by DNP was the difference between the contract price and the resale price – the penalty and the discount were relevant to the calculation of the contract price. As I will explain, I have concluded that there is no error in the Tribunal’s treatment of this matter, let alone a breach of natural justice.

(b) The second matter also relates to the Burkina Faso 023 Cargo. The Partnership argued before the Tribunal that the Partnership and

DNP had reached an agreement that, in addition to the penalty, DNP would provide a discount to the contract price for that cargo. The Tribunal found that there was no agreement about the discount. DNO contends that, had the Tribunal found that there was an agreement about the discount, then, as with the penalty, that would have led to the calculation of a reduced amount for the Arrived Cargo and thus the calculation of the 10% Deposit and 10% Advance and to a reduced amount for the contract price. Again, as I will explain, I have concluded that there is no error in the Tribunal's treatment of this matter, let alone a breach of natural justice.

(c) The third matter relates to the Tribunal's finding that DNP was entitled to terminate the MOU on 1 October 2020. The Tribunal found that DNP was entitled to terminate the MOU on 1 October 2020 because the Partnership and DNP had reached an agreement prior to that date that DNP would give the Partnership until 30 September 2020 to pay the MOU Advances and the accrued Clearing Charges, and that should the Partnership fail to pay those amounts by that date, DNP would declare the Partnership's default under the MOU and sell the Cargo to third parties. The Tribunal found that those amounts were not paid by the Partnership by 30 September 2020, and that DNP had lawfully terminated the MOU on 1 October 2020. DNO challenges the Tribunal's finding that there was an agreement giving DNP a right to terminate if payments were not made by 30 September 2020. As I will explain, I have concluded that there is no error in the Tribunal's treatment of this matter, let alone a breach of natural justice.

(d) The fourth matter also relates to DNP's right to terminate the MOU. The Tribunal found that DNP was entitled to terminate the MOU

on 1 October 2020 on grounds separate and distinct from the agreement between the parties to which I have previously referred (at (c) above). The Tribunal's decision in respect of those grounds involved the construction of clauses in the Sales Contracts and clauses in the MOU in the factual circumstances of this case; some of the construction issues were not without difficulty. As I will explain, I have concluded that there is no error in the Tribunal's treatment of this matter. Even if I am wrong, there is no error which can be characterised as a breach of natural justice.

129 One further matter should be noted. DNO submits that the Tribunal's reasoning in determining that there was no agreement as to the payment of a discount (*ie*, the second matter) was inconsistent with the reasoning it applied in determining that there was an agreement that DNP could declare a default under the MOU and sell the goods if the Partnership did not pay the MOU Advances and Clearing Charges by 30 September 2020 (*ie*, the third matter). DNO described the inconsistency as a failure to apply the same "rationale" to the latter issue as it did to the former, especially in relation to the existence of "*consensus ad idem*"; and further described the Tribunal's reasoning as "arbitrary and prejudicial". I address this submission when dealing with the third matter (see [164] below).

The Contractual Penalty and Discount Issues

130 The Tribunal dealt with the first and second matters together, and I will do the same. I begin with some observations on DNO's submissions with respect to the first and second matters.

(1) Brief observations on DNO's submissions

131 I found DNO's written submissions with respect to the first and second matters very confusing. DNO did not make any oral submissions in support of its case with respect to the first matter, and only one submission relating to both the second and third matters.

132 As I have said, the four matters appear under the heading of "Inconsistent and/or Defective Reasoning". There is then a paragraph that states that, in addition to the argument that the Tribunal was in breach of natural justice in relation to the refusal of the Amendment Application, the Tribunal was also in breach of natural justice, for having adopted an inconsistent chain of reasoning in the Award. The inconsistent chain of reasoning appears to relate only to the second matter (the finding of no agreement between the parties) and the third matter (the finding of an agreement between the parties). That view is confirmed by the fact that in relation to the other alleged errors of fact or law set out in this section, DNO did not indicate how the alleged errors gave rise to a breach of natural justice.

133 The written submissions then have a section under the heading of "Contractual Penalty" in which both the first and second matters are dealt with. This section has twelve paragraphs, and the following table identifies the subject matter of each paragraph:

Paragraph (in DNO's Written Submissions)	Subject Matter
[151]	The Tribunal failed to take into account the applicable contractual penalty on the price of the Cargo.

[152]	By failing to account for the contractual penalty, the Tribunal placed DNP in a better position than it would have been had DNO taken delivery of the Cargo; accordingly, serious prejudice was caused to DNO.
[153]	The Tribunal held that there was no agreement between parties on 2 September 2020 to apply an additional discount of US\$50 per metric tonne to the 1:1 contractual penalty.
[154]	The Tribunal did not address the email of 2 September 2020.
[155]	The Tribunal placed emphasis only on the email of 4 September 2020.
[156]	The Tribunal ignored the fact that the parties had arrived at an agreement on 2 September 2020 and further ignored the fact that Mr Z had instructed DNP's back-end employee in India to make calculations of the penalty on a 1:1 basis and to send that to DNO.
[157]	The Tribunal failed to take into consideration the email of 2 September 2020 and Mr Z's admission that he instructed his employee to send calculations and then back-pedaled.
[158]	The Tribunal failed to apply the same rationale for other issues, especially regarding the termination of the MOU.
[159]	Assuming without admitting that the parties did not arrive at an agreement for a penalty for 1:1 plus US\$50 per metric tonne, the 8 Sales Contracts executed between the parties provided for a penalty of 1:1, which ought to have been applied to the Cargo that was below contractual quality specifications.

[160]	DNO had submitted an Annexure which summarized the quality reports showing that the Cargo shipped pursuant to S&P 022, S&P 023, S&P 024, and S&P 034 were below contractual quality.
[161]	Despite demonstrating that the Cargo supplied by DNP was below the contractually agreed outturn rate for the above listed shipments, the Award concluded that: “the contractual penalty would only be relevant at the time when delivery of the Cargo occurred, and not at the time of arrival of the Cargo.”
[162]	The Tribunal erred in not applying the contractual penalty and by not taking into account that the goods supplied were below the contractually agreed quality. By doing so, the Tribunal placed DNP in a better position than had the MOU been performed without any disputes and/or differences.
[163]	The Tribunal held that DNP was not liable for any quality claim if the Cargo was cleared 15 days after arrival at the destination. The Tribunal failed to appreciate that it was not possible to clear the Cargo during the COVID-19 period and the primary purpose of the MOU was to address this situation. Further, the Tribunal failed to appreciate that DNP had admitted to the quality issues in the Cargo (at least with respect to Burkina Faso 023 Cargo) and agreed to apply a penalty/discount in its email of 2 September 2020.

134 I am able to deal with the issue identified in para 160 and part of para 161 briefly. In the arbitration, the Partnership submitted that the contractual penalty applied not only to the Cargo which was the subject of the 023 S&P, but also to other goods in the Arrived Cargo which were the subject of other Sales Contracts. This submission was rejected by the Tribunal, which gave clear reasons for doing so. It is not clear to me that DNO is challenging that

conclusion. If it is, the argument must be rejected. The argument was not developed in the proceedings before this court, and the Tribunal's conclusions with respect to this matter involved findings of fact.

- (2) Whether a breach of natural justice was established in respect of the contractual penalty issue

135 The issue of the contractual penalty arose in respect of the Cargo which was the subject of the 023 S&P (*ie*, the Burkina Faso 023 Cargo). The 023 S&P provided for the supply of 700mt (+/-10%) of raw cashew nuts originating from Burkina Faso. The contract contained a quality requirement to the following effect: "Outturn Abt. 48Lbs. per 80 kgs". It was not in dispute before the Tribunal that the Burkina Faso 023 Cargo did not meet this quality requirement. There was a contractual penalty for Cargo failing to meet the contractually specified outturn rate. Clause 2 (VII) of the S&P 023 stated as follows:

In case cargo is sold on Landed Quality basis, it is the buyer's responsibility to clear the goods within 7 days after goods arrive at destination port. In case buyer fails to clear the goods in time, any variation in quality of cargo cleared after 7 days but before 15 days of arrival of goods at discharge port, seller will be liable for 50% of the penalty on quality as per discharge port inspection. In case cargo is cleared after 15 days of arrival at destination, seller is not liable for any quality claim whatsoever.

136 Before the hearing, the parties adopted the usual procedure of agreeing on the issues which needed to be determined by the Tribunal. Those issues were characterised by the parties as either issues of fact or issues of law, and contained in a List of Issues. This List of Issues also identified issues which one of the parties said needed to be determined by the Tribunal, and the other disagreed. One of the *agreed* issues which was characterised by the parties as an issue of fact was as follows:

What is the amount of the 10% Advance and 10% Deposit that [the Partnership] was obliged to pay by 23 August 2020 pursuant to the MOU?

Sub-issues

- (a) What is the total price of the Arrived Cargo?
- (b) Whether the Contractual Penalty on the Burkina Faso 023 Cargo affects the computation of the amount of the 10 % Advance and the 10% Deposit, as alleged by [the Partnership].
- (c) If the answer to (b) is yes, how is the Contractual Penalty on the Burkina Faso 023 Cargo computed?

[...]

137 The Tribunal addressed these questions in the Award. The Tribunal reached the following conclusion with respect to sub-issue (a):

343. [DNP] provided a breakdown of the value of the Arrived Cargo in [Mr Z's] 1st WS at paragraph 19 (S/N 1-18), based on invoices submitted by [DNP] to [Company N]. The [Partnership] also provided a breakdown of the Arrived Cargo in its Opening Statement at paragraph 17. Although the invoice amounts regarding the Arrived Cargo provided by both Parties are the same, the Parties' calculations in respect of the Arrived Cargo (and thus the calculation of the 10% Deposit and 10% Advance) are different. According to the Sole Arbitrator's calculation, the total amount of the Arrived Cargo based on the breakdown provided by the Parties is USD 2,174,824.41 (which corresponds to the amount indicated by the [Partnership] in its Opening Statement).

344. The Sole Arbitrator thus finds that the total price of the Arrived Cargo on 24 July 2020 was USD 2,174,824.41.

138 With respect to sub-issue (b), The Tribunal reached the following conclusion:

346. The Sole Arbitrator considers that the contractual penalty on the Burkina Faso 023 Cargo does not affect the computation of the amount of the 10% Advance and 10% Deposit. The MoU does not include any provision stating that 10% Advance and 10% Deposit shall be calculated by taking into account the contractual penalty (or the contractual premium). Instead, the Sole Arbitrator finds that contractual penalty would only be relevant when taking delivery of the Cargo, and not at the time of arrival of the Cargo. Accordingly, it cannot be taken into

account in the computation of the amount of the 10% Advance and 10% Deposit, which, per the terms of the MoU, are based only on the value of the Arrived Cargo. The [Partnership] failed to provide any evidence or persuasive argument to the contrary.

139 With respect to sub-issue (c), the Tribunal reached the following conclusion:

347. Having found that the contractual penalty on the Burkina Faso 023 Cargo does not affect the computation of the amount of the 10% Advance and 10% Deposit, it is not necessary for the Sole Arbitrator to assess how the Contractual Penalty on the Burkina Faso 023 Cargo is computed at this point.

140 The issue of the application of the penalty arose again in the Tribunal's consideration of the contract price. The Tribunal referred to what it had said earlier concerning the application of the penalty, and provided a further reason for its conclusion. Clause 2(VII) of the Sales Contracts provided that "[i]n case cargo is cleared after 15 days of arrival at destination, seller is not liable for any quality claim whatsoever" (see [135] above). The Tribunal said DNP was not liable for the contractual penalty on the 023 S&P, as the Partnership did not take delivery or clear this Cargo at all. Accordingly, the Tribunal found that the contractual penalty on the Burkina Faso 023 Cargo could not be taken into account in the determination of the relevant contract price.

141 Before this court, DNO submits that the Tribunal had failed to consider the applicable contractual penalty on the price of the Cargo that was below the contractual specifications; accordingly, DNP had been placed in a better position than it would have been had the Partnership taken delivery of the Cargo, and the Tribunal's conclusion had severely prejudiced DNO. Further, DNO submits that in relying on cl 2(VII) of the Sales Contracts, the Tribunal failed to appreciate that it was not possible to clear the Cargo during the COVID-19 period, and that the primary purpose of the MOU was to address this situation. DNO also submits that the Tribunal had failed to appreciate that DNP

had agreed to apply the penalty/discount in its email of 2 September 2020. As to this last submission, to the extent the Tribunal did not address this submission, that is unsurprising, because, as will become clear, the focus in the arbitration was on the email dated 14 September 2020.

142 As I said earlier, DNO did not identify how any of the matters it raised in relation to the penalty constituted a breach of natural justice. That is for good reason. None of the matters do, in fact, give rise to a breach of natural justice. I am not to be taken as saying the Tribunal did err, but even if it did, the errors are errors of fact or law which do not constitute a breach of natural justice.

- (3) Whether a breach of natural justice was established in respect of the discount issue

143 I turn now to consider the issue of the discount. The issue of a discount was relevant in the same way as the issue concerning the penalty. The parties set out the following in the agreed list of issues:

What is the amount of the 10% Advance and 10% Deposit that [the Partnership] was obliged to pay by 23 August 2020 pursuant to the MOU?

Sub-issues

[...]

(e) Whether there is a valid agreement between the parties on 14 September 2020 that in addition to the Contractual Penalty, [DNP] would also provide a discount of USD 50.00 per MT to the price of the Burkina Faso 023 Cargo, as alleged by the [Partnership].

(f) If the answer to (e) is yes, whether the discount of USD 50.00 per MT also applied to the other Arrived Cargo, as alleged by the [Partnership].

144 The issue is raised again in the Tribunal's consideration of the agreed legal issues; the important matter to note in the formulation of the issues is the date of 14 September 2020. The issue was identified as follows:

Whether the [Partnership's] email dated *14 September 2020* constitutes a valid acceptance of [DNP's] Proposal to provide a discount of USD 50.00 per MT to the price of the Burkina Faso 023 Cargo in addition to the Contractual Penalty, as alleged by the [Partnership].

[emphasis added]

145 Furthermore, the Tribunal said this in the Award:

410. The [Partnership's] position is that it accepted [DNP's] proposal of a discount of USD 50 per MT over and above the "1:1 basis" to settle the matter amicably on 14 September 2020 via email. Similarly, [Mr A's] 1st WS states in paragraph 38 that on 14 September 2020, via email, he accepted Mr [Z]'s discount offer and thereby created a binding agreement in this regard.

146 DNO changed tact in this court and asserted that the Tribunal erred in not finding that the agreement as to the discount was reached *on 2 September 2020*. DNO contended that, in addition to the contractual penalty, it was agreed that DNP would provide to the Partnership a discount of US\$50 per metric tonne in relation to Cargo which did not meet the contractual specifications, namely, the Burkina Faso 023 Cargo.

147 The List of Issues prepared by the parties identified three issues in relation to the discount, and they were as follows:

(e) Whether there is a valid agreement between the parties on 14 September 2020 that in addition to the Contractual Penalty, the Claimant would also provide a discount of USD 50.00 per MT to the price of the Burkina Faso 023 Cargo, as alleged by the Respondent.

(f) If the answer to (e) is yes, whether the discount of USD 50.00 per MT also applied to the other Arrived Cargo, as alleged by the Respondent.

[...]

1. Whether the Respondent's email dated 14 September 2020 constitutes a valid acceptance of the Claimant's Proposal to provide a discount of USD 50.00 per MT to the price of the Burkina Faso 023 Cargo in addition to the Contractual Penalty, as alleged by the Respondent.

148 Unsurprisingly, in view of how the parties had defined the issue with respect to the discount, the Tribunal focused on whether there was an agreement reached on 14 September 2020, and began its consideration of that issue by referring to an email from Mr Z to Mr A dated 4 September 2020. The relevant part of the email is as follows:

We are finding it difficult to accept deep discounts especially when we are stuck with financing problems and there is a limit of taking losses. We are unable to do any new business due to our working capital stuck in this cargo[;] however to give a respect and subject to your quick clearing the cargo before 11th of September, we can agree to reduce \$50 per mt apart from RBS claim as per contract for this 765 MT. In case you insist for double penalty beyond 2 lbs we are unable to extend this \$50 per mt discount. I appeal to you please make the commitment good and do not delay payment of your committed clearing charges plus 10% advance latest [b]y 11th September.
...

149 Mr A responded by email on 9 September 2020. He requested a further discount, but did not mention the date of clearing the Cargo. The relevant part of his email is as follows:

... Also please look into the Burkina Faso 765 mts quality issues. We have bought 48 lbs cargo. On an anticipation the initial cargo will be one or two lbs more. But it is unfortunate the quality is 43–45 lbs. No one will accept 48 lbs cargo in 43 lbs at 1:1 basis. Kindly look into the matter on a processor basis and at least allow 100 usd additional discount over and above the RBS report.

150 On 9 September 2020, Mr Z wrote a WhatsApp message to Mr A via the broker, proposing to take back the Burkina Faso 023 Cargo. On 14 September 2020, Mr Z wrote to Mr A again, once more proposing to take back the Burkina Faso 023 Cargo. On the same date, Mr A replied by stating “[k]indly arrange the discount on Burkina as per our previous discussions”.

151 The Tribunal rejected the Partnership's submission that an agreement as to a discount was reached on 14 September 2020. The essence of the Tribunal's reasoning is as follows:

420. Based on the above-described correspondence, the Sole Arbitrator observes the following. On 4 September 2020, [DNP] proposed to provide a discount of USD 50.00 per MT on the price of the Burkina Faso 023 Cargo in addition to the contractual penalty, subject to the [Partnership] taking delivery of the Burkina Faso 023 Cargo against full payment before 11 September 2020. On 9 September 2020, the [Partnership] counter-proposed that [DNP] provide a discount of USD 100.00 per MT in addition to the contractual penalty. On the same date, [DNP] proposed to take back the Burkina Faso 023 Cargo. Although [DNP] contends that this was rejected by the [Partnership], there seems to be no record of any response to [DNP's] 9 September 2020 proposal before 11 September 2020. Ultimately, the [Partnership] did not make payment or take delivery of the Burkina Faso 023 Cargo before 11 September 2020, or at all. While the [Partnership's] email dated 14 September 2020 stated "[k]indly arrange the discount on Burkina as per our previous discussions," it is not clear whether this statement referred to [DNP's] proposed discount of USD 50.00 per MT (made on 4 September 2020), or to the [Partnership's] counter-proposal of USD 100.00 per MT (made on 9 September 2020). In any event, as the [Partnership] did not make payment before 11 September 2020, the [Partnership's] purported acceptance of [DNP's] proposal on 14 September 2020 had no effect, because such acceptance did not conform to the terms of the offer.

152 The Tribunal also observed that in subsequent emails on 21 September 2020, the parties were still negotiating regarding the Burkina Faso 023 Cargo.

153 The argument that DNO put to this court was that there was an agreement reached *on 2 September 2020* whereby a discount of US\$50 per metric tonne would be applied, in addition to the 1:1 contractual penalty. The email from Mr Z dated 2 September 2020 was in the following terms:

Dear sir

Please seen the calculation. While Burkina has been a problem origin this year it's not possible for us to accept any discount if you are putting double penalty.

My suggestion was \$50 per mt basis single penalty as per RBS report for this particular first lot of Burkina

Sunit please make calculations on above line and sent to [the Partnership].

DNO places emphasis on the instructions given to “Sunit” to perform the necessary calculations.

154 The argument advanced by DNO in this court must be rejected. First, DNO does not identify the communication or correspondence which constituted the acceptance by the Partnership of the proposal in the email dated 2 September 2020. In other words, it is of no assistance to point to the offer without pointing to the acceptance. If it is said to be the Partnership’s communication dated 14 September 2020, then the same difficulties identified by the Tribunal stand in the way of acceptance of that argument. Second, it is clear that there were a series of proposals and counter-proposals; and the Partnership has failed to identify a point at which both parties reached an agreement. A party cannot identify an agreement in circumstances where an offer has made, but thereafter proposals are put involving conditions which are not accepted, and at that point retreat and claim that it accepted an earlier offer.

155 Furthermore, this discussion is beside the point because on any view, there has not been a breach of the rules of natural justice. Even if a failure to consider a submission constituted a breach of the rules of natural justice, that criticism cannot be levelled at the Tribunal. The Tribunal considered the submissions which were put to it. The suggestion that the Tribunal “completely ignored” the fact that an agreement was reached on 2 September 2020 is unfair in view of the case put to it. In addition, it is not correct to say that the Tribunal

ignored the email dated 2 September 2020. It referred to the email in a footnote to para 245 of the Award:

... On 2 September 2020, Mr [Z] of [DNP] sent an email to the Broker and Mr [A] and stated that it was not possible for [DNP] to accept any discount if the Respondent was putting “double penalty” and that [DNP’s] “suggestion was \$50 per mt basis single penalty as per RBS report for this particular first lot of Burkina” (Exhibit R-18, [Mr Z’s] 1st WS, Tab 12, p. 275) On 3 September Mr [A] declined this offer further requested Mr [Z] to consider a discount of USD 100 per MT over and above the contractual penalty (Exhibit R-19).

DNP’s Right to Terminate the MOU on 1 October 2020

156 I turn to address the third and fourth matters, which pertain to the Tribunal’s finding that DNP had a right to terminate the MOU on 1 October 2020, on various grounds.

- (1) Whether a breach of natural justice was established in respect of the Tribunal’s finding that DNP had a right to terminate the MOU by reason of an agreement between the parties

157 The Tribunal found that there was an express right to terminate the MOU by reason of an agreement between DNO and DNP reached on 21 September 2020. DNO challenges that conclusion.

158 In this context, the Tribunal was required to consider email exchanges and a telephone conversation between Mr Z and Mr A on 21 September 2020. Mr Z sent an email to Mr A on 21 September 2020 in the following terms:

As discussed and agreed in details, please ensure compliance as under:

- a. You will make all clearing cost + 10% advance before coming Friday i.e. 25th September 2020. Please also make payment of warehouse charges and interest due up to September.

b. All Burkina or any other cargo will be subject to 1:1 penalty as per contract as per RBS Report. There is no discount beyond it. Needless to remind that due to your default in payments as per MOU we have suffered huge losses in consequence mainly on demurrage of our on port cargoes.

We request you when you want to mix the cargo for example IVC + Burkina, for example you can pay for one bill of IVC and one bill of burkina. We will release you both bills and then mix/match is your quality management on which we have nothing to say. However we can't allow to release any cargo for mix match until it is paid.

We hope you will not fail again. We are committed to support you and extend our best services always, however please note that in case you do not make payment again on time for item no. (a) noted above, we will be compelled to declare your default under MOU and we will have to sell the stock at our own to bring necessary liquidity needed in our side.

We are looking forward for your payment as you promised.

159 The Partnership did not dispute in the arbitration that by this email, Mr Z demanded that the Partnership pay “all clearing cost +10% advance before [...] 25 September,” and noted that in the case of non-payment on the specified time, DNP would declare the Partnership’s default under the MOU and sell the Cargo to third parties.

160 Following this email, Mr Z and Mr A had a telephone conversation. The parties did not agree on the content of this conversation. DNP’s case was that Mr A requested time until 30 September 2020 to make the relevant payments and the parties agreed that DNP would give the Partnership until 30 September 2020 to pay the MOU Advances (including the 10% Deposit) and Clearing Charges on the basis that if the Partnership failed to make full payment of those sums by then, DNP would be entitled to terminate the MOU and sell the Cargo. The Partnership denied that such an agreement was reached.

161 On the same day, Mr A sent an email to Mr Z in response to Mr Z's earlier email. Mr A's email was in the following terms:

Dear Sir,

We don't intend to mix Burkina Faso with IVC. We will only mix the 43 lbs Burkina with 45.5 lbs Burkina. Moreover we will be selling IVC separately in order to clear the cargo at the earliest. We will be settling the 10% advance and clearing charges before Sept 30th as per our teletalk. Rest all OK.

162 There was a dispute between the parties as to what was meant by the expression, "Rest all OK". Mr A gave evidence on this topic. The Tribunal found that Mr A gave three different explanations as to what he meant by the expression. It is not necessary for me to set out that evidence. The Tribunal found that Mr A's explanations were contradictory and unreliable. It also found that his explanations did not make sense when read with his email of 21 September 2020. The Tribunal found that the expression, "Rest all OK" could only mean that Mr A agreed to "10 per cent payment advance and 90 per cent payment within 90 days, or mixing of the cargo", as these issues were already specifically mentioned in his email. The Tribunal found that the effect of the email was that the topics of the Burkina Faso 023 Cargo and the extended payment deadline were specifically dealt with, and that by the expression, "Rest All OK", Mr A agreed with the other matters in Mr Z's email, including DNP's right to terminate, should payment not be made by 30 September 2020.

163 DNO referred to emails dated 14, 21 and 25 September 2020 respectively, to mount an argument that Mr A had said that the Partnership would meet its obligations under the MOU by 22 October 2020. The Tribunal rejected this argument, finding that Mr A's statements related to the Partnership's obligations, *other than* the obligation to pay the MOU Advances and the Clearing Charges by 30 September 2020. The Tribunal found that there

was an agreement between the parties that the Partnership would pay the MOU Advances and the Clearing Charges by 30 September 2020.

164 Before this court, DNO mounts one challenge to this conclusion. It argues that the Tribunal's reasoning in relation to this matter was inconsistent with its reasoning with respect to the issue of whether there was an agreement between the parties that DNP would provide a discount in relation to the Burkina Faso 023 Cargo. The inconsistency is said to be that the Tribunal had regard to subsequent emails to find that there was no agreement as to the provision of a discount, whereas the Tribunal found that there was an agreement as to the termination of the MOU *despite* subsequent emails. This argument was not developed beyond an assertion that the Tribunal overlooked the subsequent emails dated 14, 21 and 25 September respectively. Plainly, this is not right. The Tribunal referred to those emails in the Award. In addition, in the ordinary case, a party would be hard-pressed to sustain such an argument where there are two different alleged agreements arising in two different factual circumstances.

165 The Tribunal did not err, let alone err in a way which would constitute a breach of natural justice.

- (2) Whether a breach of natural justice was established in respect of the Tribunal's finding that DNP had a right to terminate the MOU on two other grounds

166 The Tribunal held that there were two other grounds upon which DNP was entitled to rely to justify its termination of the MOU on 1 October 2020. Strictly, in view of my conclusion that DNO's challenge to the Tribunal's finding that there was a right to terminate by reason of an agreement must be rejected, it is not necessary to deal with the other rights to terminate. In those circumstances, I will deal with the grounds briefly.

167 First, the Tribunal held that there was an express right to terminate the MOU by reason of a combination of cll 4 and 6 of that document itself, and cll 2(XVII) and 2(XI) in the Sales Contracts. The steps in the Tribunal's reasoning are as follows:

(a) First, cl 4 of the MOU (set out above at [15]) required the payment of the items referred to in the clause within 10–15 days of clearing of the Cargo from port. The Tribunal found that the relevant date was 21 August 2020. Clause 6 of the MOU (also set out above at [15]) required payment of the items referred to in the clause within 30 days from the date of the MOU (*ie*, 23 August 2020).

(b) Next, the Tribunal made a finding that the payments required by those clauses were not made, and therefore, there was a breach of the clauses. The right to terminate the MOU for breach of cll 4 and 6 of the MOU was contained in cll 2 (XVII) and (XI) of the Sales Contracts. Those clauses are as follows:

2 OTHER TERMS AND CONDITIONS:

[...]

- XI) Should the buyer's written confirmation of this contract not be received by the seller within one day of issuance of the contract and/or should the buyer fail to remit the advance within the time stipulated by the contract, the seller shall have the right to postpone/cancel shipment of the cargo without being liable for delay in shipment/non-shipment.

[...]

- XVII) Seller will not file the Custom IGM in favour of Buyer until full payment is received. Once documents sent to buyer bank, its buyer duty to track arrival of cargo and make timely payment to ensure Timely filing of custom IGM in favour of buyer. If any delay in payment causes Amendment in custom manifest or demurrage of

cargo for whatsoever reason, it will be solely on buyer's account. In case of delay in payment, seller has right to Cancel the contract and consider It as default from buyer on account of non-payment and claim the negative market difference (if any) from buyer, also in case the documents remain unpaid and till arrival of the cargo, seller has right to sale the cargo to any other buyer and buyer of this contract confirm that there is no need of separate NOC for the custom/IGM amendment/change and this contract is to be considered cancelled.

(c) Finally, the Tribunal concluded that the clauses in the Sales Contracts were not superseded or replaced by the MOU because:

(i) Clause 8 of the MOU provided that “all terms of the Sales Contracts remain unchanged”; and

(ii) Clause 1(a) of the MOU had not superseded the relevant clauses in the Sales Contracts or become the only source of a right to terminate the MOU. Clause 1(a) of the MOU provided that the payments referred to therein must be made within 90 days and, if they are not, then DNP may terminate the MOU. To this end, the Tribunal found that cl 1(a) was not the only source of a right to terminate; it was an *additional right* to terminate.

168 The submissions made by DNO in support of its contentions were sparse. There were submissions that the Tribunal erred in reaching conclusions, but they do not advance DNO's argument.

169 First, DNO submits that the Tribunal erred in holding that cl 1(a) of the MOU was only an additional right to terminate; instead, the Tribunal should have found that there was an inconsistency between cl 1(a) of the MOU and the clauses in the Sales Contracts, and that cl 1(a) prevailed. However, I note that the Tribunal had addressed the effect of cl 1(a) and rejected the Partnership's

submissions to the same effect. Before this court, DNO submits that the Tribunal's construction of cl 1(a) renders the clause meaningless, and made no commercial sense. However, I note that the Tribunal addressed which of the possible constructions of cl 1(a) was commercially reasonable, and decided against the construction advanced by the Partnership (see paras 464–469 of the Award).

170 Secondly, DNO challenges the Tribunal's conclusion that cll 4 and 6 were conditions of the MOU. The Tribunal decided that cll 4 and 6 of the MOU were conditions; they were breached, and this was an additional ground upon which DNP was entitled to terminate. Other than asserting in two paragraphs of its written submissions that the clauses were not conditions, the only argument advanced by DNO was that the Tribunal erred in concluding that the clauses were "vital" provisions, and that the Tribunal should have taken into account the fact that Mr Z had drafted the MOU and could have made the importance of the clauses clear. There is nothing in this argument. The Tribunal dealt with the arguments clearly and comprehensively.

Conclusion

171 In sum, I reject DNO's arguments that, with respect to the four matters it identified, the Tribunal's reasoning was inconsistent and/or defective such as to give rise to a breach of the rules of natural justice. DNO's challenges to the Tribunal's reasoning were no more than attacks on the merits of the Tribunal's conclusions.

The Public Policy Issue

172 An award may be set aside where the court is satisfied that it is in conflict with the public policy of Singapore (Art 34(2)(b)(iii) of the Model Law). DNO

relies on this ground and submits that the Award, insofar as it deals with the Remaining Cargo, is in conflict with the public policy of Singapore, and should be set aside. I summarise DNO's arguments below.

Summary of DNO's arguments

173 It is relevant to note at the outset the following: There was no suggestion before the Tribunal that there was any illegality associated with the Sales Contracts or the MOU. None of the List of Issues, DNO's Post-Hearing Brief or the Award contain reference to an allegation of that nature. The Award does no more than enforce obligations under the Sales Contracts and MOU. Nor was there any suggestion before the Tribunal that the Import General Manifests filed by DNP (see [174] below) gave rise to an offence under Indian law.

The IGMs

174 DNP had filed Import General Manifests ("IGMs") for the Remaining Cargo with the customs authorities in India (the "Indian customs authorities"). The IGMs contained declarations or statements that Company N was the owner of the Remaining Cargo. DNO submits that if, as DNP asserted and the Tribunal found, DNP was the owner of the Remaining Cargo, it followed that the declarations or statements to the effect that Company N was the owner of the Remaining Cargo were false. The provision of false declarations or statements is an offence under s 132 of the Customs Act, 1962 (India) (the "Indian Customs Act"). The Award contained an allowance for damages in respect of the Remaining Cargo. Accordingly, DNO submits that the Award should be set aside, at least as to the Remaining Cargo.

175 In the alternative, assuming that the declarations or statements in the IGMs are correct, DNO submits that Company N is the owner of the Remaining

Cargo and is the party entitled (all other matters being proved) to seek damages; DNP was not entitled to seek and recover damages. It is not entirely clear to me whether DNO claims that if that be the correct interpretation of the facts, then awarding damages to DNP means that the Award is in conflict with the public policy of Singapore. If that submission is made, it is plainly untenable having regard to the limited scope of the public policy ground (see below at [181]). I need say no more about it.

176 In addition to the above, DNO submits that the Tribunal did not consider its submission that as DNP was not the owner of the Remaining Cargo, DNP could not recover damages with respect to that cargo. DNO described this submission as “critical”, and argues that the Tribunal’s failure to consider the submission was a breach of natural justice. The way in which DNO put the submission in its written submissions is as follows:

101. The Award failed to consider that the evidentiary hearing proved otherwise. [Company N] was not only a representative and a custodian but the legal owner of the Remaining Cargo as title was transferred to it. The transfer of title of the Remaining Cargo to [Company N] was completely unaddressed or considered by the Tribunal. This is a substantial breach of natural justice as there was a clear failure to consider a critical submission that could have changed the outcome of the Award. The sheer fact that this possibility even exists makes the affirmation of the Award prejudicial.

The Invoices

177 DNO also made submissions with respect to invoices issued by DNP to Company N for the Remaining Cargo (the “Invoices”). The Invoices were dated between 25 May and 5 July 2020, *before* the parties reached the agreement embodied in the MOU dated 24 July 2020. They were included in the documents which were given to the Indian custom authorities. DNP’s case before the Tribunal was that the Invoices were relevant because they were evidence of the

contract price of the goods, which was an element of the calculation of the difference between the contract price of the goods and the resale price.

178 DNO submits the following:

(a) The Invoices were backdated and fabricated; the Tribunal had erred in admitting the invoices into evidence despite the Partnership's objection that they were not authentic.

(b) The provision of backdated invoices to the Indian customs authorities was an act which meant that the Award is in conflict with the public policy of Singapore.

(c) Furthermore, the Tribunal should not have entertained claims based on backdated and fabricated invoices, especially without addressing the issue of the transfer of title to Company N.

179 On the assumption that the foregoing submissions are accepted, DNO submits that the court should conclude that the Award "is in breach of public policy and the most basic notions of morality and justice", given that (a) the Tribunal did not provide "adequate reasoning" for holding that the losses could be recovered by DNP; and (b) the Tribunal turned a "blind eye" to the rightful owner of the Remaining Cargo "and/or the fraud and/or misrepresentations committed by [DNP] and [Company N] on the customs authority of India".

Two Important Matters

180 Two important matters should be noted at this stage:

(a) First, the losses allegedly suffered by DNP with respect to the Remaining Cargo were relevant to the assessment of damages in the

Award. I have already mentioned that they were relevant to the determination of the difference between the contract price and the resale price. In addition to this item of damage, the Tribunal awarded other damages in respect of the Remaining Cargo – the most significant in monetary terms was an award for Clearing Charges in respect of the Remaining Cargo.

(b) Secondly, I have already mentioned in the section of these reasons dealing with the allegation of a breach of natural justice that in the Partnership’s Post-Hearing Brief, the Partnership raised what the Tribunal described as a new allegation. The allegation was that the claims in the arbitration were not brought by the proper claimant. The proper claimant was Company N and not DNP. The Partnership provided particulars of that allegation, and the Tribunal gave its reasons for rejecting it. I refer to paragraphs above (at [111]–[112]).

The Relevant Authorities

181 The starting point is to describe the scope of the public policy ground in the Model Law (Art 34(2)(b)(iii)). It is well established that it is a narrow ground. In *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597, the Court of Appeal said at [59]:

59 Although the concept of public policy of the State is not defined in the Act or the Model Law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope. In our view, it should only operate in instances where the upholding of an arbitral award would “shock the conscience” (see *Downer Connect* ([58] *supra*) at [136]), or is “clearly injurious to the public good or ... wholly offensive to the ordinary reasonable and fully informed member of the public” (see *Deutsche Schachbau v Shell International Petroleum Co Ltd* [1987] 2 Lloyd’s Rep 246 at 254, *per* Sir John Donaldson MR), or where it violates the forum’s most basic notion of morality and justice: see *Parsons & Whittemore*

Overseas Co Inc v Societe Generale de L'Industrie du Papier (RAKTA) 508 F 2d 969 (2nd Cir, 1974) at 974. This would be consistent with the concept of public policy that can be ascertained from the preparatory materials to the Model Law. As was highlighted in the Commission Report (A/40/17), at para 297 (referred to in *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* by Howard M Holtzmann and Joseph E Neuhaus (Kluwer, 1989) at p 914):

In discussing the term “public policy”, it was understood that it was not equivalent to the political stance or international policies of a State but comprised the *fundamental notions and principles of justice* ... It was understood that the term “public policy”, which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as *corruption, bribery or fraud* and similar serious cases would constitute a ground for setting aside.

[emphasis in original]

182 The fact that there is illegality of some kind under foreign law is not sufficient to warrant the setting-aside of an arbitral award. As Roger Giles JJ said in *DBX and another v DBZ* [2023] SGHC(I) 18 (“*DBX v DBZ*”) at [133], it must be assessed “for the offence to the public policy of Singapore of enforcement nonetheless, with the very high threshold to which the authorities refer”.

183 In *Gokul Patnaik* (at [205]–[206]), Sir Vivian Ramsey JJ made the point that international comity did not mean that a contract illegal by the law of the country of performance would always not be enforced, or set aside, as a matter of Singapore public policy. His Honour said the following (at [206]):

206 In the present case, there is no reason why a breach of the FEMA Regulations or the laws of India, without more, would “shock the conscience” or violate the “most basic notions of morality and justice”. If Mr Patnaik’s submissions are taken to their logical conclusion, then *any* minor illegality or regulatory infringement by a contract in its place of performance would

ipso facto lead to the conclusion that international comity, and thus Singapore public policy, would be breached so that the arbitral award would have to be set aside. The public policy ground under Art 34(2)(b)(ii) of the Model Law is a narrow ground and does not lead to that conclusion. I therefore reject Mr Patnaik's submission that Art 34(2)(b)(ii) of the Model Law would have been satisfied, even if the SSSA and 2014 SPA, as amended, were found to be illegal because of a breach of the FEMA Regulations or the laws of India. [emphasis in original]

184 In *Reliance Infrastructure Ltd v Shanghai Electric Group Co Ltd* [2025] 1 SLR 1 (at [74]), the court made it clear that the public policy ground was not engaged by a party seeking to undermine an award on grounds that the party disavowed before the tribunal, or where the party raises an issue that the tribunal considers and rejects.

185 In *Sacofa Sdn Bhd v Super Sea Cable Networks Pte Ltd and another* [2025] 3 SLR 209, the court was not prepared to make a finding of a breach of a law of a foreign jurisdiction in the absence of expert evidence. The court said (at [52]–[53]):

There was no evidence of an illegal act under Malaysian law

52 The claimant did not adduce any expert evidence on Malaysian law to show that it is illegal for the first respondent to have beneficial ownership of the Built Facilities. The only persuasive authority before the court was the KLHC Decision which held that there was no contravention of the CMA and the CMLR (see [68] below).

53 Even on a plain reading of the provisions, as the claimant invited me to do, the position was not as clear-cut as the claimant made it out to be. Though reg 5(a) of the CMLR prohibits a foreign company from applying for the requisite licence, neither of the provisions relied on by the claimant prohibits a foreign company from being a beneficial owner of the relevant facilities through ownership of a Malaysian-incorporated subsidiary that has the requisite licence. In any event, in the absence of expert evidence, I was unable to make a finding that Malaysian law was breached.

186 As DNP submitted, the decision in *DBX v DBZ* is instructive. In that case, an unlicensed party was involved in the provision of margin financing. Under the law of Hong Kong, that party was required to be licensed. Giles IJ found that the law of Hong Kong did not invalidate the provision of margin financing by an unlicensed provider. His Honour went on to say that even if the law of Hong Kong had been to the effect that the provision of the facility in that case was illegal, he would not have set aside the award on the ground of conflict with the public policy of Singapore (*DBX v DBZ* at [133]):

...there is insufficient reason to hold that upholding the awards despite the illegality of the provision of the margin financing without a licence would shock the conscience, be clearly injurious to the public good, be wholly offensive to the reasonable and fully informed member of the public, violate Singapore's most basic notion of morality and justice, or otherwise conflict with the public policy of Singapore in accordance with the authorities.

187 Finally, it is to be noted that the function of the expert witness on foreign law is well-established. Again, I turn to the judgment of Giles IJ in *DBX v DBZ*. His Honour said the following (at [105]–[106]):

105 The function of the expert witness on foreign law was described in *MCC Proceeds Inc v Bishopsgate Investment Trust plc* [1999] CLC 417 at [23], cited in *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 (“*Pacific Recreation*”) at [76], as

- (1) to inform the court of the relevant contents of the foreign law; identifying statutes or other legislation and explaining where necessary the foreign court's approach to their construction;
- (2) to identify judgments or other authorities, explaining what status they have as sources of the foreign law; and
- (3) where there is no authority directly in point, to assist [the court] in making a finding as to what the foreign court's ruling would be if the issue was to arise for decision there.

106 As made clear in *Pacific Recreation* at [77]–[78], the expert should first place the relevant raw sources of foreign law

before the court, which is a requirement under O 40A r 3(2)(b) of the Rules, and the purpose of obtaining expert evidence is not only to place the content of the foreign law before the court, but also to obtain the expert's opinion as to such law's effect. In this regard, the Court of Appeal in *Pacific Recreation* cited (at [78]) *Baron de Bode's Case* (1845) 8 QB 208 at 251; 115 ER 854 at 870:

Properly speaking, the nature of such evidence is not to set forth the contents of the written law, but its effect and the state of law resulting from it. The mere contents, indeed, might often mislead persons not familiar with the particular system of law...

Whether the IGMs Gave Rise to Conflict between the Award and the Public Policy of Singapore

188 As I have said, DNO submits that DNP committed an offence under s 132 of the Indian Customs Act by the provision of IGMs which contained false declarations or statements. The IGMs were provided to the customs authorities in India. Section 132 of the Indian Customs Act provides as follows:

132. False declaration, false documents, etc.—Whoever makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document in the transaction of any business relating to the customs, knowing or having reason to believe that such declaration, statement or document is false in any material particular, shall be punishable with imprisonment for a term which may extend to [two years], or with fine, or with both.

189 DNO submits that the IGMs contained a false declaration or statement that Company N was the owner or the Remaining Cargo, whereas DNP was the actual owner of the Remaining Cargo.

190 The IGMs state that Company N is the declarant and that it is the importer of the goods. In a separate section of IGMs, Company N is identified as the buyer and DNP is identified as the supplier. The provider of the document is unclear. There is a reference to ETA Logistics in a section of the document for the “Authorised Signatory”.

191 All DNO did was to identify s 132 of the Indian Customs Act and tender the IGMs. DNO did not call any evidence as to the content of Indian law. DNO did not seek the court’s permission for the use of expert evidence under O 14 r 2 of the SICC Rules. As I have already explained, the SICC Rules contain extensive provisions as to what must be included in an expert’s report, including the expert’s qualifications showing that the expert has the requisite knowledge in relation to the issues referred to the expert. Nor did DNO make an application to the court under O 16 r 8 of the SICC Rules for an order that a question of foreign law be determined on the basis of submissions instead of proof. The court may require evidence of the suitability and competence of the person making submissions, including evidence of good standing and of “qualifications and experience in relation to the relevant area of foreign law”. In fact, DNO made it clear before this court that it would not be calling expert evidence on Indian law.

192 In effect, DNO relies on the plain meaning of s 132 and of the IGMs. Such an approach is insufficient. For example, there is certainly an arguable issue as to whether the concept of “importer” includes ownership – it may or may not. As DNP pointed out, the Partnership was described as the importer in the IGMs for the Arrived Cargo in circumstances where it was clear that the Partnership was not the owner. The description of Company N as the buyer may be somewhat closer to the concept of ownership, but even in that case, there may be an issue as to whether title has passed. There is no expert evidence as to the scope of s 132 either by way of case law or reference to other sections in the Indian Customs Act.

193 In my opinion, in the absence of expert evidence supporting DNO’s submission, a finding cannot be made that DNP committed an offence under

s 132 of the Indian Customs Act, in relation to the IGMs for the Remaining Cargo.

194 Even if, contrary to my conclusion, DNP *did* commit an offence under s 132 of the Indian Customs Act, there are two other grounds for rejecting DNO’s submission.

195 First, DNO must show a sufficient nexus between the illegality and the Award. DNO has not done that. DNP was enforcing rights derived from the Sales Contracts and the MOU, and it proved breaches of those rights in the arbitration. There is no illegality in that conduct. In other words, it cannot be said that DNP’s claim is based on any illegality on its part. DNP’s claim is based on rights and obligations in agreements between it and the Partnership.

196 Secondly, a breach of foreign law is not sufficient by itself to establish that an award is in conflict with the public policy of Singapore. DNO puts its case on the basis that the conduct by DNP, said to constitute an offence under s 132 of the Indian Customs Act, is contrary to the public policy of India. There is no evidence of that. Even if that matter is to be inferred, in my opinion, the upholding of an award which is based on the enforcement of lawful contracts found to have been breached (by way of damages) cannot be characterised as an act which would “shock the conscience” or “violate the forum’s most basic notion of morality and justice”, or is “clearly injurious to the public good” or “wholly offensive to the ordinary reasonable and fully informed member of the public”.

Whether the Invoices Gave Rise to Conflict between the Award and the Public Policy of Singapore

197 The starting point with the Invoices is DNO’s assertion that the Invoices were backdated and fabricated. Before the Tribunal, the Partnership submitted that the Invoices should not have been admitted into evidence because the documents were not authentic. The Tribunal considered and rejected that argument. It is very difficult to see how the Tribunal’s ruling on the admissibility of evidence of that nature could amount to a breach of natural justice or bring the Award into conflict with public policy.

198 In any event, the Tribunal found that the Invoices were not fabricated nor backdated with a view to mislead. The Tribunal rejected the allegation that the Invoices had been fabricated as to the prices shown in the Invoices. It noted that Mr A confirmed the amount put forward by DNP. With respect to the allegation that the Invoices had been backdated, the Tribunal found that there was nothing sinister in the dating of the Invoices. The Tribunal accepted the evidence of Mr Z. The Tribunal said:

... Also, Mr [Z] explained at the Hearing that the dates on the relevant commercial invoices are irrelevant as it is [DNP’s] “standard format” in its computer system that [DNP] “keep[s] the invoice date same as the BL [Bill of Lading] date” (Hearing Transcript (19 December 2023), page 82, lines 14 – page 84 line 1).

199 Having regard to that finding, I reject DNO’s submission that the provision of backdated invoices to the customs authorities means that the Award is in conflict with the public policy of Singapore.

Conclusion

200 For these reasons, I reject DNO’s submission that the Award is in conflict with the public policy of Singapore.

A Further Issue of Natural Justice

201 Before this court, DNO made a further submission that DNP was not the proper party to claim the damages sought in the arbitration – if any party was entitled to those damages, it was Company N. There seemed to be two threads to that submission.

202 First, a general submission was made that the Tribunal had failed to consider the issue of the proper claimant for all of the claims made by the Partnership in the arbitration. As part of that submission, particular emphasis was given to the question of the party to whom the obligations in the MOU were owed and the party which had title to the Cargo.

203 This is an argument of a breach of natural justice, which must be firmly rejected. The Tribunal *did* consider these issues. I have already referred to the matters raised by the Partnership in the Post-Hearing Brief and the Tribunal’s reasons for rejecting the Partnership’s submissions, which included a particular that “title to the cargo was transferred to [Company N]”. The Tribunal found, that in accordance with the MOU, Company N was only the custodian of the Cargo and acted as a representative of DNP as unpaid seller. The Tribunal comprehended the issue, considered it, and addressed it in the Award.

204 Secondly, although it was not entirely clear, I took DNO to be making a more limited submission that the Tribunal, in addressing the issue of title, did not take into account the IGMs or the Invoices. There are two answers to this submission. First, the Tribunal did address the issue of title, and it was not required to address every item of evidence relied on by the party who seeks a particular finding. As long as the issue is addressed, that is sufficient. Secondly, even if there was a breach of natural justice, there was no prejudice to DNO.

205 DNO made a third submission that seemed to go further: that, in circumstances where Company N was the owner of the Cargo (or at least, the Remaining Cargo), only Company N could bring an action for loss and damage in relation to the Cargo. DNP did not have the necessary title in the goods in order to make the claims it did in the arbitration, and could not bring an action for loss and damage because it had not suffered loss and damage. On the face of it, this is not an argument of a breach of natural justice, but an argument going to the merits of the Tribunal's decision. I reject the argument. As the other party to the MOU, it was only DNP that could terminate the MOU on the basis that DNO had not performed its obligations as to payment under it. Even if I am wrong about that, the error would be an error of law, and not a breach of natural justice.

206 DNP raised a further response to the above submission by reference to the decision of *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782. I do not need to address this submission which, in any event, required more development than it received in oral submissions.

Conclusion

207 For these reasons, I dismiss OA 4. I will hear the parties on costs and any other relevant orders.

Anthony James Besanko
International Judge

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