IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2024] SGHC(I) 24

Originating Application No 8 of 2024

Between

DJO

… *Claimant*

And

(1) DJP
(2) DJQ
(3) DJR

… *Defendants*

JUDGMENT

[Arbitration — Award — Recourse against award — Setting aside — Breach of natural justice — Tribunal alleged to have copied large portions of award from awards in parallel arbitrations implicating similar issues — Section 24(*b*) International Arbitration Act 1994 (2020 Rev Ed)]

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DJO
v
DJP and others

[2024] SGHC(I) 24

Singapore International Commercial Court — Originating Application No 8 of 2024
Simon Thorley IJ
11 July 2024

15 August 2024 Judgment reserved.

Simon Thorley IJ:

Introduction

1 By this application, the claimant, DJO, seeks an order that the final award dated 24 November 2023 (the "Award") issued by the arbitral tribunal in ICC Arbitration Case No 26733/HTG (the "Arbitration") be set aside in its entirety pursuant to s 24(*b*) of the International Arbitration Act 1994 (2020 Rev Ed) (the "IAA") and/or various sections of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), which is given force of law in Singapore by s 3 of the IAA.

2 This is an unusual and troubling case. International commercial arbitrations are an increasingly used means of resolving commercial disputes, often under the auspices of a body such as the International Chamber of Commerce (the "ICC"). The underlying objective is to resolve such disputes

rapidly and in confidence, with the nominated arbitrator(s) being independent, impartial adjudicator(s) selected by the parties on the basis of their expertise in the legal and technical fields in question. Very often, these are either senior lawyers or retired judges experienced in the relevant law.

3 There is no wide-ranging right of appeal such as exists in the national laws. The proceedings are generally held in private and the award is a document confidential to the parties. It is thus essential that the parties can be assured that the process adopted will be thorough and fair and that the principles of natural justice will be applied.

4 This is reflected in the International Chamber of Commerce Arbitration Rules 2021 (the "ICC Rules"):

(a) Article 11 of the ICC Rules provides that:

> 1 Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.
>
> 2 Before appointment or confirmation, a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The prospective arbitrator shall disclose in writing to the Secretariat any facts or circumstances which might be of such nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them.

(b) Article 22 of the ICC Rules, which addresses the "Conduct of the Arbitration" provides that:

> 1 The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an

> expeditious and cost-effective manner, having regard to the complexity and value of the dispute.
>
> …
>
> 4 In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

5 These duties are amplified upon in Section III of the ICC's "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration" (1 January 2021):

> **III – Arbitral Tribunal**
>
> **A – Statement of Acceptance, Availability, Impartiality and Independence**
>
> 22. All arbitrators, including emergency arbitrators, have the duty to act at all times in an impartial and independent manner (Articles 11 and 22(4) [of the ICC Rules])
>
> 23. The Court requires all prospective arbitrators to complete and sign a Statement of Acceptance, Availability, Impartiality and Independence ("Statement") (Article 11(2) [of the ICC Rules]).
>
> 24. The parties have a legitimate interest in being fully informed of all facts or circumstances that may be relevant in their view to be satisfied that an arbitrator or prospective arbitrator is and remains independent and impartial or, if the parties so wish, to explore the matter further and/or take the initiatives contemplated by the Rules.
>
> …
>
> 27. Each arbitrator or prospective arbitrator must assess what circumstances, if any, are such as to call into question his or her independence in the eyes of the parties or give rise to reasonable doubts as to his or her impartiality. In making such assessment, an arbitrator or prospective arbitrator should consider all potentially relevant circumstances, including **but not limited to** the following:
>
> …

> - The arbitrator or prospective arbitrator acts or has acted as arbitrator in a case involving one of the parties or one of its affiliates.
> - The arbitrator or prospective arbitrator acts or has acted as arbitrator in a related case.
> - The arbitrator or prospective arbitrator has in the past been appointed as arbitrator by one of the parties or one of its affiliates, or by counsel to one of the parties or the counsel's law firm.
>
> [emphasis in original]

6 The arbitral tribunal's duty of fairness and the rules of natural justice require it to form its conclusions on the issues to be decided by independently and impartially reviewing the evidence and submissions presented to it, deliberating on the matters arising and determining the weight to be attributed to those matters. But it is only *that evidence and those submissions* that should be taken into account; *extraneous matters must be ignored*.

Background to the parties' dispute

7 The claimant, DJO, who was the respondent in the Arbitration, is a special purpose vehicle set up in October 2006 responsible for the operation of a network of railway lines in India that serve only freight trains (the "Dedicated Freight Corridors"). In 2015, DJO was negotiating various contracts relating to the Western Dedicated Freight Corridors.

8 The defendants, who were the claimants in the Arbitration, are three companies which formed a consortium ("Consortium X") for the purpose of tendering for one of those contracts. Two of the members of the Consortium, DJQ and DJR, are Indian companies, whereas the third, DJP, is a Japanese company.

9 On 18 August 2015, the parties entered into a contract (the "CPT-13

Contract"). The CPT-13 Contract incorporated the International Federation of Consulting Engineers Conditions of Contract (1st Ed, 1999) ("FIDIC" and the "FIDIC Conditions"), as amended by the Particular Conditions of Contract and the Appendix to Bid.[1]

10 Clause 20.6 was one of the FIDIC Conditions[2] which was specifically amended by the parties[3] so as to include an arbitration clause that provided for a different method of arbitration depending upon whether the contractor was a foreign or domestic contractor (as defined therein). It provided as follows:

> **20.6 Arbitration**
>
> Any dispute not settled amicably and in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by arbitration. Unless otherwise agreed by both parties, arbitration shall be conducted as follows:
>
> (a) For contract with foreign contractors
>
> (i) International arbitration in accordance with the rules of arbitration of the International Chamber of Commerce.
>
> (ii) The seat of arbitration shall be Singapore or Dubai or Delhi as decided mutually by both parties during the Contract Negotiations
>
> (iii) The number of Arbitrators shall be three (3) and the language of communication will be English.
>
> (b) For contract with domestic contractors (For the purpose of this sub-clause, the term "Domestic Contractor" means a Contractor who is registered in India and is juridic person created under Indian Law as well as a joint venture/Association/Consortium between an India partner and a foreign partner where Indian partner is authorized representative of the (JV)/Association/Consortium or Lead Member).

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1 DJO's 1st affidavit dated 26 February 2024 ("DJO's 1st Affidavit") at para 8.

2 DJO's 1st Affidavit at pp 739–740.

3 DJO's 1st Affidavit at p 631.

> (i) In accordance with the rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi or such other rule as may be mutually agreed by both parties and shall be subject to the provision Indian Arbitration and Conciliation Act, 1996
>
> (ii) The seat of arbitration shall be New Delhi.
>
> (iii) The number of Arbitrators shall be three (3) and language of communication will be English.
>
> The arbitrator(s) shall have full power to open up, review, and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB, relevant to the dispute. Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute.
>
> Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB to obtain its decision, or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration.
>
> Arbitration may be commenced prior to or after completion of the works. The obligations of the Parties the Engineer and the DAB shall not be altered by reason of any arbitration being conducted during the progress of the Works.

11 Since DJP, the Japanese company, was the "Lead Member" of Consortium X, any dispute fell to be resolved in accordance with the ICC Rules in Singapore, Dubai or Delhi. On 11 August 2015, Singapore was selected as the seat of the arbitration.[4]

12 The substantive contract was, however, governed by Indian law, such that any substantive issues arising would fall to be determined in accordance with Indian law.[5]

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4 DJO's 1st Affidavit at p 397.

5 DJO's 1st Affidavit at para 8.

13 On 19 January 2017, the Indian Ministry of Labour issued a Notification No. S.O.188(E) under the Minimum Wages Act 1948, increasing the daily rates of minimum wages payable to working men with effect from 19 January 2017 (the "Notification").[6]

14 The FIDIC Conditions contained two clauses applicable to adjustments of costs occasioned by a change of circumstances, being Clauses 13.7 and 13.8. One of the issues in dispute in the Arbitration was as to which of these clauses was applicable to the increase in labour costs resulting from the Notification.

15 Clause 13.7 of the FIDIC Conditions,[7] as specifically amended by the parties,[8] provided as follows:

> **13.7 Adjustments for Changes in Legislation**
>
> The Contract Price shall be adjusted to take account of any increase or decrease in Cost after the Base Date resulting from:
>
> a. a change in the Laws of the Country (including the introduction of new Laws and the repeal or modification of existing Laws); or
>
> b. in the judicial or official governmental interpretation of such Laws, or
>
> c. the commencement of any Indian law which has not entered into effect until the Base Date; or
>
> d. any change in the rates of any of the Taxes or royalties on Materials that have a direct effect on the Project
>
> which affect the Contractor in the performance of obligations under the Contract.
>
> If the Contractor suffers (or will suffer) delay and/or incurs (or will incur) additional Cost as a result of these changes in the

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6 DJO's 1st Affidavit at para 11; DJR's 1st Affidavit dated 29 April 2024 ("DJR's 1st Affidavit") at pp 634–685.

7 DJO's 1st Affidavit at pp 702–703.

8 DJO's 1st Affidavit at p 623.

> Laws or in such interpretations, made after the Base Date, the Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [*Contractor's Claims*] to:
>
> (a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [Extension of Time for Completion], and
>
> (b) payment of any such Cost, which shall be included in the Contract Price.
>
> After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine these matters.
>
> If as a result of change in law, interpretation or rates or taxes or royalties, the Contractor benefits from any reduction in costs for the execution of this Contract, save and except as expressly provided in this Sub-Clause or in accordance with the provisions of this Contract, the Contractor shall, within [28] days from the date he becomes reasonably aware of such reduction in cost, notify the Employer with a copy to the Engineer of such reduction in cost.

16 The first two sub-clauses of cl 13.8 were in the standard form of the FIDIC Conditions, and provided as follows:[9]

> **13.8 Adjustments for Changes in Cost**
>
> In this Sub-Clause, "table of adjustment data" means the completed table of adjustment data included in the Appendix to Tender. If there is no such table of adjustment date, this Sub-Clause shall not apply.
>
> If this Sub-Clause applies, the amounts payable to the Contractor shall be adjusted for rises or falls in the cost of labour, Goods and other inputs to the Works, by the addition or deduction of the amounts determined by the formulae prescribed in this Sub-Clause. To the extent that full compensation for any rise or fall in Costs is not covered by the provisions of this or other Clauses, the Accepted Contract Amount shall be deemed to have included amounts to cover the contingency of other rises and falls in costs.
>
> …

9 DJO's 1st Affidavit at p 703.

There then follow formulae for determining the precise adjustment to be made in any given case. It is to be noted that these were amended by the parties,[10] a matter of significance which I shall return to below.

17 It is also relevant to refer to cl 20.1 of the FIDIC Conditions which was incorporated without amendment in the CPT-13 Contract:[11]

> **20.1 Contractor's Claims**
>
> If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.
>
> If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this Sub-Clause shall apply.
>
> …

18 It was not until 6 March 2020, more than three years after the Notification, that Consortium X first gave notice to DJO under cl 13.7 seeking an adjustment in respect of additional labour costs resulting from the Notification.[12]

19 DJO took the view that the increase in costs caused by the Notification would be covered by cl 13.8 and that in the intervening period from the date of

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10 DJO's 1st Affidavit at pp 623–624.

11 DJO's 1st Affidavit at p 735.

12 DJO's 1st Affidavit at para 34; DJR's 1st Affidavit at para 42.

the Notification until Consortium X's notice on 6 March 2020, there was never a request from Consortium X for payment of any costs that fell outside cl 13.8. During this period, Consortium X had filed applications for monthly Interim Payment Certificates (which were monthly bills raised by Consortium X for work done each month), and none of these applications – around 40 in total – referred to costs incurred due to the Notification.[13]

20 However, on 6 March 2020, more than three years after the Notification, Consortium X issued a notice to the Engineer (in accordance with the process set out in the CPT-13 Contract) stating that they were entitled to an adjustment of cost as a result of the Notification as this constituted a change in legislation pursuant to cl 13.7. Consortium X thus submitted an interim claim up to December 2019 that amounted to Rs 80,09,40,979/-.[14]

21 In his response dated 9 June 2020, the Engineer gave his opinion that the Notification did not entail a change in law as envisaged in cl 13.7 and that the claim for changes in minimum wage had already been dealt with under cl 13.8. He also drew attention to the fact that Consortium X's claim had not been initiated timely in accordance with cl 20.1.[15]

22 DJO was not satisfied with this response and, after unfruitful attempts at amicable settlement and a rejection of its claim by the Dispute Adjudication Board (the "DAB") as required under cl 20.2 of the CPT-13 Contract, it commenced the Arbitration on 16 December 2021.[16]

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13 DJO's 1st Affidavit at paras 12–14.

14 DJO's 1st Affidavit at p 110: Award at para 34.

15 DJO's 1st Affidavit at para 21; TLJ-1 at p 6.

16 DJO's 1st Affidavit at paras 22–24.

The Arbitration

23 A three-member arbitral tribunal (the "Tribunal") was constituted on 19 April 2022, with the three arbitrators each being an eminent retired Indian judge: (a) Judge A, nominated by Consortium X; (b) Judge B, nominated by DJO; and (c) Judge C, the presiding arbitrator, who was nominated by Judges A and B and approved by the ICC.[17]

24 The parties tendered their respective opening submissions on 10 September 2022 (Consortium X) and 1 November 2022 (DJO). Oral submissions were heard by the Tribunal on 23 and 24 November 2022, 2 December 2022, 3, 10 and 18 January 2023, 21 February 2023 and 21 April 2023, after which the parties submitted their respective closing submissions on 8 May 2023. The Arbitration was declared closed by the Tribunal on 16 August 2023.[18]

25 As the claimant in the Arbitration, Consortium X sought: (a) a declaration that the Notification was a change in law under cl 13.7 of the CPT-13 Contract and that DJO was obliged to pay Consortium X the increase in labour costs for every month following the Notification; and (b) a sum of Rs 143,39,69,003 representing the increased costs incurred by Consortium X as a result of the increase in minimum wages, calculated up to 31 August 2021.[19]

26 The main issues in the Arbitration can be summarised as follows:[20]

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17 DJO's 1st Affidavit at para 29: Award at para 55.

18 DJO's 1st Affidavit at para 31.

19 DJO's 1st Affidavit at para 24.

20 DJO's 1st Affidavit at paras 35–36.

(a) First, whether Consortium X was precluded from making its claim by reason of an applicable statutory limitation period.

(b) Second, whether Consortium X was precluded from making its claim by reason of waiver and/or estoppel.

(c) Third, whether Consortium X's claim was precluded by reason of having been brought outside the timeline stipulated in cl 20.1 of the CPT-13 Contract.

(d) Fourth, if Consortium X's claim was to be allowed, the quantum thereof.

(e) Fifth, the interest on the Award and costs of the Arbitration.

27 On 24 November 2023, the Tribunal issued the Award, in which it found in Consortium X's favour on virtually every issue.[21]

28 For completeness, neither party makes any criticism of the manner in which the Arbitration was conducted prior to the proceedings being declared closed on 16 August 2023.[22] The problems that arise, and which underlie the grounds relied upon in support of DJO's setting-aside application, lie in the Award itself and what happened in the Tribunal's preparation of the Award.

The parallel arbitrations

29 In order to put the dispute in the present application into context, it is necessary to consider two other arbitrations which were in being at the same time as the Arbitration. The subject-matter of these parallel arbitrations were

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21 DJO's 1st Affidavit at para 32.

22 DJO's 1st Affidavit at para 31; DJO's 1st Affidavit at p 122: Award at para 74

broadly similar to the Arbitration insofar as they also related to the effect of the Notification on contracts relating to the Eastern Dedicated Freight Corridor.

The CP-301 Arbitration

30 The first parallel arbitration (the "CP-301 Arbitration") arose out of a contract (the "CP-301 Contract") dated 29 August 2016. The claimant there was a Consortium ("Consortium Y") of two Indian companies, one of which was DJR whilst the respondent was DJO. The CP-301 Arbitration was commenced on 18 May 2021.

31 The underlying factual matrix of the CP-301 Arbitration was similar to that underlying the Arbitration, but with notable differences. The full facts are set out in detail in the tribunal's award in the CP-301 Arbitration (the "CP-301 Award").[23] I summarise the factual matrix underlying the CP-301 Arbitration in the following paragraphs.

32 Following the issuance of the Notification, on 4 August 2017, Consortium Y first raised with the Engineer the question of increased payments owing to the increase in minimum wage, claiming that reimbursement was due from DJO pursuant to cl 13.7 of the CP-301 Contract (which was in the same terms as cl 13.7 of the CPT-13 Contract).[24]

33 On 17 August 2017, the Engineer rejected this assertion and indicated that the contract price would be adjusted every month as per the formulae in

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[23] DJO's 1st Affidavit at pp 1722–1974.

[24] DJO's 1st Affidavit at p 1744: CP-301 Award at paras 21–22.

cl 13.8 of the CP-301 Contract (which was not in precisely the same form as in the CPT-13 Contract).[25]

34 On 18 December 2019, Consortium Y renewed its claim under cl 13.7.[26] There then followed correspondence between Consortium Y and the Engineer, during which the Engineer placed reliance on the 28-day period for the making of a claim pursuant to cl 20.1 of the CP-301 Contract, which Consortium Y contended was unenforceable.[27]

35 Dissatisfied with the Engineer's response, Consortium Y referred the matter to the DAB in July 2020.[28] The DAB rejected the claim by a letter dated 20 January 2021,[29] which led to Consortium Y commencing the CP-301 Arbitration on 18 May 2021.[30]

36 As Consortium Y consisted solely of Indian companies, cl 20.6(b) of the CP-301 Contract applied. As a result, the CP-301 Arbitration was: (a) conducted in accordance with the rules of the Arbitration of the International Centre Alternative Dispute Resolution, New Delhi; and (b) seated in New Delhi and subject to the provisions of the Indian Arbitration and Conciliation Act 1996.[31]

37 Arbitrators were then appointed. Consortium Y appointed Arbitrator D and DJO appointed Arbitrator E, neither of whom was involved in the

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25 DJO's 1st Affidavit at pp 1744–1745: CP-301 Award at para 23.

26 DJO's 1st Affidavit at p 1746: CP-301 Award at para 26.

27 DJO's 1st Affidavit at pp 1746–1748: CP-301 Award at paras 27–31.

28 DJO's 1st Affidavit at p 1748: CP-301 Award at para 32.

29 DJO's 1st Affidavit at p 1748: CP-301 Award at para 33.

30 DJO's 1st Affidavit at p 1749: CP-301 Award at paras 35–36.

31 DJO's 1st Affidavit at pp 1736-1738: Award at paras 4–6.

Arbitration. However, Judge C, who was the presiding arbitrator in the Arbitration (see [23] above), was appointed as the presiding arbitrator in the CP-301 Arbitration. The tribunal for the CP-301 Arbitration was duly constituted on 20 July 2021.[32]

38 The tribunal heard submissions in December 2021 and February 2022.[33] Further oral arguments occurred in May 2022,[34] followed by written submissions in July 2022.[35] There were further written submissions, the last of which was on 3 February 2023.[36]

39 The issues raised for determination in the CP-301 Arbitration are set out in paragraph 68 of the CP-301 Award,[37] and were broadly similar to those in the Arbitration. The underlying factual matrix, as can be seen from the overview above, was, however, not the same and hence the issues were not identical. In particular, whereas Consortium Y had raised a claim for compensation under cl 13.7 of the CP-301 Contract in 2017 – soon after the Notification had been issued – Consortium X did not do so until March 2020, more than three years after the Notification. During the intervening period Consortium X had submitted, and was paid, on the basis of some 40 invoices that did not include sums directed to a claim under cl 13.7 (see [19] above).

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32 DJO's 1st Affidavit at pp 1749–1750: CP-301 Award at paras 37–38.

33 DJO's 1st Affidavit at p 1751: CP-301 Award at para 42.

34 DJO's 1st Affidavit at p 1752: CP-301 Award at para 45.

35 DJO's 1st Affidavit at p 1752: CP-301 Award at para 46.

36 DJO's 1st Affidavit at p 1754: CP-301 Award at para 50.

37 DJO's 1st Affidavit at pp 1761–1763: CP-301 Award at paras 68.

40 The CP-301 Award was issued on 1 August 2023. It contained a lengthy and closely reasoned decision drawing upon many authorities. The tribunal found in favour of Consortium Y, holding, in particular, that:

(a) the Notification constituted a change of law within the meaning of cl 13.7 of the CP-301 Contract;[38]

(b) a claim based on cl 13.7 was not limited to compensation by way of the formulae in cl 13.8 of the CP-301 Contract;[39] and

(c) the 28-day period under cl 20.1 of the CP-301 Contract (which was in the same terms as cl 20.1 of the CPT-13 Contract) was "directory" rather than "mandatory", such that Consortium Y's failure to give notice to the Engineer within 28 days was immaterial.[40]

The CP-302 Arbitration

41 It is not necessary to enter into a comparable degree of detail in relation to the second parallel arbitration (the "CP-302 Arbitration"). The CP-302 Arbitration arose out of a contract (the "CP-302 Contract") that was in largely similar terms to those in the CP-301 Contract.

42 The claimant in the CP-302 Arbitration was a further consortium ("Consortium Z") consisting of two Indian companies, one of which was DJR and the other a different company from those involved in the other two contracts. DJO was, again, the respondent in the CP-302 Arbitration.

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38 DJO's 1st Affidavit at p 1849: CP-301 Award at para 199.

39 DJO's 1st Affidavit at p 1898: CP-301 Award at para 276.

40 DJO's 1st Affidavit at p 1799: CP-301 Award at para 126.

43 As Consortium Z consisted solely of Indian companies cl 20.6(b) of the CP-302 Contract again applied such that the arbitration was: (a) conducted in accordance with the rules of the Arbitration of the International Centre Alternative Dispute Resolution, New Delhi; and (b) seated in New Delhi and subject to the provisions of the Indian Arbitration and Conciliation Act 1996 (see [36] above).[41]

44 The CP-302 Arbitration commenced on 14 October 2021[42] and the tribunal was constituted on 17 December 2021.[43] The claimant, Consortium Z, nominated the same arbitrator as in CP-301 (Arbitrator D), but DJO nominated a different person (Arbitrator E).[44] However, once again, Judge C was appointed as the presiding arbitrator.[45]

45 Oral arguments took place between July and November 2022, and written submissions were filed on 3 January 2023.[46] The tribunal's award (the "CP-302 Award") was handed down on 27 August 2023.[47]

46 It is to be noted that whereas in CP-301 and CP-302 Arbitrations, the teams of advocates for the respective parties came from the same firms, in the Arbitration counsel for DJO were the same but those for Consortium X were not.

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41 DJO's 1st Affidavit at pp 1991–1994: CP-302 Award at paras 4–6.

42 DJO's 1st Affidavit at p 2005: CP-302 Award at para 36.

43 DJO's 1st Affidavit at p 2006: CP-302 Award at para 39.

44 DJO's 1st Affidavit at p 67.

45 DJO's 1st Affidavit at p 2006: CP-302 Award at para 39.

46 DJO's 1st Affidavit at pp 2007–2008: Award at paras 43–46.

47 DJO's 1st Affidavit at p 68.

My decision

The position of Judge C as the presiding arbitrator in all three arbitrations

47 It will thus be seen that three arbitrations were ongoing at the same time considering contracts containing the same or similar clauses and therefore involving the same or similar questions of law. However, the Arbitration was notably distinct from the CP-301 and CP-302 Arbitrations. It was to be conducted subject to the ICC Rules, whereas the CP-301 and CP-302 Arbitrations were conducted in accordance with the rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi. Further, whilst the CP-301 and CP-302 Arbitrations were seated in India (and thus had as their *lex arbitri* the Indian Arbitration and Conciliation Act 1996 (the "Indian Arbitration Act")), the Arbitration was seated in Singapore.

48 The Tribunal for the Arbitration was the last to be constituted of the three arbitrations, as it was constituted in April 2022 whilst the tribunals in the CP-301 and CP-302 Arbitrations were constituted in July and December 2021 (see [23], [37] and [44] above). The hearings in the CP-301 arbitration had begun before the Tribunal was constituted and the hearings in both arbitrations were substantially concluded before the hearings began in the Arbitration (see [24], [38] and [45] above). Hence, by the time that Judge C was proposed as the presiding arbitrator in the Arbitration, he would have been aware of the underlying facts and issues in the earlier arbitrations and fully immersed in them by the time of the hearings. Both parties to the Arbitration nominated, as their arbitrators, persons – *ie*, Judge A and Judge B – who had not been nominated in the earlier arbitrations and who were therefore not similarly immersed. However, neither party objected to Judge C's appointment, and neither Judge C himself nor the ICC saw this as a reason for him not to be appointed to preside over the Arbitration.

49 Be this as it may, Judge C was inevitably placed in an invidious position. In the Arbitration he was to hear arguments from counsel who were not all the same as those who had addressed him in the other arbitrations. Any information obtained, submissions made, or discussions which had taken place with his co-arbitrators in those arbitrators were confidential for the purposes of each arbitration. They thus could not be drawn upon or be allowed to influence in any way the proceedings in the Arbitration. In simple terms, Judge C was required to start afresh with an open mind and not seek to influence his co-arbitrators or the proceedings in the Arbitration with any accumulated knowledge or opinions.

50 In theory, I suppose that this could be done, but the process must be fraught with difficulties.

My observations on the Award in the Arbitration

51 Rather than approaching the issues *de novo* on the basis of the submissions made to them and writing a self-standing award without reference to the awards in the earlier arbitrations, the Tribunal elected to use the CP-301 Award (and/or the CP-302 Award) as a template for its Award in the Arbitration, and to "massage" it into a state where it dealt – or, at any rate, appeared to deal – with the issues in the Arbitration specifically. For brevity, I shall address matters on the basis that it was the CP-301 Award which was used as the template.

52 DJO submit that 278 paragraphs of the 451 paragraph-long Award were reproduced or substantially reproduced from the CP-301 Award. Consortium X takes issue with the exact number and the degree of reproduction but accepts that at least 212 paragraphs of the Award were taken. A comprehensive Schedule, setting out the parties' agreement (and disagreement) on which parts

of the Award were the subject of reproduction forms Annex B to DJO's supporting affidavit,[48] which is then commented upon in Annex B to Consortium X's second reply affidavit.[49]

53 In my view, it is not necessary to attempt to resolve the dispute as to which particular paragraph(s) of the Award were copied and which were not. It is clear from the degree of agreement between the parties on reproduction that Judge C drew heavily upon his previously acquired knowledge in the CP-301 and CP-302 Arbitrations and applied that knowledge to the writing of the Award. It is a matter of speculation as to whether he drew his fellow arbitrators' attention to the existence of the other awards, to the conclusions that he and his fellow arbitrators in the other arbitrations had reached and the way in which they had chosen to address their views.

54 Equally, even if Judge C had made such disclosures to Judge A and Judge B, it is as unknown at which stage this occurred – whether before or after the Tribunal had held their deliberations on the materials before them. In any event, this does not matter. Neither Judge C, nor the other arbitrators, should have had any access to the material in the other arbitrations for the purposes of this Arbitration.

55 DJO has drawn my attention to a number of aspects of comparison between the two awards which, it asserts, demonstrates that in reaching its decision in the Award:

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48 DJO's 1st Affidavit at pp 71–74.

49 DJR's 2nd Affidavit dated 24 June 2024 ("DJR's 2nd Affidavit") at pp 6–26.

(a) the Tribunal placed weight on submissions in the earlier arbitrations and did not restrict itself to the submissions made in the Arbitration;

(b) drew upon authorities cited in the earlier arbitrations which were not cited in the Arbitration;

(c) recited and relied upon provisions in the CP-301 Contract which differed from those of the CPT-13 Contract which was the subject of the Arbitration;

(d) applied the wrong *lex arbitri* to the assessment of interest and costs; and

(e) failed to properly consider the issues of (i) limitation (both statutorily and under cl 20.1 of the CPT-13 Contract), as well as (ii) waiver and estoppel, on the basis of the facts and arguments in the Arbitration.

56 I accept that these factors demonstrate the problems that arose in seeking to transform the CP-301 Award into the Award. I shall consider each of these factors in turn.

The Tribunal's references to submissions made in the other arbitrations

57 I begin with the Tribunal's references to submissions from the other arbitrations in the Award.

58 In the CP-301 Arbitration, leading counsel for Consortium Y had been a Ms [AB] SC. Her submissions are referred to, including with express reference to her name, in the CP-301 Award. In the Award, one finds the same

submissions being said to have been made in substantially identical words, but the reference to Ms [AB] *SC* is substituted for a reference to Mr [CD], who had appeared as leading counsel for Consortium X in the Arbitration.

59 As an example, paragraph 223 of the CP-301 Award opens with the words:[50]

> Ms [AB], learned Senior Counsel appearing for the Respondent, on the other hand, has argued that:

There then follow seven sub-paragraphs setting out Ms [AB]'s arguments.

60 In contrast, the opening words of paragraph 247 of the Award read:[51]

> Mr [CD], learned Counsel appearing for the Respondent, on the other hand, has asseverated (sic) that:

There then follow six of the seven sub-paragraphs in paragraph 223 of the CP-301 Award, taken more or less verbatim. The only differences of substance are that:

(a) at the end of sub-paragraphs (iii) and (iv) of paragraph 223 of the CP-301 Award, reference is made to certain authorities which are not included in the sub-paragraphs in paragraph 247 of the Award – possibly because these were not cited in the Arbitration; and

(b) sub-paragraph (vii) of paragraph 223 of the CP-301 Award, which is not reproduced in paragraph 247 of the Award, sets out a proposition of law and certain authorities – again, the omission possibly

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50 DJO's 1st Affidavit at pp 1860–1863: CP-301 Award at para 223.

51 DJO's 1st Affidavit at pp 225–227: Award at para 247.

being because said proposition and authorities were not cited in the Arbitration.

61 For ease in visual comparison, I set out a table containing paragraph 223 of the CP-301 Award alongside paragraph 247 of the Award (the differences between the two paragraphs are highlighted in bold and underline):

Paragraph 223 of the CP-301 Award	Paragraph 247 of the Award
(i) The Price Adjustment Clause in PCC Sub-Clause 13.8 considers the increase in the rate of minimum wages and suitably compensates the Claimant for the variation or increase in the rate of labour costs;	(i) The Price Adjustment Clause in PCC Sub-Clause 13.8 considers the increase in the rate of minimum wages and suitably compensates the Claimant for the variation or increase in the rate of labour costs;
(ii) Under PCC Sub-Clause 13.8, payment is made for adjustments to various cost centres and inputs in the contract which are inclusive of cost of labour and other inputs like steel, cement, fuel, etc. based on the pre-agreed indices and formula and once the terms of the contract are agreed between the principal employer and the contractor as per the specific formula based on the various indices, the said indices in the case of labour would be the CPI for industrial workers;	(ii) Under PCC Sub-Clause 13.8, payment is made for adjustments to various cost centres and inputs in the contract which are inclusive of cost of labour and other inputs like steel, cement, fuel, etc. based on the pre-agreed indices and formula and once the terms of the contract are agreed between the principal employer and the contractor as per the specific formula based on the various indices, the said indices in the case of labour would be the CPI for industrial workers;
(iii) As per the settled law, once PCC Sub-Clause 13.8 specifically covers the cost of labour, the Claimants cannot claim further amounts for	(iii) As per the settled law, once PCC Sub-Clause 13.8 specifically covers the cost of labour, the Claimants cannot claim further amounts for

labour under any other general provision or clause. It is, thus, contended that PCC Sub-Clause 13.8 is a special provision which mandates and stipulates as to how the costs incurred over and above the fixed price of the contract have to be calculated by defining the inputs and arriving at the formulae based on the indices and, therefore, any other general provision or clause must yield to the aforesaid special provision or clause, which will have an overriding effect over the general provision or clause. **To buttress its submission by laying emphasis on the maxim '*Generalis specialibus non derogant*', reliance has been placed by the Respondent on the decision rendered in *Adani Power (Mundra) Ltd v. Gujarat Electricity Regulatory Commission and Others*;**	labour under any other general provision or clause. It is, thus, contended that PCC Sub-Clause 13.8 is a special provision which mandates and stipulates as to how the costs incurred over and above the fixed price of the contract have to be calculated by defining the inputs and arriving at the formulae based on the indices and, therefore, any other general provision or clause must yield to the aforesaid special provision or clause, which will have an overriding effect over the general provision or clause;
(iv) PCC Sub-Clause 13.8 specifically creates a deeming fiction in the Contract mandating that any compensation not covered is deemed to have been covered in the 'Accepted Contract Amount', which exposits the intention of the parties that full payment has been deemed to have been received on the receipt of the additional	(iv) PCC Sub-Clause 13.8 specifically creates a deeming fiction in the Contract mandating that any compensation not covered is deemed to have been covered in the 'Accepted Contract Amount', which exposits the intention of the parties that full payment has been deemed to have been received on the receipt of the additional

cost of labour as per the formula specified in PCC Sub-Clause 13.8 and a deeming provision must be given full effect in view of the settled position of law **in *Ramesh Chandra Sharma v. Pubjab National Bank and Another*, and *State of Uttar Pradesh v Hari Ram*;**	cost of labour as per the formula specified in PCC Sub-Clause 13.8 and a deeming provision must be given full effect in view of the settled position of law;
(v) The Contract conclusively envisages that "*the Accepted Contract Amount shall be deemed to have included amounts to cover the contingency of other rise and fall in cost*" and, thus, once the said PCC Sub-Clause 13.8 is deemed to have covered the contingent rise or fall in costs, the **Contractor/Claimants is/are, as experienced bidders,** deemed to have included or factored in such contingent increase in the bid price;	(v) The Contract conclusively envisages that "*the Accepted Contract Amount shall be deemed to have included amounts to cover the contingency of other rise and fall in cost*" and, thus, once the said PCC Sub-Clause 13.8 is deemed to have covered the contingent rise or fall in costs, **the Claimants , as experienced bidders, are** deemed to have included or factored in such contingent increase in the bid price; **and**
(vi) The Claimants' claim of seeking compensation or payment of additional cost due to change in the cost of labour owing to alleged change in law/legislation under PCC Sub-Clause 13.7 would render PCC Sub-Clause 13.8 otiose and redundant and would also amount to duplicity in payment thereby being contrary to the basic principles of bidding, fairness and transparency**; and**	(vi) The Claimants' claim of seeking compensation or payment of additional cost due to change in the cost of labour owing to alleged change in law/legislation under PCC Sub-Clause 13.7 would render PCC Sub-Clause 13.8 otiose and redundant and would also amount to duplicity in payment thereby being contrary to the basic principles of bidding, fairness and transparency**.**

(vii) Emphasis has been placed on the golden rule of construction to put forth that the intention of the parties to the instrument ought to be gathered after considering all the words in their ordinary and natural sense and after considering the document as a whole since the words used in the contract cannot be treated as surplusage and no part of the agreement or words used therein can be said to be redundant. In this regard, reliance has been placed on the decisions rendered in *M. Arul Jothi and Another v. Lajja Bal (Deceased) and Another*, *JSW Infrastructure Limited and Another v. Kakinada Seaports Limited and Others*, and *Rizvi Builders v. Arun Subrao Prabhu and Others*	

62 There are other examples of a similar attribution of submissions first made by Ms [AB] SC in the CP-301 Award being expressly attributed to Mr [CD] in the Award[52].

[52] See, *eg*, (a) DJO's 1st Affidavit at p 1808: CP-301 Award at para 142, compared with DJO's 1st Affidavit at pp 162–163: Award at para 144; and (b) DJO's 1st Affidavit at p 1946: CP-301 Award at para 335, compared with DJO's 1st Affidavit at p 321: Award at para 406.

63 On the other hand, in the case of submissions made by counsel for DJO, the position is less stark but equally the substantially verbatim reproduction of his submissions supports DJO's assertion that the Tribunal in the Arbitration were not focussing solely – or at all – on the submissions made to it, but were drawing upon submissions made in the other arbitrations to which two of the arbitrators (Judge A and Judge B) had not taken part.

64 This lack of focus on the submissions made specifically in the Arbitration is demonstrated by considering paragraph 286 of the CP-301 of the Award, which reads:[53]

> It has been further submitted by Mr [EF], learned Counsel for the Claimants, that the computation carried out by the Respondent is erroneous since the Respondent, while calculating, has taken the Weighted Average for the increased rate but taken the figures on Simple Average Basis for the Base Rate, which is impermissible. Therefore, on applying the Weighted Average Wages for the Base Rate as well as the Current Rate, the Claimants have arrived at the computation as given in the Tabular Representation in Annexure A as on 08 March 2022, as depicted above.

65 This paragraph is reproduced verbatim in paragraph 333 of the Award[54] but, strikingly, DJO *did not produce any equivalent computation for the purposes of its submissions in the Arbitration*.[55] Thus, the inclusion of a reference in paragraph 333 to "the Claimants hav[ing] arrived at the computation as given in the Tabular Representation in Annexure A as on 08 March 2022, as depicted above" makes no sense in the context of the Arbitration, thus justifying the inference that the Tribunal had not applied its mind specifically to DJO's submissions in the Arbitration.

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53 DJO's 1st Affidavit at pp 1903–1904: CP-301 Award at para 286.

54 DJO's 1st Affidavit at p 274: Award at para 333.

55 DJO's 1st Affidavit at para 106(n).

The Tribunal's references to authorities not cited in the Arbitration

66 I have, at [60] above, made the observation that certain authorities referred to in the CP-301 Award had not been referred to in equivalent passages in the Award. This was however not always the case. For example, when considering the issue of whether the 28-day period in cl 20.1 of the CPT-13 Contract was mandatory or directory in paragraphs 140 to 180 of the Award, the text reproduced from the CP-301 Award included references to a number of authorities which were not cited to the Tribunal in the Arbitration but had been cited in the CP-301 Award. Nine such cases have been identified by DJO,[56] and Consortium X does not dispute that these cases were not cited by either party in the Arbitration.[57]

67 Consortium X makes the point that it is unclear whether these cases were actually cited by parties in the CP-301 Arbitration (as opposed to being unilaterally referenced by the tribunal in the CP-301 Award). But, with respect, that is beside the point. What is material is that these authorities were relied upon by the Tribunal in the Arbitration despite counsel in the Arbitration having not drawn them to the Tribunal's attention. In this regard, I accept DJO's contention that the Tribunal was drawing upon material other than that which was presented to it by the parties, without giving the parties the opportunity to address them on those authorities.

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56 DJO's 1st Affidavit at para 79.

57 Respondents' Written Submissions dated 4 July 2024 ("RWS") at paras 74–77.

The Tribunal's references to provisions that were not found in the CPT-13 Contract

68 In paragraph 253 of the Award, the Tribunal set out cl 13.8 of the CPT-13 Contract in full. I have, at [16] above, only set out the first two sub-paragraphs of it. The remainder of cl 13.8 consisted of details of how the adjustment was to be calculated. Crucially, this part of cl 13.8 was specifically modified by the parties such that it differed from the standard FIDIC clause and differed as between the contracts.

69 Unfortunately, however, the text of cl 13.8 set out in paragraph 253 of the Award, reproduced from paragraph 247 of the CP-301 Award, is the text from the CP-301 Contract which differed from the text in the CPT-13 Contract. These changes are helpfully identified by DJO in tabular form as follows (the differences being highlighted in bold and underline):[58]

Clause 13.8 quoted at paragraph 253 of the Award	Clause 13.8 of the CPT-13 Contract
The adjustment to be applied to the amount otherwise payable to the Contractor, as valued in accordance with the appropriate Schedule and certified in Payment Certificates, shall be determined from the formulae for each of the currencies in which the Contract Price is payable. No adjustment is to be applied to work valued on the basis of Cost at current prices.	The adjustment to be applied to the amount otherwise payable to the Contractor, as valued in accordance with the appropriate Schedule and certified in Payment Certificates, shall be determined from the formulae for each of the currencies in which the Contract Price is payable. No adjustment is to be applied to work valued on the basis of Cost at current prices.

58 DJO's 1st Affidavit at para 95.

The formula for adjustment for changes in cost shall be as follows: Pn= a + b(Ln/Lo) + c(Cn/Co) + d(Sn/So) + e(Fn/Fo) + f (Mn/Mo) + g (Rn/Ro) where: "Pn" is the adjustment multiplier to be applied to the contract amount paid against cost center/stage as per Price Schedule in the relevant currency for the completed stage of work;	The formula for adjustment for changes in cost shall be as follows: Pn= a + b(Ln/Lo) + c(Cn/Co) + d(Sn/So) + e(Fn/Fo) + f (Mn/Mo) + g (Rn/Ro) where: "Pn" is the adjustment multiplier to be applied to the contract amount paid against cost center/stage as per Price Schedule in the relevant currency for the completed stage of work;
"a" is a fixed coefficient, stated in the table of adjustment data as given **below**, representing the non-adjustable portion for various cost center as per price schedule;	"a" is a fixed coefficient, stated in the table of adjustment data as given **in Section 6, Financial Submission, Schedule 1**, representing the non-adjustable portion for various cost center as per price schedule;
"b" is a fixed coefficient, stated in the table of adjustment data as given **below**, representing the adjustable portion for labour component for various cost center as per price schedule;	"b" is a fixed coefficient, stated in the table of adjustment data as given **in Section 6, Financial Submission, Schedule 1**, representing the adjustable portion for labour component for various cost center as per price schedule;
"c" is a fixed coefficient, stated in the table of adjustment data as given **below**, representing the adjustable portion of cement component for	"c" is a fixed coefficient, stated in the table of adjustment data as given **in Section 6, Financial Submission, Schedule 1**, representing the adjustable portion of

various cost center as per price schedule;	cement component for various cost center as per price schedule;
"d" is a fixed coefficient, stated in the table of adjustment data as given **below**, representing the adjustable portion for steel component for various cost center as per price schedule;	"d" is a fixed coefficient, stated in the table of adjustment data as given **in Section 6, Financial Submission, Schedule 1**, representing the adjustable portion for steel component for various cost center as per price schedule;
"e" is a fixed coefficient, stated in the table of adjustment data as given **below**, representing the adjustable portion for fuel & lubricant component for various cost center as per price schedule;	"e" is a fixed coefficient, stated in the table of adjustment data as given **in Section 6, Financial Submission, Schedule 1**, representing the adjustable portion for fuel & lubricant component for various cost center as per price schedule;
"f" is a fixed coefficient, stated in the table of adjustment data as given **below**, representing the adjustable portion for Machinery & Machine tools for various cost center as per price schedule;	"f" is a fixed coefficient, stated in the table of adjustment data as given **in Section 6, Financial Submission, Schedule 1**, representing the adjustable portion for Machinery & Machine tools for various cost center as per price schedule;
"g" is a fixed coefficient, stated in the table of adjustment data as given **below**, representing the adjustable portion for Rails for relevant cost center as per price schedule;	"g" is a fixed coefficient, stated in the table of adjustment data as given **in Section 6, Financial Submission, Schedule 1**, representing the adjustable portion for Rails for relevant cost center as per price schedule;

Values of a, b, c, d, e, f and g for various cost centers are detailed in **the Appendix to tender**	Values of a, b, c, d, e, f and g for various cost centers are detailed in **the in Section 6, Financial Submission, Schedule 1**;
"Ln", "Cn", "Sn", "Fn", "Mn" and "Rn" are the current cost indices or reference prices for period "n", expressed in the relevant currency of payment, each of which is applicable to the relevant tabulated cost element on the date 49 days **prior to the last day of the period, (to which the particular Payment Certificate relates) as detailed in the Appendix to tender**.	"Ln", "Cn", "Sn", "Fn", "Mn" and "Rn" are the current cost indices or reference prices for period "n", expressed in the relevant currency of payment, each of which is applicable to the relevant tabulated cost element on the date 49 days **for Local and Foreign Currency components prior to the last day of the period (to which the particular Payment Certificate relates)**;
"Lo", "Co", "So", "Fo", "Mo" and "Ro" are the base cost indices or reference prices, expressed in the relevant currency of payment, each of which is applicable to the relevant tabulated cost element on the Base Date, as detailed in the **Appendix to tender**.	"Lo", "Co", "So", "Fo", "Mo" and "Ro" are the base cost indices or reference prices, expressed in the relevant currency of payment, each of which is applicable to the relevant tabulated cost element on the Base Date, as detailed in the **Section 6, Financial Submission, Schedule 1**.

70 This error, in failing to appreciate the difference in the wording of cl 13.8 in the CP-301 and CPT-13 Contracts, caused the Tribunal to apply the wrong coefficients to factors "Lo" and "Ln", and to refer to data published by

the Ministry of Labour (applicable to the CP-301 Contract) rather than the Reserve Bank of India (applicable to the CPT-13 Contract).[59]

71 Consortium X does not dispute that the Tribunal reproduced the wrong cl 13.8, but submits that this is of little moment in the context of the Arbitration.[60] This may be so but it is, to my mind, a clear demonstration that the Tribunal were drawing upon the submissions made to, and the labours of, the Tribunal in the CP-301 Arbitration rather than focussing on the submissions made to them in the Arbitration.

The Tribunal's application of the wrong lex arbitri to determining interest and costs

72 The parties are agreed that, as a matter of law, questions of interest and costs are matters to be determined by reference to the law of the seat of the arbitration. The *lex arbitri* for the Arbitration was Singapore law, whereas the parallel arbitrations were seated in New Delhi.

73 In the CP-301 Award, the tribunal correctly: (a) addressed the question of interest under Indian law by reference to s 31(7) of the Indian Arbitration Act; and (b) assessed costs by reference to s 31A of the Indian Arbitration Act.[61]

74 In the Award, however, the question of interest and costs are considered based upon those passages from the CP-301 Award, many of which have been reproduced verbatim.[62] Reference is made to ss 31(7) and 31A of the Indian Arbitration Act, rather than any provisions of Singapore law (in particular, the

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59 DJO's 1st Affidavit at paras 96–102.

60 RWS at paras 96–98.

61 DJO's 1st Affidavit at pp 1946–1960: CP-301 Award at paras 336–360.

62 DJO's 1st Affidavit at pp 322–336: Award at paras 407–432.

IAA), and, although reference is made to the provisions of the ICC on costs, I accept DJO's contention that the thinking and approach of the Tribunal was influenced and guided by events remote from those in the Arbitration. It is not the fact that the Tribunal may have made an error of law in its approach (which would be irrelevant to a setting aside application), but the knowledge, reliance upon and adoption of the reasoning in the earlier awards that casts doubt on their independence of thought.

The Tribunal's failure to consider certain unique issues to the Arbitration properly

75 As noted at [39] above, a crucial factual difference across the arbitrations was the length of the delay between the Notification and the time when Consortium X raised the issue of an adjustment under cl 13.7 in the Arbitration. Specifically, more than three years had elapsed from the Notification before Consortium X raised a claim for compensation under cl 13.7 of the CPT-13 Contract, during which Consortium X had submitted some 40 invoices which had not sought any uplift pursuant to cl 13.7. DJO contends that, by lifting large parts of their reasoning from the CP-301 and CP-302 Awards, the Tribunal failed to focus on the factual peculiarities unique to the Arbitration and that this of itself served to undermine the validity of the Tribunal's reasoning and conclusions.

76 This is not a matter that I see a necessity to rule upon. It would require a detailed discussion of the facts and arguments, as well as an examination of the minutiae of the Award. There is an inevitable risk that this would entail, in substance, a review of the merits of the Tribunal's findings on the implicated issues, thus transgressing the boundary line between the role of a seat court in a setting-aside application and that of a court exercising appellate jurisdiction over the substantive dispute.

77 It suffices to say that I accept DJO's submission that, considering the issues in the Arbitration and the manner in which the Tribunal addressed them, the Tribunal's reasoning was influenced – probably heavily influenced – by what had gone on in the parallel arbitrations and by the way the issues had been argued and resolved in those proceedings. Little focus appears to have been applied to the specific factual matrix in this case. Had their minds been focussed solely on the facts and submissions in the Arbitration, the actual (and different) factual matrix would have been at the forefront of their deliberations which it plainly was not.

Applicable legal principles

78 DJO has invoked a number of grounds which it says the Award is liable to be set aside on. It relies on: (a) Art 34(2)(*a*)(iv) of the Model Law; (b) Art 34(2)(*b*)(ii) of the Model Law; and (c) s 24(*b*) of the IAA.

79 Article 34(2)(*a*)(iv) of the Model Law provides that an award may be set aside for a defect in the composition of the tribunal or non-compliance with the parties' agreed arbitral procedure:

> … the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; …

80 Article 34(2)(*b*)(ii) of the Model Law provides that an award may be set aside if "the award is in conflict with the public policy of [Singapore]".

81 Section 24(*b*) of the IAA provides that an award may be set aside if there has been "a breach of the rules of natural justice … in connection with the making of the award by which the rights of any party have been prejudiced".

82 The principles applicable to determining whether or not an award should be set aside are well-settled. The starting point is that the courts' role is guided and circumscribed by the principle of minimal curial intervention. In the Court of Appeal decision of *BLC and others v BLB and another* [2014] 4 SLR 79. Andrew Phang Boon Leong JA (as he then was) outlined this cornerstone principle of international arbitration as follows (at [51]–[53]):

> 51 It is now axiomatic that there will be minimal curial intervention in arbitral proceedings. As the Judge acknowledged at [67] of the Judgment ([1] *supra*), citing our decision in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") (at [65(c)]), the principle of minimal curial intervention flows from "the need to encourage finality in the arbitral process as well as the deemed acceptance by the parties to an arbitration of the attendant risks of having only a very limited right of recourse to the courts".
>
> 52 A "very limited right of recourse to the courts" is statutorily available where there has been a denial of natural justice – in the context of this appeal, when an arbitrator does not consider one party's case and thereby fails to deal with an essential issue in the dispute.
>
> 53 In considering whether an arbitrator has addressed his mind to an issue, however, the court must be wary of its natural inclination to be drawn to the various arguments in relation to the substantive merits of the underlying dispute between the parties. In the context of a setting-aside application, it is crucial for the courts to recognise that these substantive merits are *beyond* its remit notwithstanding its natural inclinations. Put simply, there is no right of recourse to the courts where an arbitrator has simply made an error of law and/or fact. *A fortiori*, the courts should guard against attempts by a disgruntled party to fault an arbitrator for failing to consider arguments or points which were never before him. The setting-aside application is not to be abused by a party who, with the benefit of hindsight, wished he had pleaded or presented his case in a different way before the arbitrator.

83 More recently, in the Court of Appeal decision of *CJA v CIZ* [2022] 2 SLR 557, Judith Prakash JCA (as she then was) reaffirmed that (at [1]):

> It is well-established that the grounds for curial intervention in arbitration proceedings are narrowly circumscribed: parties to

> an arbitration do not have the right to a "correct" decision from an arbitral tribunal that can be vindicated by the courts, but only the right to a decision that is within the ambit of their agreement to arbitrate, and that is arrived at following a fair process. Furthermore, in ascertaining whether that has been the case, the courts accord a margin of deference to the tribunal, which is generally expected to have some independence in controlling the arbitral proceedings and considering the issues before it. …

84 The principles applicable to a challenge based on Art 34(2)(*a*)(iv), so far as it relates to an assertion that the tribunal had deviated from the parties agreed arbitral procedure, are conveniently set out in the recent High Court decision of *DGE v DGF* [2024] SGHC 107 (at [121]):

> Under Art 34(2)(*a*)(iv) of the Model Law, an arbitral award may be set aside where an agreed arbitral procedure was not adhered to. The requirements for establishing this ground are: (a) there must be an agreement between the parties on a particular procedure; (b) the tribunal must have failed to adhere to the agreed procedure; (c) the failure must be causally related to the tribunal's decision in that the decision could reasonably have been different if the agreed procedure had been adhered to; and (d) the party mounting the challenge will be barred from relying on this ground if it failed to raise an objection during the proceedings before the tribunal: *Lao Holdings NV and another v Government of the Lao People's Democratic Republic* [2023] 1 SLR 55 ("*Lao Holding*") at [98], citing *AMZ v AXX* [2016] 1 SLR 549 at [102]. …

85 It will be seen that on the facts of this case, the alleged breach of agreed procedure lay in the way the Award was written, so that the last of these requirements could not be met. This would, I apprehend, not have been fatal to the argument since there was no opportunity to object so that the concern about hedging against an adverse result did not arise (see *CAJ and another v CAI and another appeal* [2022] 1 SLR 505 at [67]–[68]).

86 As the argument developed however, it became apparent that the basis for it rested on the requirement in Art 32(2) of the ICC Rules that the Tribunal should give the reasons for its decision in the Award and that the result of the

Tribunal's copy-and-pasting meant that the reasons in the Award were no reasons at all. In effect, the argument was that the Tribunal had failed independently and impartially to consider the arguments in the Arbitration and form their own conclusions on those arguments.[63] This is a matter of fairness which falls squarely within the field of natural justice.

87 In these circumstances, I find it unnecessary to consider the submissions under Art 34(2)(*a*)(iv) separately from those relating to breach of natural justice.

88 So far as concerns the question of breach of natural justice, it is settled law that the two pillars of natural justice are the rule against bias (*nemo judex in causa sua*) and the right to a fair hearing (*audi alteram partem*) (see, *eg*, the Court of Appeal decision of *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [43]). It is these principles that underlie the obligations of arbitrators appointed by the ICC as set out in Arts 11 and 22 of the ICC Rules which I have referred to at [4] above.

89 The principles governing challenges based on alleged breaches of natural justice are well-established. They can be summarised as follows:[64]

> (a) The applicant must: (i) identify the rule of natural justice allegedly breached; (ii) establish how the rule was breached; (iii) establish the way the breach was connected to the making of the award; and (iv) show that the breach prejudiced its rights (see *Soh Beng Tee* at [29]).

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63 DJO's 1st Affidavit at para 4(c).

64 RWS at paras 22–25; Claimant's Written Submissions dated 4 July 2024 ("CWS") at para 145.

(b) In assessing if there has been a breach of natural justice, the court will not "carry out a hypothetical or excessively syntactical analysis of what the arbitrator has written", nor will it approach the award with a "meticulous legal eye endeavouring to pick holes, inconsistencies and faults … with the objective of upsetting or frustrating the arbitration" (see the Court of Appeal decision of *AKN and another v ALC and other appeals* [2015] 3 SLR 488 ("*AKN v ALC*") at [59]).

(c) The threshold for a breach of natural justice is a high one, and it will only be in exceptional cases that a court will find that threshold crossed (see *Soh Beng Tee* at [54]).

(d) As there is a particular risk of natural justice challenges being used in substance as disguised appeals on the merits of the tribunal's findings in the award, the court should focus on the "real nature of the complaint", rather than the language or form in which the challenge is presented (see *AKN v ALC* at [39]).

(e) It bears emphasis that it is necessary to demonstrate how the breach of natural justice has caused "actual or real prejudice" to the rights of the aggrieved party, as opposed to mere "technical unfairness" which would not attract the court's intervention (see *Soh Beng Tee* at [91]). However, the bar is not set as high as requiring the challenger to prove that a different outcome would necessarily have resulted but for the breach of natural justice (see the Court of Appeal decision of *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another* [2013] 1 SLR 125 at [54]).

90 DJO has cited a number of cases illustrating circumstances in which the courts have found breaches of natural justice, but each case must necessarily

turn on its own facts. Invariably, these cases turn on the question of whether the parties in the particular case were given a proper opportunity to present their arguments and whether the arbitrators had considered all the issues that fell to them for decision. None of these authorities directly addresses the unusual facts of this case.

91 The closest analogy is perhaps the High Court decision of *Yap Ah Lai v Public Prosecutor* [2014] 3 SLR 180 ("*Yap Ah Lai*"). In that case, the District Judge had, in his sentencing decision, substantially reproduced crucial passages of his reasoning from his reasoning in another decision that involved a similar offence. In finding that the measure of reproduction provided a "reasonable basis for concluding that the District Judge erred in failing to appreciate the material that was before him in each case" (at [73]), Sundaresh Menon CJ made the following observations (at [69]–[70]):

> 69 … In my judgment, a sentencing judge runs a considerable risk when he reproduces entire passages either from the submissions of the parties or, as in this case, from another of his decisions without attribution or explanation. It is one thing to cite submissions or cases at length while making it clear why they are being cited and how they might or might not be relevant ***to that case at hand***. However, it is quite another thing for a judge to reproduce whole passages from another case or matter which he has decided, with neither attribution nor explanation. *The main objection is that when the similarities are discovered the parties and other readers are left with the impression, whether or not this was intended, that the judge had not after all considered each matter separately, thoroughly or even sufficiently*. As noted by Simon Stern, "Copyright Originality and Judicial Originality" (2013) 63 UTLJ 385 at 388, the concern here is not so much that the judge is taking credit for the ideas of another but rather that it raises:
>
> > … questions about the judge's attention to the dispute at hand. *Too much cutting and pasting, without modification, may give the appearance of a 'mechanical act' with a canned solution that ignores the particularities of the parties' conflict and lacks the disinterested perspective that the adjudicator should bring to bear*.

> …
>
> 70 What appearance is conveyed when a judge has reproduced the same crucial passages of reasoning in two judgments dealing with what seem on the face to be fairly similar cases? In my judgment, in this instance, the reasonable and impartial observer would think that in **neither** case had the judge properly applied his mind to the facts and circumstances of the case before him. It is impossible to tell which case the judge worked on first and so formed the model for his approach to the other. The observer would therefore reasonably have come to the conclusion that the judge had extracted what he thought were the essential similarities of the two cases and then proceeded to decide them as if they raised identical issues.
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> [emphasis added in italics; original emphasis in bold italics]

92 The logic of Menon CJ's reasoning is, to my mind, equally applicable to a case of cutting-and-pasting in arbitral proceedings.

93 So far as concerns the public policy challenge, it is settled law that a successful challenge on this ground would be highly exceptional. The threshold is a very high one. As Judith Prakash JA explained in the Court of Appeal decision of *BTN and another v BTP and another* [2021] 1 SLR 276 (at [56]):

> The public policy ground for setting aside provided by Art 34(2) of the Model Law is a narrow one. This court has held that the ground should only succeed in cases where upholding or enforcing the arbitral award would "shock the conscience", or be "clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public", or violate "the forum's most basic notion of morality and justice": *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi*") at [59]. …

Whether the Award was rendered in breach of natural justice

The parties' arguments

94 DJO focusses its argument on the basis that the "scale, scope and source of the cut-and-pasting breached the parties' contractual expectations that their

tribunal would independently and impartially weigh, deliberate and decide their arguments".[65] It cannot be right, DJO asserts, for appointed arbitrators simply to follow the reasoning of a different tribunal in another arbitration.

95 Put simply, DJO's assertion is that the incorporation of (what they refer to as) plagiarised material on the scale in this case is the antithesis of an independent and impartial analysis.

96 In this connection, DJO draws attention to the fact that the judiciaries, both in Singapore and elsewhere, have clamped down on plagiarism at virtually every level of the legal profession and submits that there should be no leniency in the case of arbitrators.

97 I consider, with respect, that this somewhat emotive approach is in danger of missing the point. The use of the word "plagiarism" carries with it a stigma of dishonesty; that is, that the person making use of another's material is doing so in a bid to benefit, in the reader's eye, from the skill and labour of another as though it is their own.

98 That is not the case here. The copy-and-pasting was done, it would appear, not with a view to hiding the origin of the copied work but simply as a shortcut to minimise the work involved in writing the Award. The Tribunal clearly thought that this was an acceptable approach. I do not consider that in these circumstances the mere fact of copying serves to taint the award and render it liable to be set aside. It is necessary to look at the nature, the extent and the effect of the copying to determine whether the principles of natural justice are engaged.

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65 CWS at para 2.

99 DJO then goes on to submit that the Tribunal's copy-and-pasting in the Award involved related to the main arguments on liability and cl 20.1 of the CPT-13 Contract that had been canvassed at the hearing – on statutory limitation and waiver and/or estoppel – and that certain material inferences could be drawn from this:

(a) First, that the draft of the Award had been prepared by Judge C (as presiding arbitrator) in breach of his obligations of confidence as an arbitrator in the parallel arbitrations, and in breach of his obligation of independence and impartiality in the Arbitration.

(b) Second, that the two co-arbitrators, Judge A and Judge B, did not read the draft Award either properly or at all, as, had they done so, they would have appreciated that it did not address the facts or arguments presented to them in the Arbitration. Accordingly, they failed to apply their minds independently to verify that the Award was prepared based on the materials before them and thus failed in their duties of independence and impartiality in the discharge of their decision-making function.

100 On this basis, DJO asserts that there have been at least four breaches of natural justice involved in the making of the Award:[66]

(a) First, that the rule against bias precludes an arbitrator from pre-judging a case and that the accumulated knowledge of Judge C and his willingness to use that knowledge in preparing the Award constitutes impermissible pre-judging.

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66 CWS at paras 148–153.

(b) Second, that the right to a fair hearing includes the right to a fair, independent and impartial decision, which has not been the case in light of the Tribunal's copious copy-and-pasting in the Award.

(c) Third, that the right to a fair hearing enjoins a tribunal to deal with the dispute before it based on, and only on, the material before it, which the Tribunal had failed to do by relying on arguments and facts from the parallel arbitrations which were extraneous to the parties' dispute in the Arbitration.

(d) Fourth, that the right to a fair hearing prevents a tribunal from relying on factual or legal reasoning that has not been canvassed before it without giving the parties the opportunity to respond thereto, and the Tribunal by lifting reasoning from the CP-301 and CP-302 Awards had breached this rule.

101 In support of these contentions, DJO relies on the five factors set out at [55] above, which I have considered (and generally accepted) at [56]–[77] above.

102 On the issue of demonstrable prejudice, DJO's assertions can be summarised as residing in the fact that, if the Tribunal had considered the facts and arguments before it *in vacuo*, as it was required to and should have done, it could reasonably have come to different conclusions.[67]

103 Consortium X, on the other hand, approaches the matter from a very different angle. The real issue, they argue, is whether the Tribunal applied its mind to the essential issues in the Arbitration and they contend that the Tribunal

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67 CWS at paras 165–168.

did do so. They point to the fact that all three members of the Tribunal were eminent retired judges, that the parties were represented by experienced counsel, that the arbitral process was thorough and that the Award was scrutinised and approved by the ICC.[68]

104 Consortium X makes a number of points about the reproduced portions of the Award, placing emphasis on the fact that the similarities between the contracts across the three arbitrations meant that the same main issues arose, and given the common counsel and Judge C as an arbitrator in all three, it was understandable that there would be similarities and consistencies across the awards. The fact that the same language was used so that there was no novelty in expression is not, it says, a reason for concluding that the Tribunal made no attempt to apply its mind independently to the issues in the Arbitration before reaching the same conclusions as in the parallel arbitrations and choosing to use the same language to express those conclusions.[69]

105 Consortium X contends that the task of the court is to decide if the circumstances disclose a clear and inescapable inference that the Arbitrators lifted sections of the Award from the CP-301 and CP-302 Awards without applying their minds to the issues in the Arbitration.[70] The nub of its submissions lies in the following statement in the Court of Appeal's decision in *CVV and others v CVB* [2024] 1 SLR 32 (at [30(a)]):

> … a breach of the fair hearing rule can arise from a tribunal's *failure to apply its mind* to the essential issues arising from the parties' arguments. The court accords the tribunal 'fair latitude' to determine what is and is not an essential issue (*TMM Division* ([31] *supra*) at [72] and [74]). That a tribunal's decision is

68 RWS at paras 3–4.

69 RWS at para 27.

70 RWS at paras 29–31.

> inexplicable is but one factor which goes towards establishing that the tribunal failed to apply its mind to the essential issues arising from the parties' arguments (*TMM Division* at [89]). Thus, if a fair reading of the award shows that the tribunal did apply its mind to the essential issues but 'fail[ed] to comprehend the submissions or comprehended them erroneously, and thereby c[a]me to a decision which may fall to be characterised as inexplicable', that will be simply an error of fact or law and the award will not be set aside (*TMM Division* at [90]–[91]; *BLC and others v BLB and another* [2014] 4 SLR 79 at [100]). Moreover, the fact that an award fails to address one of the parties' arguments expressly does not, without more, mean that the tribunal failed to apply its mind to that argument: there may be a valid alternative explanation for the failure (*ASG v ASH* [2016] 5 SLR 54 at [92]). *An award will therefore not be set aside on the ground that the tribunal failed to apply its mind to an essential issue arising from the parties' arguments unless such failure is a clear and virtually inescapable inference from the award* (*AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 at [46]). (Emphasis in italics)

106 Consortium X then continues by examining each issue and identifying passages in the Award that focus on each issue and contend on the basis of such exercise that the Tribunal had adequately performed the task of applying its mind to each essential issue in the Arbitration.

107 On the particular matters raised by DJO as being illustrative of the unfairness of the Tribunal's approach, Consortium X submits that there is nothing inherently objectionable in relying on authorities which were not cited to the Tribunal on the basis that these authorities were not material to the outcome of the Tribunal's decision.[71] On the difference in language between the computation methods in cl 13.8 (see [68]–[71] above), Consortium X downplays this as neither significant nor material,[72] while the Tribunal's error in applying Indian law to determine interest and costs is similarly dismissed as

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71 RWS at paras 71–73.

72 RWS at para 96.

immaterial as the same result would supposedly have followed under Singapore law.[73]

Discussion

108 The starting point of Consortium X's analysis is to ask if the Tribunal had applied its mind to the essential issues in the Arbitration. In my view, there is, however, a necessary antecedent question: did the Tribunal apply its mind to the issues *in an independent, impartial and fair manner?* If it did not, then however thorough its reasoning in relation to the issues, that thoroughness would not overcome the underlying flaw.

109 In this regard, Consortium X's representative gave evidence that he had been advised that the question which arises for the court's determination is:[74]

> … not whether the Award was allegedly plagiarised or contains cut-and-pasted paragraphs without attribution from the July Award and the August Award (and the extent of such "copying"), but *whether it can be borne out from the Award that the Tribunal did not exercise its mind properly in respect of the issues in the Arbitration and decide them independently and impartially*.
>
> [emphasis added]

110 I respectfully agree with that advice. The obligation of independence and impartiality lies at the heart of natural justice. Exercising one's mind properly involves not drawing on extraneous matters so as to be able to focus solely on the factual matrix of the case and the submissions made to the Tribunal. It also requires that obligations of confidence are maintained.

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73 RWS at para 105.

74 DJR's 1st Affidavit at para 15.

111 The first breach of natural justice alleged by DJO is pre-judging on the part of Judge C as the presiding arbitrator in the Arbitration. As the argument developed in oral submissions, this developed into a submission of apparent bias on the part of Judge C. My attention was drawn to the High Court decision of *CNQ v CNR* [2023] 4 SLR 1031 ("*CNQ v CNR*"), which also concerned the situation of the same arbitrator having been appointed in related arbitration proceedings. In finding on the facts that there had not been any pre-judgment or apparent bias on the part of the arbitrator, Andre Maniam J reasoned as follows (at [54]–[59]):

> **Prejudgment**
>
> 54 The Court of Appeal stated in *BOI v BOJ* [2018] 2 SLR 1156 at [107] and [109]:
>
> > 107 The rule against prejudgment prohibits the decision-maker from reaching a final, conclusive decision before being made aware of all relevant evidence and arguments which the parties wish to put before him or her. The primary objection against prejudgment is the surrender by a decision-making body of its judgment such that it approaches the matter with a closed mind …
> >
> > …
> >
> > 109 To establish prejudgment amounting to apparent bias, therefore, *it must be established that the fair-minded, informed and reasonable observer would, after considering the facts and circumstances available before him, suspect or apprehend that the decision-maker had reached a final and conclusive decision before being made aware of all relevant evidence and arguments which the parties wish to put before him or her, such that he or she approaches the matter with a closed mind. (Emphasis in italics)*
>
> 55 The Buyer's argument on prejudgment was: "The Arbitrator had pre-judged the issue[s] by displaying an unreasonable inclination to upholding his prior ruling in the [First Award]".
>
> 56 The issues which the Buyer said the arbitrator had prejudged were the same two issues that it said the arbitrator had failed to attempt to understand, namely:

> (a) "The appropriate method to determine the market price of preforms in [Country A]"; and
>
> (b) "Whether [the Seller] bore a duty to prove its efforts to mitigate".
>
> 57 I cannot infer from the arbitration record that the arbitrator approached these issues with a closed mind.
>
> 58 In so far as the arbitrator was being asked to decide the same issues between the same parties, there was nothing inherently wrong in him deciding them the same way. *W v AW* [2021] HKCFI 1707, like the present case, involved the same parties being in two successive arbitrations involving some issues that were the same. Here, the same sole arbitrator presided over both arbitrations; in *W v AW*, each tribunal consisted of three arbitrators, with the two tribunals having one arbitrator in common. The applicant (W) applied to set aside the second award. The Hong Kong High Court held that the second award was invalid for the second tribunal had made findings that were inconsistent with those made on the same issues in the first arbitration, and the second tribunal had failed to give the parties the opportunity to address it on the first award before the second award was made (at [49]–[56]).
>
> 59 Here, the parties were given the opportunity to submit on the First Award. Indeed, the Buyer was also given the opportunity to put forward new evidence and contentions. The arbitrator considered the evidence and contentions, new and old, and stated that "[n]umerous arguments are irrelevant to a claim for damages under section 50 of the SOGA or repeat grounds which had been dealt with in the [First] Arbitration." He then set out points from the First Award that he was deciding the same way in the Second Award. He did not however say that in the Second Arbitration he was accepting the Seller's Hypothetical Market Price approach just because he had accepted it in the First Arbitration. Instead, he noted that the Buyer took "a different position on the basis for determining the market price", which he would address later in the Second Award.

112 There are at least two crucial differences between the facts in *CNQ v CNR* and the present case. First, there is in this case no suggestion that the CP-301 Award played any part in the arguments addressed to the Tribunal. Indeed, the CP-301 Award could not have done so given that it was only handed down after the oral proceedings in the Arbitration had closed. Second, even putting aside the fact that the CP-301 Award post-dated the parties' oral submissions,

it was in principle impermissible for Judge C to put the CP-301 Award to the parties for comment, as he would in doing so have breached his duties of confidence arising from the CP-301 Arbitration. Thus, the CP-301 Award could not be put to the parties such that they could make submissions on it.

113 As indicated in the italicised passage quoted in *CNQ v CNR* from the Court of Appeal decision of *BOI v BOJ* [2018] 2 SLR 1156, the correct approach is for the court to assume the mantle of a fair-minded, informed and reasonable observer and to ask whether such person, after considering the facts and circumstances, would suspect or apprehend that the arbitrator had approached the matter with a closed mind.

114 In my judgment, on considering the facts and circumstances of this case, the hypothetical fair-minded, informed and reasonable observer would undoubtedly have held such suspicions or apprehensions. The Award did not rehearse the submissions actually made to the Tribunal, but attributed submissions made in the earlier arbitration – repeated almost verbatim – to counsel in the Arbitration. There can, to my mind, be no clearer indication to such an observer that Judge C may have approached the matter with a closed mind. It bears emphasis that, in light of the maxim that "justice should not only be done, but manifestly and undoubtedly be seen to be done" (see *The King v Sussex Justices, ex p McCarthy* [1924] 1 KB 256 at 259), the test for apparent bias is whether there is a reasonable suspicion or apprehension that justice may not have been done, as opposed to a concluded view that it was not. The full facts of what went on in the Tribunal's deliberations and the preparation of the Award will not be known to such an observer, but based on what they can glean from reading the Award on its face against the background of what they would know, the suspicion or apprehension is a very real one. With regret, I conclude

that the assertion of apparent bias against Judge C, a highly experienced judge and arbitrator, is well-founded.

115 The second ground relied upon by DJO is that its right to a fair hearing included a right to a fair, independent and impartial decision and this has not been the case given how the Award turned out. The existence of the right claimed by DJO was not disputed, nor could it have been. Ultimately, this was an issue of fact. In my judgment, it is abundantly clear from the facts which I have rehearsed at length above that the Award was not the independent work of the Tribunal based solely on the material and submissions before them in the Arbitration. Where, in making its award, a tribunal draws heavily on facts and arguments in previous cases and does not clearly distinguish between those facts and arguments and those which are presented to them in the instant case and also fails to give the parties an opportunity to address it on the previous award, the right to a fair, independent and impartial award will be lost.

116 It is evident from the court's reasoning in *CNQ v CNR* that the fact that the arbitrator allowed the parties to submit on the differences between the first and second arbitrations was a crucial step in concluding that there was no pre-judgment. No such opportunity was afforded to the parties by the Tribunal in the present case. In these premises, I have little hesitation in finding that the second ground has also been made out.

117 As the third and fourth grounds raised by DJO are a sub-set of the reasons which underlie the second ground, there is no need to consider them separately.

118 In sum, I accept DJO's submission that the Award was made in breach of natural justice and is therefore liable to be set aside on that ground.

Whether the Award conflicts with the public policy of Singapore

119 My finding that the Award is liable to be set aside on the basis of breach of natural justice makes it unnecessary for me to consider in any detail the alternative ground relied on by DJO under Art 34(2)(*b*)(ii) of the Model Law; that the Award is in conflict with the public policy of Singapore. This was based on the broad assertion that plagiarism of any sort was fundamentally contrary to Singapore public policy.

120 For the reasons I have given, I would not characterise what the Tribunal did as being the usual type of concealed dishonest plagiarism and certainly would not have held that what the Tribunal did crossed the very high threshold required for a finding of a breach of public policy.

Conclusion

121 For the reasons given, I have concluded that the Award was rendered in breach of natural justice and must be set aside on that ground.

122 The parties should seek to agree on the correct order to reflect my decision and address the issue of costs. In default of agreement, written submissions, limited to seven pages each, should be filed within 28 days of this decision, together with an indication as to whether either party wishes an oral hearing or whether the outstanding matters may be decided on paper.

Simon Thorley
International Judge

Chan Leng Sun SC, Tham Lijing and Nathaniel Lai (Duxton Hill Chambers (Singapore Group Practice)) for the claimant;
Ashish Chugh, Nicholas Tan and Darien The (Wong & Leow LLC) for the defendants;

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Manager, International Judges' Chambers
Singapore International Commercial Court of the Republic of Singapore